

THE HIGH COURT

[2021] IEHC 397

[Record No. 2018/241 P]

BETWEEN

COLM CAMPBELL

PLAINTIFF

AND

**COUNTY SLIGO GOLF CLUB, THE GOLFING UNION OF IRELAND NATIONAL COACHING
ACADEMY LIMITED AND KEVIN LE BLANC**

DEFENDANTS

JUDGMENT of Ms. Justice Bronagh O’Hanlon delivered on the 4th day of June, 2021

Background to the Case

1. On the 28th March, 2016, the plaintiff was a spectator at a vantage between the eleventh green and the twelfth tee which was to the left of the green, observing the quarter final of the West of Ireland Amateur Golf Championship at Rosses Point Golf Club in the County of Sligo.
2. The third named defendant was playing the eleventh hole, which indicated that this was the third most difficult hole on the course. He was an elite amateur championship golfer at that time, having represented his country in that capacity abroad and, for a short time afterwards, became a professional golfer and, on this occasion, was playing off a plus 4 handicap. His shot from the tee had landed in the rough on the right hand side of the fairway. His second shot to the green, he had aimed slightly to the left. He could not see the green nor could he see the spectators, but could see the tip of the flag and was aware of the position of the flag on the green. He had used a 3 wood from his position in the rough. In broad terms, there are two main issues arising in this case, as to whether, firstly, this was a wayward shot which ought to have required the third named defendant to shout “Fore” And, secondly, whether the plaintiff was, himself, in a safe position.

The Evidence in the Case on Liability

Evidence of Mr Colm Campbell, Plaintiff

3. The plaintiff freely admitted that he and his friends were talking with each other and not watching when the third named defendant hit the ball. The importance of his evidence was that they had been at or near the vantage point beside the eleventh green for between two and two and a half hours prior to this incident. He heard no signal that the shot was being taken nor did he hear any warning. You could see a number of holes from the particular vantage point from just beside the twelfth tee box and beside the eleventh green. He confirmed that he was never told on arrival where he should stand or otherwise. He gave evidence of his prowess as a golfer and the obligations of a person before they play a shot to make sure it is safe to do so but that, in terms of his own personal safety, he felt quite happy about where he was standing. He agreed that he did not see where the ball was hit from. He was struck on the left hand side of the temple area of his head while he was looking up the eleventh fairway towards the tee box and he estimated that there were fifteen to twenty people standing at that point but that he was not watching what was happening. He put his own position as being over by a path and estimated that from where he was standing when he was hit to the green was 30 or 40 feet but that he was not a hundred percent sure about that. He agreed with the

contention put to him that, for the shot to have been a wayward one, he would have had to be standing where he now says he was standing and he agreed with that. He agreed that when the third named defendant hit his shot, he could not see the green, but he could see the top of the pin on the flag and that that was 23 steps to the front and four steps from the right and that it was over to the right side of the green.

Evidence of Mr Hugh Cassidy

4. Like the plaintiff, Mr Hugh Cassidy, who also gave evidence, was a member of Murvagh Golf Club in County Donegal and he himself was a regular attendee at the very famous West of Ireland Championship. He described himself as being halfway up the length of the green or maybe short of halfway, but standing at fifteen yards, possibly twenty yards, back from the green. He did note that if you were on the fairway, you could see the crowd on the left hand side because it is higher ground and he said it was common case that the ground drops and that the whole activity seemed to be to the right side but the ground dropping obscured that view. He confirmed that there was no shout of any kind and he felt that when his friend, the plaintiff, was hit, there was a ferocious thud which he deemed to indicate a pretty serious impact and that the plaintiff began to fall and Mr Cassidy helped him onto the ground. He agreed that he was situated at the eleventh hole, which he regarded as a safe place to watch the golf come in but he did accept that, at these events, one could find a wayward shot which would present a problem and that that was just the "beast of golf". He felt that from his account of where he was standing, he could not see how it was different to the plaintiff's but he argued that it did not matter any way. He felt that this particular shot was 25 metres wide off the mark and went fifteen to twenty metres further on from the green. He felt that once a person hit a shot, a good golfer would know instinctively whether the shot was a good or bad one and he said if such a golfer, having hit the shot knowing that there were people to the left of the green, did not shout "Fore", it is a breach of etiquette and the responsibility is on the golfer to ensure that he is familiar with and complies with the rules of golf and rules of the golf club and that they may exercise care in all matters relating to the playing of the game.

Points to Note regarding the Engineering Evidence

5. One item to note is that Dr Jordan's, the plaintiff's engineer, photographs were admitted but he himself did not give evidence. Mr Ross Mooney, engineer, called on behalf of the third named defendant was also involved in the joint inspection and he indicated that there had been a dispute at the joint inspection regarding the point at which the first shot of the third named defendant was hit from. He identified this location further down to the right on the embankment closer to the bottom of it. He referred to a hatched area in green and yellow as representing the location identified by the plaintiff where the drive landed, i.e. the first shot. Mr Mooney's evidence was that, in fact, it landed further down to the right on the embankment, closer to the tee box, but that the distance was not of great relevance, rather, the relevance lay in the position on the embankment because that is what affects the line of sight. The third named defendant was of the view that he had taken the shot further down this patch of rough at the bottom of the embankment but not quite as far over as the tenth fairway and he disputed that that where he stood

was the same location as identified in the hatched area on photograph 4 of the plaintiff's engineer's photographs. Photograph 6 of Mr Mooney's photographs identified the actual spot from which the third named defendant said he took his shot and his evidence was that he took the shot from where the photograph is taken, not from where the marker is and that the distance there would be 200 metres. This Court accepted the evidence of Mr Mooney, engineer, and of the third named defendant.

Evidence of Mr Enda Lonergan, called on behalf of the First and Second Named Defendants

6. This witness gave evidence in his capacity as an executive officer of Connaught Golf with the Golfing Union of Ireland. Mr Enda Lonergan gave evidence on behalf of the first and second named defendants. Mr Lonergan described the vantage point as elevated and that people just generally do not walk and, when shown a photograph marking where the plaintiff said he was, he said he said that, where he was standing was a little distance away from where he would traditionally be used to seeing people at such a vantage point and he agreed that the plaintiff was standing closer to the green and had the potential to be closer to the area of play as people were coming up along the eleventh. He said he would be concerned about people standing there and that the terrain was such that it is a golf hole, that you do not want to miss on the right hand side so that an approach from any distance would always favour a line probably just inside on the green side, between the bunker and the green on the left and he said he would not personally stand where the plaintiff was. He described an amateur body such as the Association and their priority was to arrange the tournament and players and not to control the access to the facility, that that was not within their jurisdiction to manage and that, as tournament director, his job was to manage the event and, in effect, manage the players' entry, their adherence to the rules, time schedules, starting times and to process results and that it did not go beyond that boundary. His employer, the Golfing Union of Ireland, had noted that there was no breach of etiquette reported to the championship committee.
7. Regarding the type of spectator who usually attend this championship, his evidence was that these are golfers themselves and are usually knowledgeable and that they know their game, especially at this championship and that the same spectators come back every year and know the course better than he does and it was pretty much the situation that they look after themselves.
8. He described the role of the referee as being to watch the match itself, with no role regarding spectators and that there were no stewards, that these are amateur championships that do not have the resources for stewarding. His evidence was that there was a profit of €83 when the accounts were done at the end of this championship.
9. He outlined the responsibility of the golfer for his own ball and, also, to make sure not to endanger anybody, not to hit anybody with the ball. If he hit a ball which might imperil a person in front of him, he should shout "Fore".
10. Of particular note, was his evidence that from the eleventh tee box up to the eleventh green there is a change in elevation, you are climbing uphill and that is why people do not

walk there and that the area where the yellow and green stripes are, the hatched area, that if one were there, it would certainly be lower than the green and one may or may not be obscured in view depending on the shape of the dunes. He said that Mr Cassidy was probably fifteen to twenty yards to the left of the green as he looked at it. He said he himself was not a very competent golfer so for him to take 3 wood from the rough he said would be a high risk shot because his own skillset is not near the skillset of a player who can make it to the last eight in the West of Ireland Championship. He respected Mr Kearney's opinion that it was a high risk shot. This witness said that it was an inherent part of the game that, if a person hits a shot that they think is not going where it is supposed to go or where they want it go, they should be shouting "Fore". Under re-examination, this witness confirmed that all amateur tournaments in the country are run and administered in exactly the same way by the Golfing Union of Ireland at an amateur, as opposed to a professional event. This Court accepted the evidence of this witness.

Evidence of Mr Ken Kearney of Ken Kearney Golf Design

11. Mr Ken Kearney was called on behalf of the first and second Named Defendants and runs a business called Ken Kearney Golf Design and confirmed that he had played golf to a high level on the amateur circuit for a fifteen-year period, including both the course and championship in question. His expertise in this case is in the area of golf design and the implications of that for this incident. He said that it was accepted and agreed that the third named defendant's tee shot missed the fairway and landed in the rough between the eleventh fairway and the tenth fairway. He said his next shot was played up from that point towards the green and he said that the use of a 3 wood in the rough into a breeze where the third named defendant identified the ball was played from looked to him like a pretty risky shot in what was a really difficult golf hole with a lot of trouble on the right hand side, so you had to always err to the left hand side as you could easily miss the shot to the right because of the long and heavy grasses and that there was that element of risk to the shot for sure.

12. This witness also made the point that a person knowledgeable in golf with a reasonable knowledge of the course would be expected to stand appropriately in the correct location. The third named defendant's contention was that he did not go near the fairway at all, rather, he walked up the left side of the rough because his ball had gone to the right and Mr Kearney gave evidence that the third named defendant would have a limited view from there, he would have been able to see the green or the flag but, because of the nature of the ground and because it rises in front of him, he may have had a limited view. He pointed out that, in the location to which the plaintiff had indicated, one would not have a view of the green but you would have a view of the right side of the green, not the left side. He said it is just rough links type grass and he had examined it on the 11th March, 2019, where he said that the plaintiff had pointed out the distance he was away from the edge of the green and had been measured on the day to scale at 25 metres. Although it was put to him that Mr Cassidy felt that the plaintiff had been closer to the green, although he had not measured it, this witness thought that as you get closer to the green, it is obviously more dangerous because that is where people are trying to strike the ball towards. He thought that the drive would have gone 225 metres and that the ball was

obviously on its way down from the sky when it hit the plaintiff who is six feet tall and that, had it not struck him, it would have gone fifteen to twenty yards further on. He agreed that if you have a blind spot, you do not have to shout "Fore" and he agreed that this area was a blind shot and that there was nobody in front in danger and he clarified his understanding of the term high risk shot as meaning that, because it was particularly blind from the rough into the wind into a tough green, from a tough lie, there was an element of high risk which meant that the player may not have been able to get the ball up onto the green and that he may have lost the hole and that he did not mean this to be interpreted as a high risk for spectators and he felt that the third named defendant did not break any of the rules. By implication, he felt that a person standing in the bailout, a person such as the plaintiff familiar with golf, ought not to stand there because that was where the second shots of any player could land and he made the point that a person golfing does not have to shout "Fore" if they do not feel that somebody might be in danger.

13. This witness did, however, accept that the golfer is responsible for his ball and that it is reasonable and fair that the law should require that he be careful that it does not cause injury to others, although he did agree that this was a blind shot and said that there was nobody in front. He also agreed that the third named defendant did not break any of the rules.
14. He accepted the point that, immediately after a golfer makes his shot, they would know whether or not it is going too far and that he does not shout "Fore", knowing that there are people to the left of the green, that that is a breach of golf etiquette and that there is a responsibility on the golfer to ensure that he is familiar with and complies with the rules of golf and of the golf club and that they must exercise care in all matters relating to the playing of the game.

Evidence of Mr Ross Mooney called on behalf of the Third Named Defendant

15. This witness confirmed his engineering degree qualifications and science degree and that he is a member of Engineers Ireland and has ten years' experience doing court reports. At the joint inspection, one of the issues in dispute was the position from which the third named defendant's drive or first shot. This was identified as a location further to the right down the embankment closer to the bottom of the embankment. The hatched area in green and yellow was indicated to have represented the location identified by the plaintiff where the ball landed the drive, i.e. the first shot. His evidence was that further down to the right down the embankment, closer to the tee box was the position but that the distance is not of great relevance, that the real relevance is the position on the embankment because that is what affects the line of sight. He said the plaintiff reckoned that the shot was taken from the edge of the eleventh fairway and the position of the third named defendant was that he took it further down this patch of rough at the bottom of the embankment but not quite as far over as the tenth fairway. The third named defendant disputed that that where he stood was the same location as identified in the hatched area on photograph 4 of the plaintiff's engineer's photographs.

16. He then turned to photograph 5 and he said it showed the position closer to where the third named defendant took his shot, that it was further back and there were people on the left side and that is the location identified by the plaintiff. The location identified by the third named defendant was that slightly to the right of that from where he took the shot, not as far up but just there at the guide that it was to the right. Photograph 6 of his own photographs identifies the actual spot from which the third named defendant says he took the shot and that the third named defendant's evidence will be that he took the shot from where the photograph is taken, not from where the marker is and that the distance there would be 200 metres. He said the third named defendant does not have a view of the green but has a slight view of the right hand side of the green and he thought of the pin of the flag itself, rather than the green if the flag is raised up above, then left of that he does not have any view and the plaintiff was standing to the left of the green and, therefore, the third named defendant does not have any view of any of that from his position.

17. With regard to photograph 13, the witness confirmed that with regard to the three exits marked by Dr Jordan, engineer for the plaintiff, he said they would equate with the photograph and that it was not too far off where the exit was indicated and he marked it close to where the plaintiff marked his X but that a little further off the green. The engineer's X is the smallest one of all, level with the plaintiff's X but a little further away from the green itself. Mr Mooney said that there may have been a misunderstanding in relation to that aspect of the inspection but that he thought the shot was taken from further down, he said that the line of sight from either direction means you cannot see the green, that there is very little difference between the photographs, a question of zoom level on the camera and that Mr Kearney could have taken a closer shot than his where he was standing a bit further back. With reference to the cross-examination of the plaintiff where it was put to him that the fairway was described as a manicured or semi-manicured area just off the tenth fairway but Mr Mooney said he would not describe it as manicured and he gave the measurement where the plaintiff was found on the ground as 35 metres. He was asked did the ball not land 23 metres to the left of the green on the plaintiff's head. He disputed that and he said there was no dispute on the day of the joint inspection when he put the measuring tape down in that location. He agreed that there had not been any dispute on that point on the day. A discrepancy or a point of dispute did appear between Mr Kearney and Mr Mooney. According to Mr Mooney, there was not a great deal in it because he said that from the line of sight from either direction, you cannot see the green and Mr Mooney said that it could be a question of zoom level on the camera and that Mr Mooney could have taken a closer shot in his photograph than his view from where he was standing which was a bit further back.

Evidence of Mr James Mooney, Referee

18. The evidence of Mr James Mooney, referee, becomes particularly important at this point. He had taken up golf himself in 2002 and had reached a handicap of 10 and he played at club level at Boyle Golf Club, County Roscommon, and had been involved with the GUI since October, 2005 and, when he was elected to the Connaught branch of the Golfing Union of Ireland and he was an ordinary delegate up to 2006 and that he then attended

the R&A Rule School in Edinburgh, or the Royal & Ancient, and he said that he did a course to become a level 3 rules official which qualifies him to referee and to do the rules at Golfing Union of Ireland competitions at all levels and gave evidence of his extensive experience in that role.

19. He described this competition as one of the six top competitions in Ireland for elite golfers. He had walked up to the ball which had been pointed out to him and, with reference to the plaintiff's photograph 2, he said the ball was not in that hatched area. He marked in red in photograph 6 where he thought the ball landed and he described it as manicured rough and it was not regular because there were little hillocks and, past the hillocks, there was prepared rough. He had seen the third named defendant strike the ball and believed it to have been a fine strike. He did not shout "Fore" nor did his caddy, so he himself, therefore, did not follow the flight of the ball. He had taken it for granted that the shot was OK and he proceeded to walk to the second player. He said, from where the third named defendant was standing, you cannot see the green but you could see the top of the flag and the flag was 22 paces onto the green and four paces to the right. He noted a crowd lying around a man on the ground and that that man was Mr Campbell, although he was not known to him. He noted the position of the third named defendant's ball at that stage as being just off the green and he marked that in photograph 10 with the words "JM" on the photograph to show where he thought the plaintiff was found when he came up onto the green. He said that his estimate was that the plaintiff was a good fifteen to twenty paces away. His evidence was that a golfer should shout "Fore" if he believes he hit a wayward shot that he knows might endanger other people on the course whether that other person or spectator or other, that there was no obligation to shout "Fore" if the shot was not wayward or if the player did not think there was a danger and he said there was no report of breach of etiquette by the third named defendant. He marked where the ball landed as being right beside where the plaintiff was hit and lying on the ground being attended to and, again, he marked the plaintiff on the ground beside the green just beyond the bunker, ten to fifteen paces off the green.

Evidence of Mr Jude O'Reilly, Caddy to the Third Named Defendant

20. Mr Jude O'Reilly, who was caddy to the third named defendant on the day in question, gave evidence of his extensive experience in that role and said that the choice of a 3 wood between himself and the third named defendant as the safest option they had from the lie and the best option to get as close to within the area which they would deem to have been a good outcome. He pointed out that they were at a considerably lower level, six to eight metres below the level of the green, and that he could just see the mound in front and that the shot was a good one, straight and on the intended line and that he realised that the ball was just on the fringe, just off the edge of the green's surface and that, looking at photograph 10, it probably gave the closest impression as to where the plaintiff was, beyond two sand bunkers on the left side, on the edge of what would have been a grass bunker, just beyond that and he marked "C" for caddy beside it and that he did not see anything on the tee box while watching the shot being taken, on the tee box or on the second shot. He disagreed with Mr Kearney in that he felt that this was a low risk shot from a golfing point of view and that he knew this course very well and his role

is to give advice or recommendation to the player. He did agree that the ball was airborne when it struck the plaintiff on the head and he said that, depending on one's level of experience in golf, he believed some golfers would take this shot as it was taken onto the green in question using a 3 or 4 iron index 3 into the green with people standing beside it just on the bunker with ten people, for example, as was put to him.

Evidence of the Third Named Defendant

21. He described finding his ball closer to the tenth fairway than the eleventh. He described the lie as fine and that, regarding club selection, they had calculated the distance, added the wind and slope factors going uphill and got a distance for a 3 wood to get up to the green and he said he struck the ball and it went on the intended line. They both thought it was 200 to 220 yards uphill so that they would have been adding ten yards for the uphill and then into the wind which he thought was 25 kilometres an hour on the day in question and, for every kilometre an hour wind, they added one and a half yards extra and they said they were looking at 260 to 270 yards at that stage with all factors in and he felt they picked a 3 wood as the only option. He said he called "Fore" many times if his shot was going off target or was going to hit someone or if there is a different golf hole where someone might be playing, but he said he could not see anything up there to call "Fore" to as there were no spectators watching at that stage and he presumed it was empty. This witness said that his intention was with the particular shot to land it roughly in the area of the first bunker to the right, just left of that, and for the ball to end up in an area just to the left hand side of the green beside the second bunker on the left. He said that had he been aware that there were people to the left of the green and that if his ball was heading towards people to the left, he would have shouted "Fore" but, unfortunately, he was not aware that there were people standing so close to the green.
22. This witness was most impressive, understated but very honest and very credible. He explained that had he thought his ball was going to another hole, where there might have been other players, that would, of course, require a shout of "Fore" as all golfers know that if a ball is going to another hole, not their hole, you should shout "Fore" just in case there was another golfer in the hole. He said that meant that in general that was the rule but it did not mean that it applied to this particular situation. He said he and his caddy were both of the view that it was not possible to see where the shot was going but they had a yardage book and they were very similar to the pictures and that he had 40 seconds to hit the shot as well so he had to be very careful and he took a look at the yardage book, got the intended line and actually hit the ball along the intended line and they were happy with this.

The Legal Submissions

(1) The Plaintiff's Legal Submissions

23. In the submission made on behalf of the plaintiff he noted that there were no stewards to lead them to the vantage point or to tell them where to stand and, had he been directed to move elsewhere, he would have done so. He was struck by a golf ball and suffered numerous sequelae with problems ongoing. The plaintiff's contention is that all three parties were liable for the damage caused to him and that they had a duty of care towards the spectators, which they failed to fulfil. The contention is that, under the

principles of an occupier's liability with reference to *McCarthy v. Kavanagh* [2018] IEHC 101, he was owed a duty of reasonable care.

24. It is argued on behalf of the plaintiff that the organiser must exercise a duty of reasonable care towards the spectators of their events and that they should have been able to recognise that certain areas would be hazardous and it would be incumbent upon the organisers to direct spectators away from viewing events from hazardous areas. It is argued that there should have been a fence around the vantage point to stop errant shots or any signs which would warn the spectators of the danger to them while standing there. Reference in that regard is made to *Murphy v. County Galway Motor Club* [2011] IEHC 135. Evidence of a sign was found in the Scottish case of *Phee v. Gordon* [2013] CSIH 18 ("*Phee*") to go towards altering liability as there would be a likelihood of changing the reaction and awareness of those to whom it was addressed. It is argued that one is commonly used and that the shot attempted by the golfer was also a common shot and would have been expected and there could have been a chance of the vantage being a vulnerable spot for any errant shots. It is argued that, should the golfer be found to have a duty to shout "Fore", which is a common warning shout in the rules of golf, after he made his shot, then the liability of the organisers would certainly be reduced and the golfer should be held liable. Reference is made to *Brennan v. Trundle* (High Court, 11th August, 2014) ("*Trundle*") where Peart J. decided as follows:-

"The golfer is responsible for his ball and it is reasonable and fair that the law should require that he be careful that it does not cause injury to others."

It is argued that the golfer ought to have checked the line of trajectory of his shot and that he should have checked further down the fairway which would have made him able to see the vantage clearly and he would have become aware of the spectators and the danger they faced. Mr Kearney had described this as a very difficult shot with a high degree for any ball becoming a "*flier*". In accordance with the decision in *Phee*, this would not necessarily remove all liability from the golfer but would have been evidence towards reducing same. It was negligent in *Trundle* not to do so and it could be considered so here even if the likelihood of the injury was quite remote as occurred in *Pearson v. Lightning* (1st April, 1998). It was pointed out that, in *Phee*, "*the level of duty of care towards those on the golf course is not to be affected by their level of knowledge of golf*". With reference to *Phee* (paras. 23-24), this viewed the decisions on liability as very fact specific with reference to the game of golf.

Legal Submissions on behalf of the First and Second Named Defendants

25. The first and second named defendants' submissions show reliance on *Weir-Rodgers v. SF Trust Ltd* [2005] 1 ILRM 471 ("*Weir*") and, with reference to s. 4(2) of the 1991 Act, with particular reference to (e), (f) and (g) in that section:-

"(e) the burden on the occupier of eliminating the danger or of protecting the person and property of the person from the danger, taking into account the difficulty, expense or impracticability, having regard to the character of the premises, and the degree of the danger, of so doing;

- (f) *the character of the premises including, in relation to premises of such a character as to be likely to be used for recreational activity, the desirability of maintaining the tradition of open access to premises of such a character for such an activity;*
- (g) *the conduct of the person, and the care which he or she may reasonably be expected to take for his or her own safety, while on the premises, having regard to the extent of his or her knowledge thereof;”*

The organisers argue with reference to these three sections, in particular, that they could not be held to have been negligent in their organisation of the amateur competition which would be viewed by those who are knowledgeable of the game of golf. It would be overly onerous to require signs, fencing and stewardship for the entirety of the amateur competition where stewards usually only appear in the final stages of an amateur competition.

- 26. It is further argued that even if the court were to decide that the plaintiff were a visitor under the 1991 Act, then the organisers would still not have breached their duty of reasonable care due to a lack of stewards, signs and fencing. In this case, it was stressed by more than one witness that the plaintiff and other attendees were all people familiar with the game of golf and then they should have to be able to exercise self-care to avoid the risk posed to them from the danger of errant shots and it would not be reasonable to require stewardship for amateur competitions all the way along. The point is further made with reference to *McMahon v. Dear* [2014] GWD 22-421 that the absence of any signage could not be indicative of removing liability as it was impossible to effectively know what the reaction of a person would be to any additional information being included on signage at a golf course.
- 27. The organisers argue that they are in no way liable for the accident and that they successfully fulfilled their duty of care towards the plaintiff by not having reckless disregard for their safety. The said organisers took the pragmatic approach that, should they be found liable for the accident, then they would accept that they had to share a level of whatever quantum is decided based on the medical evidence put forward by the plaintiff's experts without prejudice to their contention that they should not be found liable.

(2) The Third Named Defendant's Submissions

- 28. These are to the effect that the said defendant had fulfilled a duty of reasonable care and could not have foreseen the injury, quantum of damages and the liability of the organisers in terms of liability being a stronger case against them. No distinction was to be made in *McMahon* as between a professional referee and a spectator, as in this case. Lord Jones indicated that both categories of person would be treated as the same so that allows reference to that decision in this case. In *McMahon*, his Lordship decided that it would be unreasonable to require the defendant to disrupt the ordinary course of play to walk down the green and check the area in front of him for fear of hypothetical people (para. 223). In the *McMahon* case, there was not an immediate duty on the golfer to shout "Fore" and the position was deemed to be that of something which a golfer must

assess for himself or herself in the circumstances as they arise on the basis that you can only assess what you can see. In the McMahon decision, Lord Jones stated that the referee (and, by extension, spectators) accepted the risk that could come about by attending the golf competition, that the errant shot striking them was a real possibility, saying at para. 233:-

"In summary, the Defender played his second shot in the ordinary course of play. The danger of the pursuer being hit by a shot was a risk incidental to the competition which was accepted by the pursuer. The injury sustained by the pursuer was not caused by an error of judgment on the part of the defender that a reasonable competitor being a reasonable man of the sporting world would not have made."

In the submissions, this is applied to this case in that the third named defendant, his caddy, Mr Jude O'Reilly, and Mr Hugh Cassidy, from the vantage point, on all reckoned the shot not to be an errant one. They believed that the shot followed a good trajectory and, while it was overshot, it was not extremely so in their opinion so as to require a shouting of "Fore". They contest that the plaintiff was not standing on the higher vantage point but was, instead, standing in the bailout area of the course and this is a difference of being 21 metres from the green and not the 35 to 40 metres which was the distance from the vantage point to the green. The third named defendant also rejects the application of *Trundle* distinguishing it on the basis that, in *Trundle*, the plaintiff was cordoned off standing on a veranda which was fully off the course. By contrast, the plaintiff in this case was standing in an area which would be considered to be part of the course, then the duty of self-care of the plaintiff was much greater and the golfer should not be held to the level of liability enunciated in *Trundle*. If any liability is to be attached, they argue that it should be weighted against the first and second named defendants for not organising a safer viewing experience for the spectators and referred to the apportionment of claim 75% as against the organiser and 25% as against the competitor in *Murphy*. The third named defendant maintains that, should the arguments against liability fail, that the lion's share of damages should be paid by the first and second named defendants, the organisers, for not creating a safe environment in which the spectators might have watched the competition.

Submissions made by the Parties on 2nd March, 2021

29. Further oral submissions were invited in answer to the written submissions filed by each of the parties and these oral submissions were heard on the 2nd March, 2021. On behalf of the first and second named defendants, the court was urged to deem the plaintiff a recreational user on the basis that, in *Weir* in relation to the provisions of the Occupiers' Liability Act, 1995, the Supreme Court held that not only was the duty owed to a recreational user (or trespasser being the same duty in the Act), of lessor stricture upon the occupier than the "ordinary duty of reasonable care" but that it might well be, therefore, that the liability is something more than what might be described as "gross negligence" (p. 477). It is carefully pointed out in the written submissions in relation to that case that Geoghegan J. (as he then was) did not express a definitive view on

whether the duty not to act with reckless disregard was or was not higher than gross negligence, but it is clear from that case that the failure to erect a warning sign pertaining to a dangerous cliff edge did not amount to acting with reckless disregard; and, in that case, the court held that, even on the lesser duty of reasonable care, the occupier would not have been negligent given the nature of the land – sea cliffs, the danger was obvious and did not require a sign. Applying that logic to the within proceedings, Rosses Point, it is argued, could not be held to be acting with reckless disregard in not having stewards positioned at various locations around the course or having areas of the course specifically roped off. Reference and reliance was made on Mr Lonergan’s evidence (transcript Day 2, p. 37, 127) when he stated that, where there was golf enthusiasts knowledgeable as to the risks involved and knew where to stand and were, to some extent, self-regulating and self-policing spectators.

30. By way of amplification on the written submissions of the first and second named defendants, it is argued at para. 2, p. 9, para. 5.11 that even if the plaintiff were a visitor under the Act and owed the common duty of care, it is submitted that there was no breach in circumstances where there is a duty on the plaintiff to take account of his own safety and it was reasonable in the particular circumstances here for Rosses Point to avail of that requirement in circumstances where not just the plaintiff but all spectators were knowledgeable of the game of golf and with nowhere to stand and would reasonably be expected to take care of their own safety accordingly. The oral submissions have urged upon the court that the evidence does not support a finding in negligence against the first and/or second named defendants. It is further argued that, including Mr Cassidy, there were five witnesses who did not criticise the first or second named defendants and that, in all of the circumstances, there is no evidential basis for a finding in negligence against them.
31. Counsel for the plaintiff relies on *McMahon* and refers to para. 164 which summarises the facts. It is argued that here the evidence is consistent with that in being a similar situation because the third named defendant could only see the top of the flag and that the aim was not at the green but into an area the third named defendant could not see where people tended to congregate and reference is made to the description of Peart J., in *Trundle*, where he described the golf ball as a dangerous missile travelling at speed in that case.
32. Reference was made in the oral submissions to Day 3 of the transcript, paras. 91 and 92, where the intention was stated to be to hit the ball away from the green, not at the flag, and p. 94 which referred to the presumption that it was empty out there and further best practice and duty of care are referred to (p. 229) and it is stressed that neither did the defendant nor the caddy either took the trouble to go walk up and look before the shot was taken nor was there any shout in advance or after the shot.
33. The third named defendant’s oral submissions referred to the rules of golf and the plaintiff as spectator and that the third named defendant should not expect him to do the job of others. Reliance again in these oral submissions was to the fact that, in *Trundle*, the

plaintiff was clearly off limits on a balcony which distinguishes it from this set of circumstances. The referee is referred to and the caddy as giving no evidence that there was going to be a danger at that point.

34. While the plaintiff argues in these oral submissions that *McMahon* is on all fours with his case, he stressed that the caddy did not even look and see what was above and that is with reference to Day 3, p. 60, and the plaintiff argues that the recreational user is owed a separate duty with reference to p. 212 as set out in *McMahon*

Further Submissions invited by the Court which were heard on the 2nd March, 2021

35. Further submissions on behalf of the first named defendant stressed the contention that the plaintiff in this case was a recreational user and that, accordingly, the law provides that the duty on behalf of the first and second named defendants is obviously much less strict and is not the duty of the reasonable care, rather the duty not to injure intentionally and, indeed, a duty not to act with wanton disregard.
36. Reference was made to what was noted by Geoghegan J. (as he then was) in the celebrated *Weir* case where he contended that it was really probably something close to gross negligence which was envisaged and it was submitted that there has been no evidence to suggest a finding of that kind in this case as against the first and second named defendants.
37. It is strongly stressed on behalf of the first and second named defendants that the evidence in this case does not support a finding against the first and second named defendants and a close examination of the evidence adduced by the plaintiff and the third named defendant shows no evidence supportive of any exposure on the part of the first and second named defendants. It is pointed out that neither Mr Campbell, the plaintiff, his friend, Mr Cassidy, the third named defendant, Mr Le Blanc and Mr O'Reilly, the caddy, and the two gentlemen, Mr Mooney, referee, and Mr Mooney, engineer, called on behalf of the third named defendant that one would scan the transcript in vain to find a single criticism of the first and second named defendants arrangements that they are simply not there. Counsel stressed the importance and paramountcy of the evidence in any case and in this case and said that submissions then cannot be made even in a lukewarm way as against or independently of the evidence.
38. Counsel on behalf of the plaintiff noted that the third named defendant's submission placed great emphasis on *McMahon*, a Scottish case, with particular reference to para. 164 which summarises the factual position in that case and, in particular, the position which faced the golfer in question as he was addressing the shot:-

"When we looked down towards the green from where the ball had landed after his tee shot, the defendant could see that everything was clear on the right side of his intended shot and that there was a lone golf cart sitting on the left side where was marked C on appendix 3. It was in the area of "Gorse A". The defendant could see the top third of the cart, the roof and some of the windscreen and some of the top of the seating area. Behind the cart was a background of gorse in the distance,

"Gorse C". When he saw the golf cart, the defendant visually checked around that area to see whether there were people in the bushes. He looked around the golf cart itself and there was nobody present. To the left of the golf cart, as marked on appendix 3 there is a mound, then the green. The defendant saw no one around the mound. There was no one on the green, the previous group having left."

Counsel referred to that situation where the defendant could see the green, the fairway, the mound and a golf cart. Having seen a golf cart, he took care to check whether anyone was in the vicinity of the golf cart. He took some time to do that and, having satisfied himself that there was no one at the golf cart, or on the green, or on the fairway, he then began to take his shot. He began his stroke and did not look up until after he hit the ball, by which point it was too late and it is pointed out that this is significantly different to the factual situation in this case where the evidence is consistent, it is argued, that the third named defendant could not see the green, could not see the fairway and could not see the area he was hitting the ball into. The most he could see was the top of the flag which, it is pointed out, was irrelevant as the court had heard. He was not either aiming at the flag or the green and his caddy gave evidence to this court that no golfer that he had caddied for would have aimed at the green from where the ball was. What he was pointed out as doing was taking a shot open to him from a difficult lie, into an area he could not see and he was doing this during a golf tournament, and we have heard that it was a well-attended and popular golf tournament and he was aiming towards an area where people tend to congregate. The plaintiff's counsel felt that the precise location where Mr Campbell was standing is largely irrelevant and he relies on Peart J.'s comment in *Trundle*, that it was very clear that, when you are a golfer, you are dealing with a dangerous missile travelling at speed and you have to have a responsibility for that. Counsel for the plaintiff then refers to Day 3, pp. 91 and 92 and the evidence of the third named defendant:-

"...I am not a robot so that I can't hit it to an exact spot, Judge, but our intention was to land it roughly in the area of the first bunker on the right, just left of that and for the ball to end up in an area, just the left hand side of the green beside the second bunker on the left. That was our intention."

And he further answers:-

"The further the shot is the harder it is to get the right end result that you exactly want. When you are playing the numbers game in golf which we do you can only go off your numbers and hope for the best after that."

He accepted at p. 94:-

"Yeah. If I was aware that there was people to the left of the green and my ball was heading towards people that were left of the green in hole 11, Judge I would have shouted Fore but unfortunately I wasn't aware that there was people standing so close to the green."

Counsel points out that this is significantly different from the case relied on by the third named defendant. Counsel points out that in *McMahon*, the golfer had looked carefully and then took his shot but that, in this case, Mr Le Blanc did not look. His caddy did not look and he said that a key point is that there were multiple opportunities to do so had they walked up the fairway, they could have walked up to the mound and had a look, and his caddy gave evidence that the practice was that, on some occasions, people shout "Fore" in advance of hitting into the green if they think people might be up there but that this was not done here so, having not looked, they did not shout in advance of the shot or shout after the shot and anyone of those three easy steps would have averted the danger in this case and it is argued that this was a foreseeable danger to the plaintiff and people standing in that vicinity.

39. Counsel on behalf of the third named defendant replied that the golfer in this case had a certain amount of time to hit his golf shots in a competitive environment and that to expect him to go and check to do the job of others was ridiculous. Counsel said it was pushing the bounds of it if he had to go and check where in play on the course, not an off or a skewed shot, on the course of play it is safe to hit a shot. Because he refers to Peart J.'s decision (as he then was) in the old Connaught case, he said the plaintiff is up on the balcony and effectively off limits and anyone would know that it was a crazy shot to hit someone who was off the course.
40. Counsel reiterated that this was a competitive competition where you have need to shout "Fore" if and only if you feel that there is somebody who might be in danger of your shot and that leads you to the point where, if you hit an errant shot, in that regard, he says the court is being asked to decide that it was an errant shot because the plaintiff placed himself in a different location to where others were.
41. It was further pointed out on behalf of the third named defendant that, in the pleadings, his shot was criticised even though the evidence goes towards a description of a shot which cannot be criticised and this is in circumstances where the plaintiff did not see the shot at all and was not looking, nor did his witness, Mr Cassidy, actually see it. Independent evidence of an independent referee was that this was a fine shot and that there were no concerns from those who were behind the shot, including the caddy who is an expert and the referee that there was going to be a danger for anyone up in the area concerned. Counsel stressed the time limit which Mr Le Blanc had to hit the shot as 40 seconds and said nobody disagreed with that and he said that this was a competitive round of golf and the plaintiff was struck by a golf ball by a competitor in around where the plaintiff should not have been standing, effectively. He said that this is because he was hit by a golf ball on the course beside the green in an area where they say they are entitled to hit the ball without being dragged into court about it.
42. The plaintiff countered saying that the pleadings under para. 15 of the particulars against the third named defendant include acting with reckless disregard, failing to have adequate regard for the safety of the plaintiff and failing to warn spectators of dangers which the third named defendant was or ought to have been aware. It is further pointed out that

there is no excuse as to lack of time, that case is not made by the third named defendant and it is pointed out that someone could have then gone behind the golf cart while his back was turned on the way back even if he had walked up but that it is not the same situation here at all.

43. In summary, the plaintiff's counsel did accept the contention on behalf of the first and second named defendants that he was a recreational user but the plaintiff relies more on the common law duty of care and contends that the plaintiff was owed a separate duty as someone who had attended an event organised by the first and second named defendants. It was pointed out that the claim against the first and second named defendants only arises if the claim against the third named defendant is unsuccessful and, if the third named defendant was negligent, then that was a risk that the first and second named defendants could not have been expected to guard against.

Findings of Fact

44. The evidence of Mr Enda Lonergan called on behalf of the first and second named defendants is very important in that he sets out the various responsibilities of those concerned. He agreed that the plaintiff was situated at the eleventh hole which he regarded as a safe place to watch the golf but he did accept that, at these events, one could find a wayward shot which would present a problem and that that was just the beast of golf. He did not put any particular significance on the particular spot on which the plaintiff stood. He said that the shot was 25 metres wide off the mark and went fifteen to twenty metres further on from the green.
45. He set out the etiquette of golf and the responsibility of the golfer who, having hit a shot knowing that there were people to the left of the green that, if they did not shout "Fore", was in breach of etiquette and the responsibility is on the golfer to ensure that he is familiar with and complies with the rules of golf and rules of the golf club and they must exercise care in all matters regarding playing of the game. He said that he personally would not stand where the plaintiff was, that the approach would always favour a line probably just inside on the green side, right hand side of the bunker on the left and he said he would not personally stand where the plaintiff was.
46. He went on to describe the priority, from the Association's point of view, was to organise the tournament and players and not to control the access to the facility nor was it in their jurisdiction to manage that. As tournament director, his job was to manage the event, the player's entry, their adherence to the rules, time schedules, starting times and to process results and that it did not go beyond that boundary and he noted that no breach of etiquette had been reported to the Championship Committee. He noted a profit of €83 when the accounts were done at the end of that particular championship. He stressed that this was an amateur championship and that all such championships were organised by the Golfing Union of Ireland in the same way.
47. Turning to the evidence of Mr James Mooney, referee, he marked "JM" on the photograph to show where he thought the plaintiff was found when he came upon the green and his estimate was that the plaintiff was a good fifteen to twenty paces away. He reiterated the

rule regarding the shouting of "Fore" if a golfer believes he hit a wayward shot and that he knows that it might endanger other people or a spectator but he pointed out the rules that there is no obligation to shout "Fore" if the shot was not wayward or if the player did not think that there was a danger and he said there was no report of breach of etiquette by the third named defendant. He marked the ball as having landed right beside where the plaintiff was hit and lying on the ground and marked where the plaintiff was lying on the ground beside the green just beyond the bunker, ten to fifteen paces off the green.

48. The court then looked at the evidence again of the third named defendant, remembering that this is an amateur championship and the third named defendant's evidence was that they, he and his caddy, had calculated the distance, added the winds and slope factors going uphill and got a distance for a 3 wood to get up to the green and he said he struck the ball and it went on the intended line. The mathematical calculation they made was that they thought that it was 200 to 220 yards uphill, therefore, they added ten yards for the uphill and then into the wind which he thought was 25 kilometres an hour on the day in question and, for every kilometre in hour wind, they added one and a half yards extra and they said they were looking at 260 to 270 yards at that stage with all factors in and he said they picked a 3 wood as the only option. He gave three instances of where he might have shouted "Fore" in the past. He said if his shot was going off target or was going to hit someone or if there was a different golf hole where someone might be playing but he said he could not see anything up there to call "Fore" to as there were no spectators watching at that stage and he presumed it was empty. He said that he had been aware that there were people who were left of the green and that, if his ball was heading towards people to the left, he would have shouted "Fore" but he said, unfortunately, he was not aware that there were people standing so close to the green. The court notes that this man had 40 seconds to hit the shot and, on his own evidence, he had to be very careful and he took a look at the yardage book, got the intended line and actually hit the ball along the intended line and both he and his caddy were happy with this and they had taken the view that it was not possible to see where the shot was going but they relied on the implements they had as described. The argument is made on behalf of the plaintiff that the third named defendant ought to have walked up and clarified his line of vision and walked back before he hit the ball but, in my opinion, that would have been a very unreasonable requirement with 40 seconds within which to prepare his calculations and to hit the ball. He confirmed that he and the third named defendant picked the 3 wood as the safest option they had from the lie to get as close to within the area which they would deem to have been a good outcome and he noted that they were at a considerably lower level, six to eight metres below the level of the green and that he could just see the mound in front and that the shot was a good one, straight and on the intended line and that he realised that the ball was just on the fringe, just on the edge of the green's surface and he said photograph 10 gives the closest impression to where the plaintiff was, i.e. between two sand bunkers on the left side on the edge and that would have been a grass bunker just beyond that where he marked "C" for caddy beside it. He disagreed substantially with Mr Kearney because he said this was a low risk shot from a golfing point of view and that he knew this course very well and that he gave his recommendation to the player on the basis of his knowledge. I accept the foregoing

evidence as reflecting what actually happened in terms of how the golf was played on the day. While there was a dispute between Mr Kearney and Mr Ross Mooney, engineer, Mr Mooney said the measurement as to where the plaintiff was found on the ground, he put it at 35 metres. He disputed that the ball landed 23 metres to the left of the green on the plaintiff's head and he said there was no dispute on the day of the joint inspection when he put the measuring tape down at that location. Discrepancy or point of dispute did appear between Mr Kearney and Mr Mooney but, according to Mr Mooney, there was not a great deal in it because he said that, from the line of sight from either direction, you cannot see the green and Mr Mooney said that it could be a question of zoom level on the camera. This witness turned to photograph 5 where he said the position from which the third named defendant took his shot was further back and there were people on the left side and that this was the location identified by the plaintiff but that the location by the third named defendant was that slightly to the right of that from where he took the shot, not as far up but just there at the guide that it was to the right. He points to photograph 6 of his photographs as the actual spot from which the third named defendant says he took the shot and not from where the marker is and that that would be a distance of 200 metres. He said the third named defendant did not have a view of the green but had a slight view of the right hand side of the green and he thought that the pin of the flag rather than the green, if the flag is raised up above, then left of that he does not have any view. The plaintiff was standing to the left of the green and, therefore, the defendant does not have any view of that from his position, i.e. from where he took his shot and I accept that evidence. The foregoing, in the view of this Court, represents what actually happened. Let me turn now to the plaintiff's own evidence. The plaintiff's contention in the pleadings is that all three parties are responsible for the accident which befell him. He agreed he did not see from what point the ball had been struck and he was an experienced attendee at these events and an experienced golfer, having positions of responsibility in his own golf club. He could not be sure where he was actually standing. He agreed under cross-examination, that for the shot to have been a wayward one, he would have had to be standing where he later changed his view as to where he was standing. Mr Cassidy, his friend, helped him onto the ground when he fell and agreed that he was situate at the eleventh hole which he regarded as a safe place to watch the golf come in, but he did accept that one could find a wayward shot which would present a problem and that that was just the beast of golf. He said that from his own account of where he was standing, Mr Cassidy could not see that it was different to the plaintiff's but he argued that it did not matter either way. Mr Cassidy felt that this shot was a wayward one in that he argued that it went 25 metres wide of the mark but that, in fact, is disputed and heavily so.

49. Turning now to the evidence of the referee, Mr James Mooney, he noted a crowd lying around a man on the ground and that he identified him as the plaintiff, although he was not known to him, and he noted the position of the third named defendant's ball as just being off the green and he marked that on photograph 10 with the words "JM" to show where he thought the plaintiff was found when he himself arrived up at the green. His estimate was that the plaintiff was a good fifteen to twenty paces away and he marked

the plaintiff on the ground, beside the green, just beyond the bunker, ten to fifteen paces off the green.

50. The court has looked at all of the evidence very carefully, has read the legal submissions and, indeed, the pleadings carefully and comes to the following conclusions. This is an amateur sport, although an elite amateur championship. There is no tariff for entry. The contention of the first and second named defendants is that the plaintiff entered this premises as a recreational user. The plaintiff's own evidence was that he had attended this championship over many years and he picked what he believed to have been a good vantage point. Of particular note in the opinion of this Court is that the plaintiff was not paying attention at all when this incident occurred. He was not looking at play, he described people looking for a ball and that he was talking to his friends. Taking into account that the third named defendant himself was a highly experienced elite amateur golfer who knew his game and who calmly and confidently defended this action. This Court considers the decision of Peart J. in *Trundle* to be in a completely different category. In that case, serious injury was suffered by a person who was sitting on a veranda, a cordoned off area and that is not the situation. In the instant case, the contention of this Court is that the third named defendant did everything correctly and by book as is verified by his caddy and I am fortified in this view by the evidence of the referee in the case that it was not a wayward shot and it is a case like many other golfing cases which must turn on its own particular facts. With reference to the Supreme Court, *Weir-Rodger v. SF Trust Ltd* [2005] 1 ILRM 471, in relation to the provisions of the Occupiers' Liability Act, 1995, the Supreme Court held that, not only was the duty owed to a recreational user "*or trespasser being the same duty in the Act*", of lesser stricture upon the occupier than the "*ordinary duty of reasonable care*" but that it might well be, therefore, that the liability is something more than might be described as "*gross negligence*" (p. 477), and in that case, it was found that the failure to erect a warning sign pertaining to a dangerous cliff edge did not amount to acting with reckless disregard and, in that case, the court heard that, even on the lesser duty of reasonable care, the occupier would not have been negligent given the nature of the land – sea cliffs, the danger was obvious and did not require a sign.
51. The situation on the ground of this championship competition was that, to a great extent, they were self-regulating and self-policing spectators. All spectators were deemed to have been knowledgeable of the game of golf and would be reasonably expected to take care of their own safety accordingly. It is my conclusion, and I accept the submissions on behalf of the first and second named defendants entirely, that here we have five witnesses who did not in any way criticise the first or second named defendants and that there is no evidential basis for a finding of negligence against them.
52. It is quite clear, from the supplementary submissions requested by me and furnished on behalf of the first and second named defendants, that the law provides the duty of the first and second named defendants, it is not the duty of reasonable care, it is much less strict than that Geoghegan J. (as he then was) in the celebrated *Weir* case noted that, in that case, they would have had to act with something presumably close to gross

negligence and the case is put that, in this case, that the duty is not to act with wanton disregard. With regard to the supplemental submissions received on behalf of the plaintiff, it is noted that where Mr Campbell, the plaintiff, was standing is largely irrelevant. The conclusion of this court is that it would be completely impractical and unreasonable to have expected with 40 seconds to play his shot for the third named defendant to have walked before he took the shot as suggested on behalf of the plaintiff in the supplemental submissions. The preponderance of the evidence supports the contention of the defendants that no case has been actually made out against them in this case. We have to keep in mind that this is an amateur sport, although played at an elite amateur level, and that the plaintiff was a recreational user responsible to a huge extent, as matters played out, for his own safety.

53. While the court was very appreciative to have heard the medical evidence, given that I am finding against the plaintiff on liability, I do not need to deal with that evidence. The court, therefore, dismisses the plaintiff's claim.