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Hosel rockets: Dispatches from the pettifogging lawyer | Michael Cochrane

By **Michael Cochrane**

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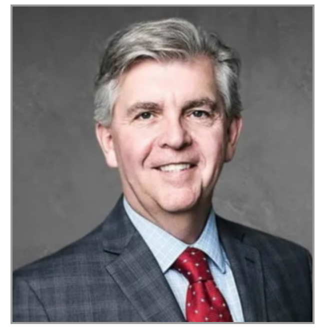
The case of the misbegotten golf ball



Michael Cochrane

It was a perfect day for golf: warm, sunny and with a light breeze out of the northwest. My playing partners and I had made the turn and were heading in on the back nine of a fine links course west of Toronto. We were playing well, making good time, enjoying the course and the company, even if two in the group were outdriving me by wide margins. I got used to that a long time ago. But it was enjoyable golf. No complaints. And as members of a group of regulars, out for our annual gathering of golf and networking, we were probably more familiar with the rules and etiquette of golf than the average duffer.

And yet.

Perhaps arriving at the 13th hole should have been an omen. A par 4, straightaway to the green, but with six fairway bunkers, it called for a modest but accurate drive. Teeing off all four of us found the fairway, but once again one ball had settled near a bunker much further than the others. My cart mate and I took a leisurely ride to our balls, enjoying the box lunch and our chat while the other two in our foursome drove to a ball that sat at the right edge of the fairway some 200-plus yards from the green.

The driver of that cart (let's call him Tom) stopped beside his partner's ball (let's call him Sergio), pulled a couple of irons from his bag and decided to walk ahead. Now, I say at this point that when Tom arrived at his ball further down the fairway he did not stand in the direct path of Sergio's next shot toward the green.

And yet.

Sergio, a righty, surveyed the situation and conjured a plan for what would be a heroic shot to the green, even perhaps nurturing thoughts of a one putt birdie. Such are the careless dreams of many a golfer. Reality is often quite different. Club in hand, Sergio set up for the shot. Was it a three wood? A five wood? It mattered not. Because the mighty swing unleashed at that unsuspecting ball did not deliver clean contact with the club face.

Now, a typical professional golfer hits a golf ball at speeds of about 160 to 180 miles per hour (or, in more frightening terms, as much as 290 kilometres per hour). But this shot clearly had not been struck by a pro, so let's reduce — generously — that speed by half.

I imagine Tom waiting by his ball, enjoying the sun on his face, his mind toggling between an 8 or a 9 iron for his next shot. Did he have a similar but more realistic dream of a birdie? We do not know.

The misbegotten ball left the hosel of Sergio's fairway wood at a 45-degree angle, screaming at an estimated 80 – 90 miles per hour on a path that would not end well. Its destination? The ball bit the left forearm of the unsuspecting Tom — standing 30 yards ahead and 25 yards to Sergio's right — like a Caspian cobra, then dropped and settled nearby.

Although my partner and I were some 30 yards away from Tom we knew immediately that he may have been a salty mouthed sailor in a previous life. He dropped his clubs, clutched his forearm in obvious pain and cursed in agony. (As Tom writhed in pain I remarked to my partner, callously in retrospect, that it appeared Sergio was still away.)

Was Tom seriously injured? Of course. Within seconds the gross lump on his arm was the size of well-used gutta percha. Similar colours too. But that's not important.

What is important to this pettifogging lawyer is this: Was there liability for this heinous act? Can Tom sue Sergio?

Let's take a look at the law.

There are a few considerations when looking at liability for injuries suffered at the hands of another golfer on a golf course. Are the rules and etiquette of golf helpful in such circumstances? Do we owe any duty to each other out there on the course?

When we attend a sporting event like a hockey game our ticket includes an express exclusion of liability for injuries suffered while in attendance. Hit by a puck? Too bad. We have willingly accepted the risk of that possibility when we bought our ticket. Note however, that the exclusion applies to events that occur in the ordinary course of the game. If the arena roof fell in or a hockey player climbed into the stands and assaulted you, that would not be excluded as it's outside the bounds of the game and its rules.

When we check in at the pro shop of a golf course we are handed a receipt and told to pass it to the starter and have a nice round. There is no exclusion of liability on that ticket because the golf experience is different from the hockey game. The course is sending golfers out with the expectation that they will follow the rules of golf and have due regard for each other. There is no interaction between the course and the golfer that the course needs to exclude itself from liability. Golfers owe a duty to each other to follow the rules of golf. If an injury occurs while the golfers are reasonably following the rules there is no liability.

But consider the following: The case of the unannounced mulligan.

In 2001, the New Jersey Supreme Court considered the case of *Schick v. Ferolito*. Four golfers stood on a tee box. All four teed off. The last one, John Ferolito, was not satisfied with his drive — a dramatic slice to the right — and decided to take a mulligan. (Personally I'm not familiar with this "do over" practice but I'm told it occurs.) Two of his playing partners, unaware of his decision, had walked to their carts and sat parked at a 45-degree angle to the left of the tee box. Ferolito's second drive, worse than the first, struck Schick in the right eye, knocking him out. Clearly there had been an over correction.

Taking a mulligan — unannounced or otherwise — is not a part of the rules of golf. Unlike a shank or an errant shot, an unannounced mulligan creates what the court called an unanticipated risk. Ferolito was liable for the injury to his (now former) friend.

Let's consider a different scenario for this same group. After waiting for the group ahead to make their way down the fairway a safe distance, assume they teed off properly. However, a golfer in that previous group, say looking for a lost golf ball, then suddenly stepped out of the woods and is struck by Ferolito's first errant drive, a stroke made within the rules. There is no liability to the person hit.

When we golf we accept the possibility that we may be struck by golf balls hit in the ordinary course. As one judge remarked, "That's golf. Not every shot goes where we want it to go. Golfers expect bad shots."

Now, back to Tom. Sergio's shot, as poor as it was, was within the rules of golf. Tom, on the other hand, may have a problem. Rule 6.4 of the USGA states that order of play is based on which ball is farthest from the hole. The rules also state that, while there is no penalty for playing out of turn and while players are encouraged to play "ready golf" (le out of turn), it must be done in a safe and responsible way.

Was Tom's decision to walk ahead safe and responsible? In retrospect perhaps not. Is Sergio liable to Tom? I think not.

So no liability while playing within the rules. But what if the course was designed negligently? What you say? You may have cursed a course layout but was it negligently designed? That's where we'll go in the next instalment of Hosel rockets: Dispatches from the pettifogging lawyer.

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