SUPREME COURT OF QUEENSLAND

CITATION:	*Ollier v Magnetic Island Country Club Inc & Anor* [2004] QCA 137
PARTIES:	**GLENN THOMAS OLLIER** **by his litigation guardian SUSAN OLLIER** (plaintiff/respondent) v **MAGNETIC ISLAND COUNTRY CLUB INCORPORATED** (first defendant) **MARK ROY SHANAHAN** (second defendant/appellant)
FILE NO/S:	Appeal No 8099 of 2003 SC No 189 of 1996
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	30 April 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2004
JUDGES:	McMurdo P, McPherson JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Dismiss the appeal with costs to be assessed**
CATCHWORDS:	TORTS – NEGLIGENCE – DUTY OF CARE – where the respondent sustained a serious head injury when he was hit behind the left ear by a golf ball driven by the appellant – whether the respondent ought to have been seen by the appellant *Agar v Hyde* (2000) 201 CLR 552, cited *McHale v Watson* (1964) 111 CLR 384, cited *Platt v Nutt* (1988) 12 NSWLR 231, cited *Rootes v Shelton* (1967) 116 CLR 383, considered *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, cited
COUNSEL:	J A Griffin QC, with N Adams & J Pappas, for the appellant J R Baulch SC, with M A Drew, for the respondent
SOLICITORS:	Vandenberg-Reid for the appellant

Lee Turnbull & Co for the respondent

[1] **McMURDO P:** I have read the reasons for judgment of White J and agree with them. As White J demonstrates, the findings of fact made by the learned primary judge were open on the evidence. On those findings, the judge was right to conclude that the appellant breached his duty of care to the respondent when he hit the golf ball, which struck and so seriously injured the respondent, before ensuring that it was reasonably safe to strike the ball. His Honour observed that witnesses whose evidence did not support that conclusion were "credit worthy and were giving an honest account of the events as they saw them". His Honour immediately made further observations as to which witnesses he preferred and why. In using the quoted words, his Honour was plainly intending to convey only that the witnesses whose evidence he rejected were honest rather than reliable.

[2] I agree that the appeal should be dismissed with costs.

[3] **McPHERSON JA:** The plaintiff was a participant in a game of golf taking place on the 9-hole golf course at the Magnetic Island Country Club in August 1994, when he was struck on the left side of the head by a golf ball. It had been hit off the 8th tee by the second defendant, who was a member of the following team or group of four players. As a result, the plaintiff sustained serious injuries for which, at the trial, he was awarded an amount of some $2.6 million in damages against that defendant. This is an appeal by the defendant against the finding of negligence made against him.

[4] The eighth fairway in that course is a long one and the defendant's shot travelled further than expected and somewhat to the right of its intended destination. It landed on a hard patch of ground and bounced once before striking the plaintiff. He was on the fairway readying himself to take his second shot, and so was positioned at an angle to the direction of the flight of the ball that hit him. He was the second of the four players in his group to hit a shot from that position, the first having been a Mr Peterson. I say "from that position" because this was what was described as an "Ambrose" competition, under the rules of which a player plays from the spot where the most favourably placed of the four balls struck by each of the members of his group has come to rest. No doubt the underlying object is to speed up a game in which many players are participating.

[5] His Honour's finding of negligence against the defendant was that he had failed to look ahead before he teed off at the eighth; and that, had he done so, he would or ought not have played his stroke until that group, including the plaintiff, had passed out of danger of being hit. On appeal, it was submitted that this was incorrect because the plaintiff's group was playing from an area of dappled light and shade near some trees. It was therefore difficult or impossible to see them, and in fact each member of the defendant's team claimed not to have seen any of those ahead of them at any time before the appellant drove off.

[6] There are several circumstances that render this submission a most improbable explanation of the tragedy. At the time the incident occurred, it was 2.30 pm on a clear and sunny day in north Queensland. The defendant and other members of his team were conscious of the potential presence of the plaintiff's group not far ahead of them. They had been following them all day. Yet the defendant said he became

aware of their actual presence only after he had played his stroke. He was the third of his group to do so at that hole. The evidence of the first two to do so was that, before hitting off, they had seen nothing of those ahead of them.

[7] The fourth player in the defendant's team, who was due to do so next, was in fact the captain of the club Mr Singleton. He had been called away temporarily, and returned to see the defendant play his shot and then see the ball travelling through the air. Seeing the plaintiff's group ahead of them in the direction in which the ball was travelling, he called out "Fore". The defendant himself also admitted seeing the plaintiff's group in front of him after his ball had become airborne.

[8] Given these circumstances the only possible plausible explanations fairly open are that the defendant (and for that matter the other members of his team) did not look properly before playing off; or that he looked, and decided to take the risk that none of those ahead would be struck by his ball. In either event he was plainly negligent. His Honour, it may be added, found that all of the defendant's team were credible witnesses, by which he clearly meant that they were honest rather than that they were reliable or accurate. He also discounted the possibility that they might have been materially influenced by alcohol, although coming so soon after lunch on a charity occasion, there is little doubt that drink had been and was being taken.

[9] This being so, there is no justification for concluding that his Honour's finding of negligence against the defendant was incorrect, or that it should be disturbed. The outcome has been tragic for all concerned. But the defendant cannot escape liability for the injuries which the plaintiff sustained. On one view of the facts and the law, there was no need for the plaintiff to have undertaken the burden of proving negligence. In *McHale v Watson* (1964) 111 CLR 384, 388, Windeyer J doubted if, in an action for trespass to the person "based upon a battery by a blow or a missile", the plaintiff is required to aver and prove that the defendant's act in delivering the blow or the missile is either intentional or negligent. As recently as 1988 this was still considered an open question in New South Wales: see *Platt v Nutt* (1988) 12 NSWLR 231, 248-249. The question does not arise here because, as Mr Baulch SC for the plaintiff acknowledged on appeal, the trial in this case had been conducted on the basis that the defendant had been negligent.

[10] In my opinion, the appeal should be dismissed with costs for the reasons given by White J, to which I have added these confirmatory observations of my own only because of the obvious importance to both parties of the outcome in this case.

[11] **WHITE J:** The respondent sustained a serious head injury when he was hit behind the left ear on 28 August 1994 by a golf ball driven by the appellant who was the second defendant in the proceedings. The respondent's injury caused him serious neuro-cognitive deficits. He was a participant in a competition held on the Magnetic Island Country Club Inc's golf course which the respondent had sued as first defendant.

[12] The learned trial judge gave judgment for the respondent against the appellant in the sum of $2,610,795.72 and for the golf club against the respondent. He dismissed the appellant's claim for indemnity or contribution against the golf club. The appellant appeals against the finding of liability against him. There is no appeal against his Honour's findings in favour of the golf club or against the quantum assessed.

[13] Essentially, the appeal is against his Honour's finding of negligence in light of the evidence about visibility on the eighth fairway where the respondent was hit and findings by his Honour that he accepted the evidence of a number of golfers who were in the group (of which the appellant was one) following that of the respondent who said they had not seen the respondent when teeing off before the appellant. The learned trial judge rejected the appellant's assertion that the respondent had voluntarily assumed the risk of being hit by a golf ball as an inherent risk of participating in a game of golf particularly where the event had attracted inexperienced golfers.

[14] On 28 August 1994 a competition was held on the nine hole golf course on Magnetic Island off the coast from Townsville to raise funds for a local charity. There were a great many competitors consisting of members and visitors so that two sessions of play were arranged – one in the morning and one in the afternoon. The respondent played in the afternoon session in which there were 17 teams of four players. Eighteen holes were to be played which entailed going around the course twice. The competition was known as an Ambrose competition wherein all four players in the team play off the tee and then decide amongst themselves which of the four balls is best positioned for the next shot. The position is marked and all four players play their second shot from that position and so the play continues until a ball is holed on the green.

[15] The afternoon session had what was described as a shotgun start with two teams at each tee, the second being ready to tee-off when appropriate. Mr Hurst and Mr Power, players in the respondent's team, said this would occur on a par three hole when the first team to tee-off had reached the green and called the following team through and on a par four hole, either when the team had completed the second shot, or called the following team on. The course had two tees per hole, one a competition tee and the other, forward of it, a social tee and it was the latter which was in use for the play that day.

[16] The events with which these proceedings are concerned occurred at the eighth tee and fairway which was approximately 250m in length and a par four hole. The respondent's team consisting of Alan Hurst, the patron and a member of the club, Martin Power, a member of the club and John Peterson and the respondent who were social players. The group also included Mr Hurst's granddaughter who was about 10 years old. Each man had a pull-along golf buggy and one at least was carrying an esky containing drinks and ice. Those men had played together previously as a group. The appellant's group, which had been following the respondent's group throughout the play, comprised John Rockett, Ross Woodger and the club captain, John Singleton, as well as the appellant. Mr Rockett regularly played social golf on the Magnetic Island course and Mr Woodger was an experienced golfer. The appellant, although a resident of Townsville and Magnetic Island over a period of about 20 years, had played only approximately four times on the course during that time and was an inexperienced golfer.

[17] The afternoon session commenced at 12:30pm and these two teams commenced from the first tee. It was generally agreed that the respondent's team teed off from the eighth tee at approximately 2:30pm on a clear, sunny day. Each of Messrs Hurst, Power and Peterson had made written statements in 2000 (Hurst, an affidavit) and 1994 (Power and Peterson). Power's and Peterson's were very brief. They constituted for the most part their evidence in chief. Nine years had elapsed

from the time of the events in question to trial. In that time there had been some changes to the eighth fairway and its surroundings. A survey map showed the layout of the golf course as at December 1994. The eighth fairway is shown as straight. The evidence suggested it had a very slight downward slope. From the forward or social tee to the green was a distance of some 251m. To the left was a stand of bloodwood and gum trees dividing that fairway from the third fairway which was known as Sherwood Forest. A number of assorted trees additionally bounded the fairway and several dotted the fairway itself. Of particular interest was a reasonably substantial tree positioned two-thirds or more down the fairway and slightly to the right of centre which, it was postulated by the appellant, may have obscured in some way the respondent from anyone about to tee-off on the eighth social tee. His Honour found that the fairway of the eighth hole extended to the right of that tree.

[18] A series of photographs, Exhibit 1H, was taken in October 1994 and some further photographs in 2003. There was no evidence about the time of day when they were taken. This was of some importance because it was also contended by the appellant that at least two if not all of the respondent's group were in dappled light when the respondent was hit. His Honour noted that the photographs showed shadows from the trees on the right looking down the fairway which fell across the fairway. He concluded that given the width of the fairway and the trees surrounding it that there was likely to have been shade "on one part or other of the fairway for most of the day". This finding is not disputed. There was no evidence about the colour of clothing worn by the people in the respondent's group.

[19] His Honour heard evidence from all the players in the two teams, although, as he found, the respondent was unable to make any worthwhile contribution due to his cognitive deficits.

[20] His Honour generally preferred the evidence of Mr Hurst about positioning on the fairway to that of Mr Power and Mr Peterson as he thought he had the best recollection. It is not suggested that he was incorrect to do so. Mr Hurst is featured in the photographs taken in October 1994 including standing where he said the respondent was positioned when hit. According to Mr Hurst, as found by his Honour, after his team had teed off they walked down the fairway. Mr Hurst and his granddaughter picked up two balls on the fairway which were not in the best position for the second shot. A third ball was just in or close to Sherwood Forest which also was not thought to be the best position for the next stroke. The remaining ball lay on the fairway to the right near Sherwood Forest but still in play and said to be approximately 182 to 200m from the tee and about 50 to 70m from the green.

[21] Mr Peterson said that he was the first in the team to play his second stroke. He did so and was putting his club in his bag as the respondent was preparing to play his second shot from the same position. Mr Peterson agreed in cross-examination that he was standing to the respondent's right looking down the fairway on the edge of the trees but could not say if he was in the shade. He heard the golf ball strike the respondent but was not watching him.

[22] Mr Hurst agreed that shadows were variously across parts of the fairway on 28 August and that the photographs although not taken at the same time of the year and the time of day was not noted, nonetheless gave a good indication of how the

shadows were on the day. He positioned himself to the left and at a safe distance from the respondent whom he estimated in oral evidence was about 6 to 8 ft from the edge of Sherwood Forest. He had marked the respondent's position on the survey map and said that his position in the photographs was where the respondent was standing to play his second shot. His Honour preferred the evidence of Mr Rowlands, a surveyor, who had taken measurements on the fairway, to Mr Hurst's estimate of how far he was in measurement terms from the edge of the trees. Mr Rowland said that the position indicated by Mr Hurst on the plan was a distance of 5 to 10 metres from the edge of Sherwood Forest. Mr Hurst's evidence in chief was largely contained in an affidavit and in it he had estimated that he and the respondent were approximately 10 to 15 metres from the trees. Mr Hurst said that the other two players in the team were over towards Sherwood Forest.

[23] Mr Power said that he was only a few metres away from the respondent when he heard the sound of him being struck and turned around. He and Mr Peterson were keeping out of range of the respondent's swing. They both said they had no difficulty seeing the four balls in the grass that had been hit off the eighth tee. It had been suggested that one, at least, of the balls was in Sherwood Forest but the evidence suggests that the fourth but unplayed ball was still in play even if at the edge of the timber.

[24] Mr Hurst said that as the respondent turned side on to play his shot he lifted his head towards the eighth green and then was struck. Mr Hurst heard the golf ball strike a bare patch on the fairway described as "hard as concrete", turned and saw the ball rise up and strike the respondent on the head. He dropped to one knee holding his head. Mr Hurst looked back up the fairway and saw the following team at the eighth tee although he could not identify who had hit the ball which struck the respondent and could not recall if he had waved to them to stop play.

[25] When the appellant's team arrived at the eighth tee Mr Rockett recalled seeing the respondent's team set off down the fairway. Whilst waiting he thought he possibly obtained beer from the booth. Mr Rockett teed off first. He was aware of the respondent's group ahead of them in a general way. He said that if there was any possibility that there was anybody in range of his best shot he would not have hit off. He said that there was nobody in range and nobody in sight having scanned the fairway and the tree line bounding the fairway. His ball went straight down the middle of the fairway. He stepped back and was followed by Mr Woodger but did not watch him play.

[26] Mr Woodger said that he looked down the fairway and to the left and right before Mr Rockett played his shot and saw no one nor did he see any golf buggies. Mr Woodger's shot hooked to the left into the early part of the rough on the left of the fairway at a distance of about 150m. He noted the position of his ball and did not see anyone on the fairway. He stepped back from the tee, replaced his club and took his beer. When reminded of the statement he had made three days after these events, he agreed that he said he had seen the appellant tee off and the ball go "into the timber". He next heard Mr Singleton call "fore", turned his attention towards the eighth green and still saw no one.

[27] Mr Singleton had been the club captain for about 18 months to two years prior to 28 August 1994. He had a number of duties on this day. When the appellant's team arrived at the eighth tee Mr Singleton positioned his buggy next to the tee,

purchased some drinks from the bar which was off to the right hand side, and dealt with a query about a scorecard from the morning session and had a discussion with a committee member about it. He then gave drinks to the other people in his team and selected his club to play his tee shot. By that time the appellant was on the tee and ready to play. Mr Singleton had not seen Mr Rockett or Mr Woodger tee off. He was standing behind and to the right from the appellant's position. He looked down and saw a clear fairway. As the appellant made his shot Mr Singleton watched the ball in flight and saw the respondent's group ahead and to the right of the fairway, generally in the direction of the appellant's ball. He called out "fore". He said the group was in the shade of the trees when he first saw them. When shown the photographs he thought the group was slightly further to the right, that is nearer to Sherwood Forest, than Mr Hurst who had stood in the position of the respondent. He also thought the group was closer to the eighth green. He said that nothing obstructed his view of the group when he saw them. In answer to a question in cross-examination by the respondent's counsel he said he agreed that the only reason he had not seen the respondent's team at that point was that he had not looked down there with any particularity. Similarly when asked to mark on the survey plan the position of the group he was disposed to place it further down the fairway and a little further to the right from the position marked by Mr Hurst.

[28] A few days after the respondent was injured the appellant wrote to Mr Singleton as captain of the Magnetic Island Golf Club setting out his recollection of how the respondent came to be struck by his golf ball. He wrote:

> "On the 8th tee off, John and Ross had teed off first and then I followed. The 8th fairway is a long fairway and I hit a very long shot down the right hand side of the fairway, following the line of trees. As the ball was descending, I became aware of the group of golfers who were playing a long way in front of us. I was unsure if my ball would carry as far as the group of four golfers when Kevin Singleton yelled out 'FOUR' [sic]".

The appellant indicated that he was an inexperienced golfer having played on this course only on four occasions and apart from that about once a year over a 20 year period. The appellant estimated that about 30 seconds elapsed from the time when he took his last look down the fairway and he became aware of the respondent's group on the fairway in line with his ball which was then airborne. He said that he had a sense that the group or some of them were moving after he noticed them. He thought that they were moving from right to left and forwards towards the green. He had no difficulty in making them out when he saw them. His answer in cross-examination about his awareness of the group he was following is instructive.

> "You saw Mr Hurst's team progressing along in front of you? -- I saw a team. I was aware of a team in front of us.
>
> All right. And from time to time you'd have to wait while they played before you could play? -- I don't recall.
>
> Don't remember that happening? -- That probably would be the case, but I don't recall.

> All right. Now, when you came to the eighth hole you say you didn't see anybody? -- No.
>
> Did you wonder what had happened to that team in front? -- No.
>
> They'd been in front of you on the seventh hole, weren't they? -- They must have been.
>
> When – when do you last recall seeing them? -- I don't recall last seeing them on a specific hole. I couldn't tell you.
>
> You say that you saw nobody at all on the eighth fairway when you got there? -- That's correct.
>
> You didn't see anyone walking down the middle of the fairway? -- No.
>
> All right. Did you – did you notice how many people there were in the group in front of you? -- Well there's always four, so it would have been four.
>
> You see, I suggest that in the group in front of you there were five because there was a young girl walking with them? -- I don't recall seeing a young girl, and particularly later on when I caught up with the group I don't recall seeing a young girl.
>
> Don't you? -- No.
>
> All right. Do you remember that each of the members of the group in front of you had a separate cart of equipment? -- No I don't.
>
> All right. Did – did everyone that you saw playing that day have their own equipment? -- I couldn't see."

[29] As his Honour found, all of the witnesses gave evidence about their knowledge of a rule of etiquette that a player does not hit off from a tee where there are people in a position on the fairway where there is a risk that they might be hit by a tee shot. The rules of golf were tendered below. Section I - "Etiquette" provides

> "**Safety**
> Prior to playing a stroke or making a practice swing, the player should ensure that no one is standing close by or in a position to be hit by the club, the ball or any stones, pebbles, twigs or the like which may be moved by the stroke or swing.
>
> **Consideration for other players**
> ….. No player should play until the players in front are out of range."

The appellant's evidence was that although an indifferent player he had played some good shots possibly the longest of which was some 150m. He accepted that there was a risk of the respondent being struck by a ball hit by him from the tee

given the respondent's position and that had he seen the respondent he would not have played the ball. As his Honour noted, it was conceded that had the respondent been seen by the appellant before he teed off it would not have been safe to do so.

[30] His Honour found that "all of the witnesses were ... credit worthy and were giving an honest account of the events as they saw them". The witnesses said that alcohol was consumed throughout the day either from drinks obtained from the clubhouse, brought from the player's own supplies and carried in eskies, or obtained from booths positioned around the course itself. His Honour expressly found that some alcohol was drunk in the course of the competition but that it did not seem that alcohol played any role at all in the events which occurred. His Honour noted that it was not contended otherwise in addresses. There is no challenge to that finding. The contention is that his Honour erred in concluding that the respondent ought to have been seen by the appellant as he was preparing to tee off in light of the evidence about the presence of shadows from the trees on the fairway, the position of the players, and the evidence Messrs Rockett, Woodger and the appellant that they saw no one ahead of them.

[31] His Honour accepted the evidence of Mr Hurst as to where the other members of his group and the respondent were at the time when the respondent was struck. He preferred the surveyor's estimate of the distance of Mr Hurst and the respondent from the Sherwood Forest line of trees. He concluded that Mr Singleton seemed to have agreed that the respondent's group were in that general position when he saw it and called out "fore" and that is supported by the evidence. His Honour commented that it was not readily explicable as to why the appellant's group members had not seen the respondent's group before the respondent was hit. His Honour said

> "It can be accepted there would have been some dappling or shadow effect but, as I have said, the position of the group and certainly the [respondent] was at all times on the fairway in a position where they or he ought to have been seen." para 41

His Honour noted that the respondent's team players did not suggest or agree that any ball had been lost which had taken the members of the group into the trees of Sherwood Forest. There was evidence which might support a conclusion that one of the balls had been hit close to or even just inside the tree line but there was no evidence to conclude that the group went into that area.

[32] The appellant contends that having accepted the evidence of the players in the appellant's team that they had looked down the fairway and saw no persons, or indeed, equipment present on the fairway he was not entitled to find that the respondent ought to have been seen by the appellant and, in effect, wrongly reversed the onus of proof. When his Honour said that he found all of the witnesses were credit worthy and were giving an honest account of the events as they saw them he was not, thereby, saying that the witnesses were reliable. That is clear from his preference for Mr Hurst's evidence over that of Mr Peterson and Mr Power and his reference to the weaknesses in Mr Woodger's and Mr Rockett's evidence. In the case of Mr Woodger he noted that his evidence was that he did not at any time see the respondent's team even after Mr Singleton had called out "fore". He said when he heard Mr Singleton call out "fore" he looked at the fairway and to the green but saw nothing, advanced down the fairway, found his ball on the left and proceeded with the game. It seems that Mr Woodger could not recall that he was aware that

anyone had been injured. His Honour found the evidence of Mr Rockett unsatisfactory in as much as he thought that the people he observed were "in the trees". His Honour concluded that he was mistaken if he was intending to refer to an area different to that shown in the photographs and indicated by Mr Hurst. There is an important distinction between the evidence of a witness who is accepted as giving honest evidence and the evidence of a witness who is accepted as giving reliable evidence. Once that distinction is appreciated then the conclusions reached by his Honour are in accordance with the evidence.

[33] There was no basis for a finding, as the appellant contended, that the respondent was in an area of shadowed or dappled light as an explanation for neither the appellant nor any member of that team having seen the respondent from the eighth tee. Mr Griffin QC for the appellant made the submission that Messrs Rockett and Woodger and the appellant were not cross-examined on the basis that they did not look properly. Whether they were or not is hardly to the point. They gave evidence about what they did. It was a matter for the learned trial judge to conclude whether or not they kept a sufficient look out so as to conform to an appropriate standard of care in all the circumstances.

[34] A major criticism was that in some way the learned trial judge had relied impermissibly on the photographic evidence to reach the conclusion that the respondent was visible to the appellant had he taken proper care. It is clear however that the photographs were admitted on the understanding that they were taken some two months after the event (or later) and there was no record of the time of day at which they were taken. The oral evidence of the witnesses supplemented the photographs and Mr Hurst and Mr Rowland together produced a map which indicated the position of the players in the respondent's group.

[35] The appellant contended in ground 3 of his grounds of appeal that he had discharged any duty of care that he might have owed to the respondent by looking and ascertaining to his satisfaction that there was no one within the range of his shot. This is said to be reinforced by the fact that he was preceded by two more experienced golfers than himself and in the company of Mr Singleton, the club captain. The responsibility for ensuring that there were no persons in a position to be struck by any golf ball which he might play was that of the appellant. The evidence was to the effect that this was one of the most popular events ever held at the Magnetic Island Golf Club. There were some 68 persons participating in the afternoon session as well as other people in and about the course. With such a large group of people moving around as well as the nature of an Ambrose competition where people might be expected to be making decisions about the most advantageously located ball, it was essential that each player satisfy himself that it was safe to play. Whatever the appellant might have recalled in evidence (quoted above) his team had started at the first tee with the respondent's group and had followed them for seven holes. If the members of that group could not be seen by the appellant he ought to have reflected on that matter and concerned himself as to their whereabouts. Although not raised in argument, it might be suggested that because of his inexperience in the game, the appellant needed to be particularly careful since his ball might go in a direction unwilled or unexpected. Mr Singleton's evidence made it clear that he was attending to other duties as club captain when the earlier players teed off.

[36] Ground 5 of the appeal (ground 4 in the outline) contends that the learned trial judge erred in finding that there was a causal connection between the appellant striking the ball and the injuries suffered by the respondent because of the evidence of the appellant that his shot did not go in the intended direction, that the longest shot he had ever previously played was some 150m and that parts of the fairway consisted of decomposed granite which was hard and the ball ricocheted from the ground before striking the plaintiff. This ground was not elaborated in oral submissions. As has been mentioned, that the appellant was inexperienced might have suggested to him that he needed to be particularly cautious before he played his shot since his capacity, it might be inferred, to control its direction was less than that of a competent, experienced player. The surface of the fairway was always likely to contain stones or other objects which might cause the ball to ricochet. It was possible that the ball might have hit a tree and gone off at a tangent. The appellant had traversed seven holes by then and was aware of the nature of the course. There is nothing in that ground.

[37] The other ground argued on behalf of the appellant was a failure to apply the principles reflected in the maxim *volenti non fit injuria*. In *Rootes v Shelton* (1967) 116 CLR 383 Barwick CJ at 389 expressed the principle underlying the maxim as follows:

> "By engaging in a sport or pastime the participants may be held to have accepted risks which are inherent in that sport or pastime: the tribunal of fact can make its own assessment of what the accepted risks are: but this does not eliminate all duty of care of the one participant to the other. Whether or not such a duty arises, and, if it does, its extent, must necessarily depend in each case upon its own circumstances. In this connexion, the rules of the sport or game may constitute one of those circumstances: but, in my opinion, they are neither definitive of the existence nor of the extent of the duty; nor does their breach or non-observance necessarily constitute a breach of any duty found to exist."

As to the "rules of the game" Kitto J observed at 389:

> "Unless the activity partakes of the nature of a war or of something else in which all is notoriously fair, the conclusion to be reached must necessarily depend, according to the concepts of the common law, upon the reasonableness, in relation to the special circumstances, of the conduct which caused the plaintiff's injury. That does not necessarily mean the compliance of that conduct with the rules, conventions or customs (if there are any) by which the correctness of conduct for the purpose of the carrying on of the activity as an organized affair is judged; for the tribunal of fact may think that in the situation in which the plaintiff's injury was caused a participant might do what the defendant did and still not be acting unreasonably, even though he infringed the "rules of the game". Non-compliance with such rules, conventions or customs (where they exist) is necessarily one consideration to be attended to upon the question of reasonableness; but it is only one, and it may be of much or little or even no weight in the circumstances."

See also observations by Gleeson CJ in *Agar v Hyde* (2000) 201 CLR 552 at 561 and in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 472.

[38] As the learned trial judge correctly expressed it, the risk to which the respondent was exposed was a risk that a following player would play the ball at a time when the respondent was in range of being struck and thus at risk of being injured. Not only, as his Honour found, is this not a risk inherent in a game of golf, the appellant was aware of the rule of the game and knew, as did other witnesses who described it as being a rule of common sense, that a player ought not play a ball in circumstances where there was a risk of another player being struck. The argument was virtually concluded when the appellant agreed that had he seen the respondent he would not have struck the ball because of the risk that the respondent might have been hit.

[39] In my view the learned trial judge was correct when he concluded that the appellant was under a duty of care to the respondent and because of his defective lookout he failed to discharge that duty and as a consequence the respondent sustained serious injury.

[40] I would dismiss the appeal with costs to be assessed.