

No Negligence Involved When Sheltered Golfer Is Hit by Lightning

By WILLIAM JABINE

Caught in a thunderstorm while playing golf on a course in Tennessee, a 16-year-old boy and a 14-year-old girl sought protection in a shelter near the 16th green. The boy left the shelter briefly in order to cover their golf clubs left in a cart. As he was returning, the shelter was struck by lightning. The girl was seriously injured and the boy rendered unconscious. Damage done to the shelter (an open wooden structure with a gabled roof whose peak was about 10 feet above ground level) was negligible.

Action charging negligence was brought by the injured girl and her father against the club that owned the course. Their complaints alleged that the club was negligent on two counts. First, the shelter had been built in an exposed position higher than the ground immediately surrounding it, thus creating a hazardous and dangerous place as regards lightning. Second, the club had failed to provide lightning protection equipment for the shelter.

The trial of the two cases resulted in jury verdicts of \$25,000 each in favor of the father and daughter. On a defense motion the court set aside the verdicts. The plaintiffs then moved for a new trial and these motions were denied. An appeal of the plaintiffs was taken to the Court of Appeals of Tennessee.

Combined with Act of God

After reciting the facts and stating that a lightning stroke is recognized by the courts as an Act of God, the Court of Appeals quoted from two cases that held negligence may be so combined with an

Act of God as to make a person guilty of a negligent act liable.

The Court stated in part: "Several expert witnesses testified concerning lightning and its effects. The consensus of their testimony seems to be that, all other things being equal, lightning would tend to strike a person, building, tree or any other object in open country, where the person, building, tree or object is higher than the surrounding ground. The experts further agreed that there is nothing that can be done to prevent lightning from striking, but that the damage done can be minimized by enclosing a structure in metallic conductors which will ground the electric current.

What Is An Average Hazard?

"H. M. Scull, a professor at the University of Tennessee, stated that the shelter was more than an 'average' hazard because of its location. No effort was made to define an 'average' hazard.

"W. E. Deeds, also a professor at the University of Tennessee, testified that the chance of a person being struck and injured by lightning while in the shelter was less than that of being struck and injured while standing in the open or on a golf tee. In either instance, the hazard was caused by being in the open and higher than the surrounding ground.

"Admitting that the possibility of the weather shelter being struck by lightning, because of its location, was more than an 'average' hazard, it would still be very remote as shown by the infrequency of lightning striking the innumerable objects meeting the test of being in the open and being higher than the surrounding ground. In the present case, there was higher ground only 87 feet away, yet, lightning struck the shelter." (An engineering drawing introduced as evidence showed that the ground elevation of the 16th tee, 87 feet away, was 7 feet 6 inches higher than the shelter.)

Danger Is Remote

After quoting from cases that referred to the inevitability of lightning, the Court concluded: "In our opinion, after considering the evidence in this case in the light most favorable to the plaintiffs, the only reasonable conclusion to which fair-minded men can arrive is that the danger

of a shelter being struck by lightning is so remote as to be beyond the requirement of due care. Therefore, the injuries and damages of the plaintiffs were not caused in whole or in part by any negligence of the defendants. Bare possibility is not sufficient. 'Events too remote to require reasonable provision need not be anticipated.' *Brady v. Southern R. Co.*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239."

The action of the trial court in dismissing the plaintiffs' complaints and holding the club blameless for the unfortunate accident was affirmed. The plaintiffs attempted to take the case to the Supreme Court of Tennessee, but a writ of certiorari was denied. (*Davis v. Country Club, Inc.*, 381 S. W. 2nd 308.)

USGA Counsel Clarifies Revenue Ruling Covering Use of Club by Public

Lynford Lardner, Jr., general counsel of the USGA, has announced that the Internal Revenue Service has issued a new revenue procedure (64-36), to be used in determining what effect gross receipts from use of a club by non-members have on the club's income-tax exemption. A club may occasionally make its facilities available to the general public, but repeated use of this nature may be held to constitute engaging in business and result in revocation of its exemption. The purpose of the procedure is to provide minimum standards only with respect to non-member use and its application presumes that a club is not engaged in other activities that might jeopardize its exempt status.

If a club's annual gross receipts (defined as receipts from normal and usual club activities including membership fees, dues and assessments, but excluding initiation fees and unusual or non-recurring receipts such as income from the sale of club assets from the general public are \$2,500 or less) the gross receipts factor alone will not be sufficient to demonstrate that a club is engaging in business. Where annual gross receipts from the general public are more than \$2,500 the gross receipts factor alone will not demonstrate

that a club is engaging in business if the percentage of gross receipts from the general public is five per cent or less of the club's total annual gross receipts.

Members' Guests Excluded

Club members, their bona fide guests and visitors who are members of other exempt clubs and use the club's facilities under reciprocal arrangements are excluded from the definition of general public. When club facilities are made available to an outside group through arrangements made in a member's name, the persons comprising the group do not constitute bona fide guests. This is so regardless whether arrangements were made for the convenience of members, the club derived no net profit from the operation, the outside group was a non-profit organization, or the club in no way advertised for or solicited such patronage by the outside group.

However, if it can be shown that 75 per cent or more of the total number of persons in the outside group were members of the host club, the group will be considered a member group and no part of such group will be considered the general public. Otherwise, all receipts from the group will be treated as derived from the general public unless the club can demonstrate from its records the portion of such receipts that came from host-club members.

Defined as "General Public"

Non-members who pay for the use of a club's facilities either by payment directly to the club or by reimbursing a sponsoring member are apparently considered the general public. They are distinguished from bona fide guests whose use of club facilities is paid for by a member without reimbursement from the guests. A club will not be permitted to rely on the new minimum standards unless it maintains books and records that clearly reflect the frequency of use of its facilities by non-members and the gross receipts derived therefrom.

Virginia Turf Conference

The Virginia Turfgrass conference will be held Jan. 27-28 in the Hotel John Marshall in Richmond.