A LEGAL PAR FIVE

You will need more than a good selection of clubs and shotmaking skills to get out of these legal hazards on the golf course.

by BO LINKS © 1998

THE SCENE is Deep Pockets Golf Club, founded in 1993 and hosting its first U.S. Open Sectional Qualifying in 1998. The 18th hole at Deep Pockets borders a housing development. It was built in a narrow slot between two rows of houses that have been there for 20 years. The hole is an extremely short par four; it is a dogleg right, measuring only 298 yards (about 245 as the crow flies). The green is tucked behind a large house owned by Mr. and Mrs. Rick O'Shea. Their kitchen faces the tee.

Often, when players at the tee ask where to aim, knowledgeable caddies tell them to aim at the O'Shea's chimney — for longer hitters, a shot directly over the O'Shea's chimney has a good chance of reaching the green, offering up the chance at an eagle putt to finish the round.

Billy Bob Basherooni, aka "The Hammer," is a 2-handicap and a veteran of several national long-driving competitions. He has come to Deep Pockets in an attempt to qualify for the U.S. Open. He arrives at the 18th hole with a chance to make it through sectional qualifying, but he needs to go two under on the last hole in order to do so. He asks his caddie, Lippy de Loopo, where he should aim his tee shot. Lippy tells him about the "chimney route," as it is known locally.

Billy Bob Basherooni attempts to cut the dogleg, but his tee shot, while hammered hard and on line for the chimney, comes up short. He doesn't make it across the dogleg. His ball bounces off the chimney, crashing through one of the windows in the O'Shea's kitchen, injuring Mrs. O'Shea, who suffers facial lacerations from the flying glass. Mrs. O'Shea is devastated by the injury as the resulting scars cause her to resign from her job as a news anchor. (She was making over $350,000 a year in that position.)

Mr. and Mrs. O'Shea sue Billy Bob Basherooni, Lippy de Loopo, as well as Deep Pockets Golf Club. They also sue Launch, Inc., the company that manufactured Billy Bob's driver, which is called "Big Thunder" and is advertised as the longest club ever made (one ad said, "When you hit it with this stick, it won't come down!"). Finally, they bring a claim against Wilson Sporting Goods, maker of the Ultra Competition golf ball, which Billy Bob was bashing on the fateful tee shot. Wilson has claimed publicly that the Ultra is the longest ball in golfing history and that when hit, it flies forever.

But that's not all, folks . . . . A local pro, Sammy Sprain, shows up for qualifying with metal spikes in his shoes. He has a sizeable local contingent following him and rooting for him to qualify for the Open. Deep Pockets is a "spikeless" facility and the USGA is enforcing that rule for all competitors. Sammy Sprain must remove his spikes and replace them with "alternative" cleats. Wouldn't you know it . . . while walking down a hill on the third hole, Sammy Sprain slips and . . . you guessed it . . . sprains his ankle. In the fall, he also twists his knee and wrenches his back. The injury sidelines him for a year. He sues the club and the USGA, claiming loss of income and reimbursement for medical bills. Oh yes, he also includes a claim for pain and suffering and public humiliation (he has never fallen on a golf course before).

And . . . another young professional, Ada Case, shows up and requests a cart so he can ride between shots. He suffers from a degenerative nerve disorder in his left leg and cannot walk 18 holes without serious health risk. If provided with a cart, he can swing normally and is quite an accomplished player, having won several mini-tour events and having competed on an NCAA championship team while in college (he used a cart in college, the result of a special accommodation afforded him by a vote of coaches in his school's athletic conference and by the NCAA in the collegiate championship). Ada Case's request for a cart is turned down by the USGA. Ada Case proceeds to hire a caddie who carries his ultra-light "moon" bag and transports him between shots via use of a sedan chair. Ada Case not only completes the round, but he qualifies for the Open. He also threatens to sue so he can use a cart in the Open proper. (Rumor has it he is personal friends with Tiger Woods and plans to call Tiger as a character witness at the trial.)

Who wins these lawsuits?

Mr. and Mrs. Rick O'Shea vs. Various Defendants:

1. Billy Bob Basherooni (the golfer)
2. Lippy de Loopo (the caddie)
3. Deep Pockets (the golf course)
4. Launch, Inc. (the club manufacturer)
5. Wilson Sporting Goods (the ball manufacturer)

Did the O'Shea's attorney commit malpractice?

Should the lawyer have sued anyone else?

Do you need any additional information?

Sammy Sprain vs. Deep Pockets & USGA:

What does Sammy Sprain have to prove?

Can he win?

What defenses does the golf club have?

How about the USGA? Does it have potential liability?

Ada Case vs. USGA:

Does Ada Case have a case?

How would you advise the USGA?

Does the "ADA" (the Americans With Disabilities Act, 42 USC § 12100, *et seq.*) apply?

Isn't walking an essential part of championship golf? If not, why not?

Can there be a reasonable accommodation without everyone riding a cart?

Who should decide what the rules are for elite sporting competitions? The courts? Or a ruling athletic body?

The following debate was presented during the USGA Educational Program to investigate the many issues presented in "A Legal Par Five."

by BO LINKS and MIKE VERON

Robert (Bo) Links (left) and Mike Veron.

OUR TURF TIP is to stay out of a courtroom. We know just about all of the lawyer jokes that have ever been told. The one that you should pay attention to is this: A good doctor will save your life, a good accountant will save your money, a good clergyman will save your soul, but it's going to take one of us to save your fanny. And that's what we're here to talk about.

Each of the situations to be debated is presented in the preceding "A Legal Par Five." We're going to demonstrate the potential issues that could be raised in the various circumstances and try to raise your awareness about liability situations that should be reviewed at your golf course.

The Case of Deep Pockets Golf Club

Links: Let's start with the first case dealing with Deep Pockets Golf Club. Who wins the lawsuit, Mike?

Veron: Well, on behalf of Mr. and Mrs. O'Shea, we're going to file a lawsuit against a number of individuals responsible for her unfortunate injuries.

First, Mr. and Mrs. O'Shea are going to sue Billy Bob Basherooni for negligence in launching this shot. The legal term for doing something wrong and being at fault is called negligence. Billy Bob is negligent because no one was in a position to better appreciate the limitations of his game and the extent of his abilities than Billy Bob. No one forced him to aim where he aimed; no one told him to hit the ball. He knew who he was putting in danger and what danger he was putting them in. So, first and foremost, Billy Bob is responsible.

Second, Lippy de Loopo, the caddie. A caddie is not just a bag carrier. A caddie is there to provide advice and counsel to the player, as he is allowed and encouraged to do under the Rules of Golf. Lippy de Loopo understood the course, the layout, the dangers, and failed to provide any kind of counsel, advice, or warning to Billy Bob Basherooni. He was acting in concert with Billy Bob and so shares responsibility for his egregious deed.

Third is Deep Pockets Golf Club. One of the first things I learned as a lawyer, if I'm going to represent a plaintiff who is bringing suit, is that I need to look for a deep pocket. Billy Bob Basherooni doesn't strike me as someone who has sound financial management in his background any more than he has sound golf course planning.

Did Deep Pockets Golf Club appreciate the danger? It should have. Did Deep Pockets Golf Club provide any advice or counseling to the players against attempting such a foolhardy thing, against putting people in danger like my clients, Mr. and Mrs. O'Shea? Should Deep Pockets Golf Club have foreseen this unfortunate and tragic affair that has virtually ruined Mrs. O'Shea's life, that has perhaps destroyed her marriage and shattered the lives that she and her husband previously enjoyed and were entitled to continue to enjoy? No, Deep Pockets Golf Club did nothing. It blindly disregarded the interest of these people who lived next to its property by allowing the pursuit of activities that it should have foreseen would place Mr. and Mrs. O'Shea in harm's way. It did nothing and it bears responsibility for its omissions. It's clear negligence.

I like the name of Deep Pockets, but let's just suppose that Deep Pockets isn't deep enough. Well, there's Launch, Inc., the club manufacturer. I got on the internet and the financial press, and I found out that Launch, Inc., has an outstanding debt to equity ratio. Launch, Inc., looks like a pretty good prospect. Well, Launch, Inc., had no business leading someone as unsophisticated and foolish as Billy Bob Basherooni into thinking he was going to launch that ball to where it would never come down. That was a ludicrous advertising claim. We're going to make Launch, Inc., responsible for those kinds of assertions. If you want to make a representation, then you'd better be able to back it up.

Finally, Wilson Sporting Goods — now there's a name that will bring a smile to the face of any plaintiff's lawyer looking for a deep pocket. My clients wouldn't mind owning a little bit of Wilson Sporting Goods and being able to go on outings with John Daly, their spokesman.

Links: He's with Callaway now.

Veron: Well, we can name Callaway as a co-defendant. Wilson Sporting Goods manufactures a golf ball, and its advertisements say that it's the longest ball. We might call Frank Thomas of the USGA because he knows who has the longest ball. He's no doubt going to testify that Wilson's Ultra is not the longest ball and that his own tests demonstrate that Wilson's claims are perhaps exaggerated.

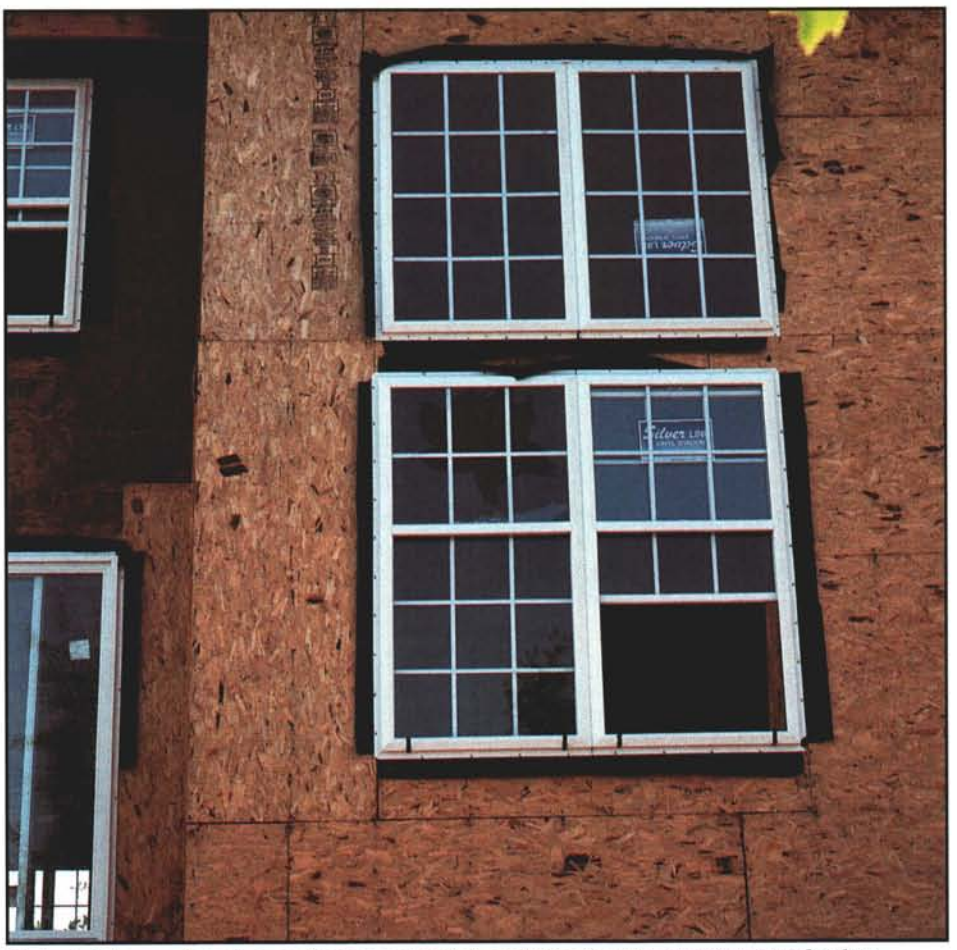
At any rate, those are our defendants, Bo, and those are the ones we are going to pursue a claim against. I'm just licking my chops because one-third of the gajillion dollars that I'm going to get is going to put my children through college.

Links: Well, I hope your children go on to some land grant school where they give scholarships because zero divided by three is zero. Let me tell you why. This is why people don't like lawyers. He's going to own the company, he's going to the deep pocket, and he's going to get into your pocket. Here's the problem and let me start at the back end first, where a lot of lawyers like to begin.

First, the case on the advertising. We're probably going to beat you on some summary judgement because the cases say that claims like "you can hit it forever" are not representations of fact — they're merely puffing. You don't get a warranty with that and you don't incur liability by saying it. If you did, you'd never see an ad for anything, and all you would see is lawsuits. You're going to lose on summary judgement on both of the claims against Launch, Inc., and Wilson Sporting Goods.

Before I talk about Billy Bob, the caddie, and the club, let me tell you about a theme that Mike and I do agree on. The one thing that you all have to do in preparing yourself for these unfortunate events is trying to engage in what lawyers and the insurance professionals call *loss prevention*. You should be working with your insurance brokers and insurance people to get safety auditors out to your club or your course. They will do it for you; some will do it for free and some for a very modest fee. What you need to do is to get an independent set of eyes looking at your facility because you're not qualified to make the assessment. You've been there too long and you overlook things that you should be seeing.

The other thing that Mike and I try to tell people is that you need to know there are attorneys out there gunning for you. The Trial Lawyers Association holds conferences around the country on how to prepare recreational liability cases. What you need to do, however safe you feel your facility may be, is ask yourself how you would respond if put on the witness stand and asked, "What did you do to try and prevent this?" I hope you do more than shrug your shoulders and say, "Gee, I didn't think it was going to happen." There are things you can do, and I'm going to talk about how my good buddy Mike has only told you part of the story.



This clubhouse hasn't even been completed and it's already experiencing broken windows from errant golf shots. What's the future hold when there may be someone standing at the window?

In terms of Billy Bob Basherooni, normally a player is not negligent by hitting the ball crooked. The cases say that over and over again. I will concede to you that the problem here is: he didn't hit it crooked. He hit it right where he was aiming, and that's why we framed the hypothetical situation this way. The argument is that he heightened the danger. But what he's going to be able to argue is that because the game is so unpredictable, there is no way to control where the ball goes — whether he's aiming at someone or away from them. In many states, he probably has a fair shot at winning summary judgement because a player who hits a ball does not have liability unless it's some direct and immediate danger that he has created. Somebody who's 250 yards away and off the course property is not in that zone of danger. I will concede, Mike, it would be a closer call because he's aiming right at them, but he's got a good chance of beating you on summary judgement.

I think the problem you have with Billy Bob Basherooni, and you've already highlighted it, is that he has no money. Same thing for the caddie. I don't know anybody who would waste their time with the caddie, and I want to focus on Deep Pockets because they're the clients who pay my bill and I want to keep them in business.

What you haven't told everybody is that Deep Pockets put up a 60-foot fence to try to keep balls on the course. They can't keep every ball on the golf course. What they did was a reasonable protection under all the circumstances, and this has never happened before. I'm going to argue that my client attempted to prevent it, attempted to be reasonable and, moreover, to the extent there is a danger, it was obvious to Mr. and Mrs. O'Shea when they bought their house. They assumed the risk and, if you will, conceded an implied easement to my client to allow golf balls to fly near their property.

If I'm the defense lawyer, the question that I raise with all of you is: Do I have a cross complaint against some third party that we haven't talked about yet? I think I might. Particularly in California because in this state there is a case or two on the books that says that a golf course architect may have

liability if he designs an unsafe golf hole. From the hypothetical, the house was there and the hole was built around it. It's a driveable par four, and the way to get there is to aim at the house. The question is, does the architect have liability? Mike, as the plaintiff's lawyer, what do you think?

Veron: As a plaintiff's lawyer, *of course* he has liability, and so does his professional liability insurer. In Louisiana we can sue him by direct action, sue the insurer by direct action, and bring them both into the lawsuit. He shares blame because no one knows better than the architect, whom the club hired and relied upon, where the appropriate location of a green ought to be. He shares responsibility with that club for locating the green in a place that put the O'Sheas in peril. There's a maxim in the law that your rights end where mine begin.

The architect used the air space above my home, which I can argue I have a right to use. Instead of using your property, you've chosen to use my property, place me in peril, and you've incurred responsibility. Certainly, a golf course architect, in designing golf courses, naturally thinks first and foremost about the shots that will be played at the hole. That's how he decides where to position bunkers, how to shape the green, where to place the tees, where trees ought to be, and how to take advantage of the landscape. There is no question that if Deep Pockets filed what we call a third-party demand against the golf course architect, he should be considered to share in the responsibility.

Links: Mike, let me ask a question about Billy Bob. Would you be making an argument that he should have yelled "fore" and has liability for failing to do so?

Veron: That's an excellent point. Some jurisdictions say while striking someone with a golf ball is not negligence because even the world's finest players do not have absolute control over the direction their golf ball will take, failing to warn someone who is in a zone of danger is an independent act of negligence that will subject you to liability. There are cases in Louisiana that make this point. I wrote a *Green Section Record* article (September/October, 1990, "Liability on the Golf Course") a number of years ago that discussed them.

Links: In California you're going to lose on that point. A case came out last year that said even though the yelling of "fore" is part of the etiquette of the game, it doesn't rise to a legal duty. The case in question involved a woman who was on the sixth fairway of a course, and a player teeing off on the fifth hole hooked a ball that hit her in the jaw. She suffered damages, sued, and the contention was raised that the player didn't yell "fore." The court said that wasn't a breach of duty and the failure to yell "fore" didn't create liability. That's in California.

Get safety auditors out to your golf course to fully review potential liabilities before *problems arise.*

One of the things you can see is that the law varies from state to state. This is an ad for the lawyers. You have got to check with your own local people to find out what's going to apply in your jurisdiction.

Veron: California is obviously a more golf-friendly state than Louisiana.

Links: In California we've gotten some real good law in the last five years on assumption of risk, and particularly as it relates to the game of golf. As I mentioned, seminars were held around the country on recreational liability. The last one I know of was held about six years ago. I think the reason the cases are thinning out is because judges have learned that these recreational activities we cherish so much are in danger from some of these liability issues.

Veron: That's a good point. This is something for your organizations to consider. Many state golf associations, regional golf associations, and professional organizations are considering going to the state legislatures and getting special immunities passed. In Louisiana, for example, there are special immunities for certain recreational properties that are not-for-profit activities and therefore different rules may apply. All the more reason to consult an attorney in your jurisdiction if a particular problem arises.

Links: I want to leave one last comment. You understand that this hypothetical case is framed in terms of a golf ball going *off* the property. The case of somebody getting hit while *on* the property pretty much is going to get resolved by assumption of the risk. The problem I see on course after course is this. There is a bigger, more substantial fence or protective device on an interior driving range to protect the players walking on the ninth or 18th holes than there is at the course boundary to protect people driving on the highway. One of these days a stray golf ball is going to hit a van of kids coming back from the science fair, it is going to flip over, some of them are going to die, and some of them are going to suffer catastrophic injuries. The argument will be made that you were more concerned about protecting your members on the ninth and 18th holes than you were about protecting the general public from a known danger. The fence and the protection at your border ought to be at least as great as what you afford your golfers who walk near the driving ranges.

The Case of Sammy Sprain

Veron: There are several questions that I would explore as a counsel for

Sammy Sprain. First of all, the manufacturer bears the most responsibility for any unreasonably dangerous condition in its product that causes injury. That is pretty much a universal principle of product liability law.

In going to a new system of alternative footwear, the manufacturer of the footwear bears some responsibility to warn those who use its product that it may be slippery. Did the manufacturer explore that point? Did the manufacturer use slip-resistant tests that explored the extent to which the product it was putting in golfers' hands, or rather on their feet, would cause slippage, was more hazardous in some form or fashion, and that it was foreseeable that it would cause injury than the existing situation? If it didn't, and simply in its blind pursuit of profit and greed sent a product out and put it on the feet of golfers who unsuspectingly wore that product, not aware of the hazards and the dangers in which they were being placed, then it bears responsibility. I would start there, but I wouldn't stop there.

If the club, like the first scenario, had deep pockets, I'd want to look at the club or golf course facility and say, "Did you investigate this? Should you have known that there was a danger, and if you should, what did you do to warn golfers of the problem? Are you going to a spikeless policy without exploring it? Are you encouraging, if not requiring, golfers at your facility to put these hazardous products on their feet and expose them to danger without even bothering to investigate and warn them of this danger? If you are, then you bear responsibility."

There are two important principles when you deal with this kind of situation. When you're faced with a hazard, number one, eliminate it if you can. Number two, if you cannot eliminate it, then warn.

You could have eliminated it. You don't have to go to spikeless, or to a specific type of spikeless cleat. You can conduct an investigation and say, "We don't allow this kind because it exposes you to danger." But, number two, even if you didn't do that, did you make an effort to warn the player? Just like the manufacturer, did you say, "This is a little more slippery. Please be careful."

It's one thing to say it works well on the greens or fairways. It's quite another, though, if it causes you to slip leaving the locker room, in the locker room or restroom, on the concrete

If you were put on the witness stand, could you completely answer the question, "What did you do to try and prevent this potential accident from happening?"

Obviously, this well-worn path is a sure sign that these steps aren't in good enough condition for golfers to use.

aprons when you cross the practice putting green to the first tee, on the cart paths if you have concrete cart paths, or on any kind of slippery metal surfaces. Does it make a difference if it's wet as opposed to dry? Before you put people in situations that expose them to danger, you have got to investigate these things and inform them of the dangers.

Links: There is one easy way for all of us to never have to worry about this kind of problem. I have not checked the USGA's entry blank recently; I'm not that good of a player. There ought to be on that entry blank a release of liability. When players register to participate in a USGA championship, regional tournament, or club tournament, by signing the entry blank they release the USGA from liability. Now, if that happens, we're out of Dodge. There's no case. We're done.

Secondly, I'm probably going to beat Mike on summary judgement here too, by arguing that slipping and falling is one of the risks that is associated with the game and it is assumed by the player. Slipping and falling on the golf course is nothing new if you talk to the people in the insurance industry. They will tell you that one of the top three claims, aside from carts and bridges, is people falling on golf courses. It's been that way for 30 years with metal spikes. In fact, we're going to demonstrate to the court and to the jury that the footwear Mr. Sprain was using provides *more traction* than a six-millimeter metal spike in a standardized friction test. We're going to prove that through expert testimony. The scientific evidence shows that spikeless is better than metal spikes because it provides better footing on slick concrete surfaces.

We're also going to prove the history of how this footwear was invented. It was invented in Idaho for use during the winter when there was ice on the golf course. We also are going to prove, and we don't mean anything unkind toward Mr. Sprain in this regard, but everyone else walked down that hill. They didn't fall and there can be a lot of reasons for slipping and falling. Just because he fell doesn't mean it was the shoes. We're going to show that the product he used, that is, if you get by the release and you get by the assumption of risk, was not defective. On this issue of a warning, we're going to beat you before you get to a jury because you don't have to warn about obvious hazards that are known to everyone.

Zero divided by three is still zero.

Veron: Now, our situation is not farfetched. Counselor would have you believe, ladies and gentlemen of the jury, that no one ever recovers damages for a slip and fall. The truth is people are awarded money for slips and falls every day because it's not their fault. It's because someone else created the condition that caused them to fall.

What made this country great was people accepting responsibility, and this case is about responsibility. The defendants in this case want to avoid responsibility. They want to take the

Take the extra steps to make golfers aware of potentially slippery areas on the golf course.

profits from their activities. They want the green fees, your hamburger prices, your beer prices, they want you to buy golf balls in the pro shop, and for you to rent carts. They want you to line their pockets with profit.

But, if in their blind pursuit of profit they create an unsafe condition, fail to look out for your best interest, or exercise even the smallest amount of care and diligence so that you can use their facilities safely, then they want to turn their backs on you. And, if you slip and fall, and if you sustain a serious back injury, and you can never play golf again because you've had a back fusion, or you can never work again, they don't want to have a thing to do with that. They want to say, thank you very much, too bad, guess you won't be back next week.

Ice rinks don't send you outside to walk in the parking lot in their ice skates. We're not talking about falling on the golf course; we're talking about falling in areas where they know you're going to be traveling in the shoes they require you to wear. If they're going to require them, maybe they ought to tell you not to put them on until you're standing on the first tee.

With respect to that expert, we deposed him and we found out that he didn't even attend college; he doesn't have that engineering degree he claims he has, and he's not going to be allowed to testify. We have a motion in front of the court to strike his testimony.

Links: Let me say, ladies and gentlemen, before you make a rich man richer, I ask you to consider what position my client would have been in had it required metal spikes and Mr. Veron's client had fallen down on the concrete. We would have been accused of requiring him to wear footwear that was slick on the concrete.

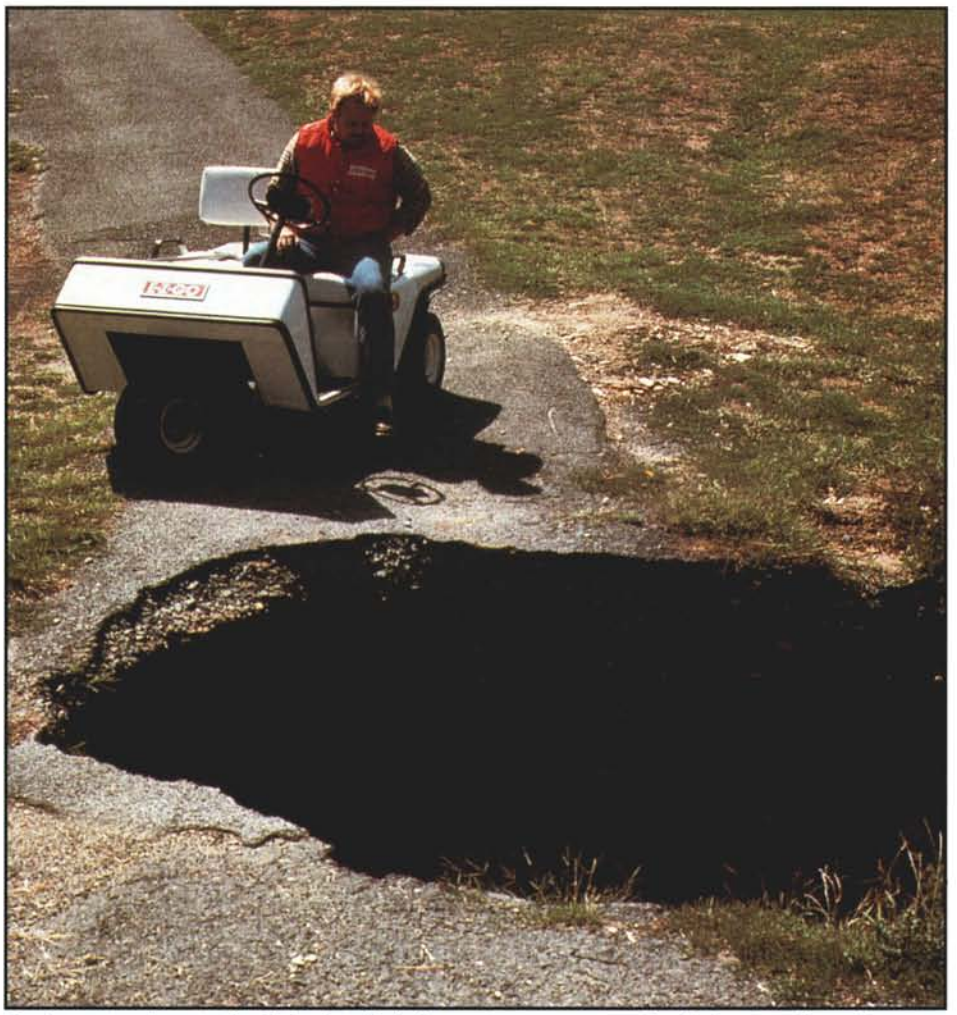
If we provide a rule that says we want to use this kind of footwear, one of the benefits being the improvement of our golf course, but another of the benefits is it provides better footing on the harder, more dangerous surfaces, are we to be faulted for that? We can't win. It doesn't matter what we do. In the end, you have to ask yourselves, ladies and gentlemen of the jury, do you want to be able to go down to the playground and play basketball, have your children go to the ice skating rink, play that golf course, play touch football, go sailing, throw horseshoes, or do any of these things? If my esteemed colleague has it his way, you're all going to be indoors doing nothing. What I ask you to consider is that my client was reasonable and responsible and did nothing wrong.

The Ada Case

Let's begin with a few things about this case. This is not far fetched because they are trying a lawsuit in Eugene, Oregon, right now. This hypothetical case is designed to highlight the issues. While we're going to debate this, I want to say something at the start to set the tone.

Anybody who thinks this is an easy question is wrong. This is a very difficult, serious, sensitive question and it affects a lot of people. There are people who can walk and people who can't. It affects the administration of the game. It's about fairness, competition, and a lot of things. It's a case in many respects in which both sides are right.What we want to do, hopefully, is to sensitize you to these issues and to have you experience, whatever your view may be, that there is another side to this question.

Links: From a plaintiff's perspective, this case is about principles, not money.



Paying attention to the little *details is important to preventing injury on the golf course. Be sure to correct problems as soon as they arise to avoid potential problems.*

The statute we're talking about, like the Civil Rights Act of 1964, is literally one of the great charters of human dignity. It is there to address a condition that is wrong and has been wrong for a long, long time. The principle is that someone who has ability should not be held back because of a legally defined and recognized disability. If it is possible to make a reasonable accommodation, that person should not be barred from the right to earn a living in the career of his choice. The first question this court has to address is whether the Americans with Disabilities Act, which we all refer to as the ADA, applies in this case. I suggest to you that it clearly does for a number of reasons.

First, the PGA Tour is not a private club; it's a public business. In fact, it's a very big business. It operates its events at public facilities, which are covered as public accommodations under the statute. When it runs the qualifying school, it administers what is in essence an employment test as the qualification mechanism. This statute makes clear beyond question, you cannot administer such an employment examination in a discriminatory manner. You can't bar somebody solely because of a disability when you can reasonably accommodate him and enable him to take the test. The PGA Tour acts much like a labor organization — representing its players, negotiating rights for them, offering them up to tournament sponsors, and handling the rights to their image.

Lastly, we're going to make an argument that the PGA Tour is, in fact, my client's employer. Yes, they do not control how he plays a golf shot, or take withholding from his earnings. But with every other test, they sure look like an employer. They tell him when to show up, when to sign autographs, what he can say and what he can't say, and they fine him if he says the wrong things about the game. They control his image; they have a dress code; they tell him he's got to employ his best efforts; they control and regulate the standards for his caddie. They do all kinds of things — very much like an employer.

The ultimate question we get to is, Can we reasonably accommodate my client? This case is a poster boy for reasonable accommodation because every facility that this defendant utilizes for tournaments has a cart barn and the carts are in that barn. It doesn't cost any money or take any time to give my client a cart. Now, I quite agree that this statute does not require, nor permit, the fundamental alteration of an employment setting. I know the argument has been made that the ADA was never intended to apply to a professional sports event. Of course, I suggest that if that were so true, how come they didn't write such an exemption into the law that took them nine years to write? I don't think they just missed it.

Let me talk for a moment about an argument that's sure to come up — the argument that walking is part of the game. You know, I read yesterday in the paper that one of my heroes, Arnold Palmer, is quoted as saying that walking is part of the integrity of the game. I say to you and to Mr. Palmer, with all the respect I have for him, that his statement, if quoted accurately, is an insult to any person who can't walk. You don't have to walk to have integrity and you don't have to walk to play golf with integrity. You know, Casey Martin had a cart the last two years of his college competition and everything worked out fine. Nobody argued that he had an unfair advantage on a warm day or that it wasn't right. He thrilled people from the Atlantic to the Pacific with what he could do and he showed us all that you don't measure a man's character by the length of his stride. You measure it by his heart.

I will show you that the Rules of Golf support my position. The rules don't say anything about how a player gets between shots. They define golf as propelling the ball by a stroke or a series of strokes until it gets into the hole. In fact, the USGA publishes a guide on the conduct of competitions and it says nothing in the Rules that prevents transportation, but if the committee desires to do so, it can adopt a special condition. If walking is so fundamental, why does it take a "special condition" to require it? Did they just miss it? I don't think so.

To make one last argument, I'm going to show that the Rules of Golf were specifically modified to cut out my

client. Until 1996, the special condition I've referred to said that a player "shall not use motorized transportation." Well, under that condition, my client could have his caddie carry him between shots — it would be perfectly legal. If he could do that, let's stop the charade. Let him have a cart. We don't need to protect the image of a walking golfer. The condition was amended in 1996 or thereabouts, and it now says the player "shall walk at all times during a stipulated round."

I give you one last thought. I quote Tom Lehman, "This guy's got an awful lot of talent. Why don't we just let him play."

Veron: We have an expression in the law that hard cases make bad law. It's an attempt to express the truism that when we let our emotions override logic and our sense of the big picture, we start carving out special exceptions because we feel sympathy. Then we jeopardize the big picture and we jeopardize a great game that has existed for 400 years. This case is about trying to fix something that ain't broke. How many times in the history of this country are we going to do that and pay the price? When will we learn our lesson? What made this country great was a pioneering spirit that said, "I will not be accommodated but I will overcome in some form or fashion." What does that mean? It means that if Casey Martin can't overcome his particular disability, his particular condition, just as I can't overcome mine, which is that I can't control the flight of a golf ball, then perhaps he will learn from that struggle and like so many before him and so many after him, he will grow and he will find another path to try.

My father was in the hospital for two years from the ages of nine to 11. When he came home, his left leg was four-and-a-half inches shorter than the other. He couldn't run and keep up with his playmates; he'd go home and cry. That's a true story. A life as an athlete for him was over. He rechanneled his efforts. At the age of 32, he entered college, went to law school, became a judge, and at the time of his death was a Federal judge. He was the only person out of eight children in his family ever to attend college. He often said that if it were not for that condition, he may never have found the way.

I'm going to tell you that this case is not about Casey Martin, but it's about a grand and glorious game that is, as Arnold Palmer has said correctly, "the greatest game ever invented." I'm going to tell you something, ladies and gentlemen of the jury, about Casey Martin — you're going to like him during this trial. I like him. You would be wrong not to feel sympathy for him. You would be wrong not to wish as we do that he didn't have this problem, but this case is not about Casey Martin and this is not about sympathy. He's not here seeking your sympathy; he has that without filing a lawsuit. He is here to change the face of golf.

This is about a great game that by definition tests your abilities. Whether it's a leg condition or some other condition, whether it's a deficiency of neuromuscular skills and anatomy, that is what the game tests. If we begin to let the government run this great game instead of the guardians who have protected this game, preserved its integrity and made it the great game it is today, then where will we be?

Do we really have confidence that the government can do a better job? Look at the government's record. Is there anything that the government does better than private industry? Maybe there are those who have that confidence, but I certainly don't. What next? That's what I mean about hard cases make bad law. Once we start sliding down that slope, where do you draw the line? I don't hit the ball particularly straight — that is my disability and impairment. Do I get to carry a weed eater into the rough? I don't putt particularly well. Who the heck says that hole needs to be only four-and-a-quarter inches wide?

There are those who believe that our government should concern itself with defending our borders and little else. When it comes to the ADA you can search the Congressional Record in vain and you will never find any mention therein of any debate or suggestion by Senator Harkin or anyone else who sponsored this bill that it would ever apply to a professional sports enterprise. It is simply fiction to manufacture such a legislative intent.

Fuel storage is a major environmental issue for most golf courses. Containment for the storage containers is becoming a basic minimum to reduce the potential for environmental damage.

Let's talk for a moment about the equities in the case since that is the plaintiff's entire case. It is that you should feel sorry for him, that you should turn back all of the Rules and 400 years of tradition.

When Casey Martin can name a single major championship in golf in 400 years that used carts, then I'll be prepared to reevaluate my position. Has golf been cruel to Casey Martin? Casey Martin has competed, has a glittering resume, and received four years at one of the most prominent educational institutions in the world, free of charge, because of golf.

Is Casey Martin a victim? If Casey Martin is a victim, ladies and gentlemen, then we are all victims because

there are but a precious few who can withstand the challenges and become champions. There are some who are gifted, there are many whom we all envy. They were born with tremendous talent, great bodies, and endurance. They were born with skills none of us has. They all worked to some degree to develop those, but let's face it, we live in an imperfect world. It's time that we stop trying to manufacture perfection and manufacture things that we cannot. You cannot legislate morality and you cannot change physical science. Those rules take precedence. There are no golf carts in Scotland; the game was not created for golf carts. That is, many believe, an unfortunate Americanization of the game.

But this is not about Casey Martin's right to play golf. He can play golf every day for the rest of his life riding a cart. This is about defining champions, and this is about championships in golf. Yes, I would love to win the U.S. Open. I was not blessed with the talent and all the physical skills that are necessary to achieve it. And in that respect, Casey Martin is unfortunately like so many of the rest of us.

But in another respect, Casey Martin is so much, much more fortunate than we are. He has already achieved so much more than any of us can hope to achieve. It's time to celebrate that and rejoice in it. Respect not only Casey Martin, but the great game of golf. And for those reasons, this is why we believe spectators, not competitors, ought to be accommodated at all championships. We believe that it will demean those championships if the survival of the fittest is jeopardized. We believe that a championship must test all of the skills necessary, not just striking a ball, but walking to it, finding it, braving the elements. The Rules of Golf say, "a golfer may not accept physical protection from the elements," and there's a principle there that has been sacred since the first Scotsman struck a golf ball 400 years ago. In the name of this wonderful young man, let's not abandon all of that.

Links: The plaintiff usually gets the last word at the courthouse. Let me try to summarize here. You know, I have one other client besides Casey Martin, and her name is Rosa Parks. I suppose if we were arguing her case some 40 years ago, you'd be telling us of the virtues of riding at the back of the bus and how she'd just have to struggle. She'd be a better person for it.

My client is not a victim; he's a human being. We're not asking you to change the rules; we're asking you to apply them as they've existed. Of course, this case hasn't come up before. Baseball didn't have Jackie Robinson until 1947, and there were those then who said that it would ruin Major League Baseball.

In closing, I want to say two things. I hear this argument about the testing of character and how we want to measure a player's endurance. If you want a test, make them carry their own clubs, make them read their own putts, make them figure their own yardage, and make them play 36 holes the last day. You know, all this stuff about endurance is ridiculous. It's about money, as my esteemed colleague knows so well. And lastly, let me say to the PGA Tour, the best test of character is when a man practices what he preaches. Anything is possible. And to my friends at the USGA, we don't call it the U.S. Open for nothing. Don't close it off to my client.

Closing Remarks

We hope we have sensitized you and that now you understand how difficult this issue is. Neither one of us, whatever our convictions may be, would ever want to see the game lose in court or anywhere else, because this is the greatest game, the greatest endeavor that mankind has ever devised to allow a person, male or female, young or old, disabled or full-bodied, to find out what kind of character he or she has. That's why this game is so great. That's why it's been so great, and that's why forever it will be great.

Trees play an important role on the golf course, but they must be maintained with a carefully managed tree care program. Existing trees with structural problems should be removed before they become a potential liability to golfers.

ROBERT "BO" LINKS *practices law in San Francisco, California. He has handled golf course facility injury cases and liability issues. Bo is a member of the USGA Green Section Committee.* MIKE VERON *is an active trial lawyer, based in Lake Charles, Louisiana, specializing in product liability and personal injury. He is active on the USGA Sectional Affairs Committee and is a former volunteer on the Green Section Committee.*