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TORT LIABILITY FOR GOLF SHOTS: TIME TO REJECT THE RECKLESSNESS STANDARD AND RESPECT THE RULES OF GOLF

Gregory M. Dexter*

I. INTRODUCTION

In other sports the opponent is regarded as the enemy. We seek by our actions to disable him. In tennis, our stroke defeats him; in football, our tackle lays him low. . . . The golfer on the other hand is never directly affected by his opponent's actions. He comes to realize that the game is not against his foe, but against himself. . . .

Consider the golfer's relation to the rules. . . . This too differs from every other sport. In baseball, a batter, knowing a pitch to be over the plate, will argue vociferously with an umpire to the opposite effect, trying to avoid having a strike called on him. The tennis player will bitterly contest a line call he knows to be fair, the footballer vehemently declare his innocence of a penalty he knows he committed.

. . . .

It is only in golf . . . that players routinely call penalties on themselves.¹

On October 7, 2010, sixty-nine-year-old Hiroshi Tango was hit in the back of the head with an errant golf ball while playing golf at a California country club and pronounced dead by a coroner nine days later.² Apparently Hiroshi was standing ten to twenty yards ahead of his playing partners when one of their pulled³ shots struck him with-

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1. STEVEN PRESSFIELD, *THE LEGEND OF BAGGER VANCE: A NOVEL OF GOLF AND THE GAME OF LIFE* 121 (William Morrow and Company 1995) (internal quotations omitted).

2. Randall Mell, *Deadly Hooks and Slices*, *THE GOLF CHANNEL* (Oct. 20, 2010), <http://www.thegolfchannel.com/tour-insider/deadly-hooks-and-slices>.

3. A pull is a shot "that flies in a fairly straight path to the left of the target line" when played by a right-handed player. The converse occurs for a left-handed player. PETER DAVIES, *GOLFING TERMS FROM 1500 TO PRESENT* 133-34 (Bison Books 4th ed. 1992).

out warning.⁴ Under California law, Hiroshi's estate will have no cause of action against his partner because this conduct was not "so reckless as to be totally outside the range of the ordinary activity involved in [golf]." ⁵ California adheres to the recklessness standard,⁶ which does not impose a duty on golfers to give warning to co-participants who might foreseeably be injured by an errant golf shot⁷—despite this being a clear violation of the Rules of Golf.⁸ Remarkably, California is not the only state to adhere to the recklessness standard.⁹ Recently, the New York Court of Appeals in *Anand v. Kapoor*¹⁰—a case that garnered international media attention¹¹—refused to hold a golfer liable when his shanked¹² shot struck his partner in the eye,

4. Mell, *supra* note 2 (twenty yards); *BRIEF: Golfer Hit in Head With Golf Ball, Dies*, Oct. 19, 2010 (KTLA-TV, Los Angeles) (ten yards).

5. Shin v. Ahn, 165 P.3d 581, 583 (Cal. 2007) (alteration in original) (quoting *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992)).

6. It is actually more precise to say that under California law, golfers assume the risk of negligence. See *infra* Part II.B.2.i for an analysis of how the doctrine of primary assumption of risk under California law requires injured golfers to plead reckless or intentional conduct.

7. See *infra* Part II.C.3.i for a discussion of the failure to give warning before hitting a golf ball under the recklessness standard.

8. U.S. GOLF ASS'N, THE RULES OF GOLF 2010-2011 1 (2009). The first rule of golf safety provides "[p]layers should ensure that no one is standing close by or in a position to be hit by . . . the ball . . . when they make a stroke or practice swing." The fourth rule of golf safety provides "[i]f a player plays a ball in a direction where there is a danger of hitting someone, he should immediately shout a warning. The traditional word of warning in such situations is 'fore.'" See *infra* note 205 and accompanying text for a discussion of the rules of golf safety.

9. Courts in other states that adhere to the recklessness standard include: Hawaii, Indiana, Massachusetts, New Jersey, New York, Ohio, and Texas. See *infra* note 117 for a discussion of courts that adhere to the recklessness standard.

10. *Anand v. Kapoor*, 15 N.Y. 3d 946, 947-48 (2010).

11. See, e.g., Associated Press, *Top NY Court upholds dismissal of golf "Fore" suit*, WALL ST. J., Dec. 21, 2010, available at <http://online.wsj.com/article/APbf30365cd6ef4d92b070d1684b099c37.html>; Associated Press, *Court: Shanked shots an expected risk*, ESPN, (Dec. 21, 2010, 11:18 AM), available at <http://sports.espn.go.com/golf/news/story?id=5942382>; Ashby Jones, *If You Yell "Fore" on a Golf Course, Are You Wasting Your Breath?*, WALL STREET J. LAW BLOG (Nov. 15, 2010, 5:24 PM), available at <http://blogs.wsj.com/law/2010/11/15/if-you-yell-fore-on-a-golf-course-are-you-wasting-your-breath/>; Ed Pilkington, *Golfing shankers told there is no need for "Fore!"*, GUARDIAN.CO.UK (Dec. 22, 2010, 10:51 PM), available at <http://www.guardian.co.uk/world/2010/dec/22/golf-fore-warning>.

12. A shank is a shot hit off the hosel, which is the socket or neck—rather than the head—of an iron club. DAVIES, *supra* note 3, at 93, 152. Another word for the hosel is the shank, which is how the shot gets its name. JIM DANTE & LEO DIEGEL, THE NINE BAD SHOTS OF GOLF 121 (Fireside 1947). More on the shank:

[The shank] is generally regarded as the most mysterious shot in golf. And, since psychologists tell us that it is the unknown that terrifies, shanking is also the most terrifying shot in golf.

When you recall what happens to a shanked ball, that it flies off to the right at almost right angles to the intended direction, and doesn't go far at that, you realize why it is so feared. Another reason the shank is so dreaded is that it strikes without warning.

Id. at 120.

causing retinal detachment and permanent vision loss.¹³ Indeed, the current trend among courts is to adopt the recklessness standard—the majority rule in the context of recreational sports generally¹⁴—to golf.¹⁵

This trend is a relatively new development: before 1990, no court required golfers to plead more than ordinary negligence to recover for injuries sustained by an errant golf ball.¹⁶ The negligence standard requires golfers to use ordinary, or reasonable care.¹⁷ At its core, this standard imposes a duty on golfers to give timely and adequate warning, customarily by yelling “fore,”¹⁸ before hitting if another individual is within the “foreseeable zone of danger.”¹⁹ If another individual is not within the foreseeable zone of danger, a golfer has no duty to warn of his intention to hit, but must give timely and adequate warning if it becomes apparent that his²⁰ ball has endangered another.²¹

13. *Anand*, 15 N.Y. 3d at 947-48.

14. *Schick v. Ferolito*, 767 A.2d 962, 965 (N.J. 2001) (noting that the majority of jurisdictions apply the recklessness standard to recreational sports generally). Some examples of recreational sports include pick-up basketball games, ice skating, touch football, polo, intra-office softball games, karate matches, and roller skating. *Id.*

15. See *infra* Part II.B.2 for an analysis of the current trend of adopting the recklessness standard to golf.

16. The first case to do so was *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990).

17. *E.g.*, *Alexander v. Wrenn*, 164 S.E. 715, 716 (Va. 1932).

18. “Fore” is the customary warning given when a ball is played in the direction of hitting someone. U.S. GOLF ASS’N, *supra* note 8, at 1. “Fore” is the warning given “when a player is about to play toward people on the course who might be within range.” DAVIES, *supra* note 3, at 68. The etymology:

The traditional warning “fore” is shouted when there is a danger of hitting someone with a ball. While the exact etymology of the term is uncertain, a popular view traces the term “fore” to military operations. During the 17th and 18th century, the infantry advanced in formation while artillery batteries fired over their heads. When an artilleryman was about to fire, he would yell “beware before.” This fore-warning allowed the infantrymen to drop and cover to avoid being hit. On the golf course, the warning has been shortened to “fore.”

JOHN H. MILLER, *THE LITTLE GREEN BOOK OF GOLF LAW* 148 (2007). Another interpretation: “[f]ore” is another word for “ahead,” . . . and may have evolved from the word “forecaddie,” a person accompanying a group around a golf course who often went forward to be in a position to pinpoint the location of the group’s shots.” *Thomas v. Wheat*, 143 P.3d 767, 768 n.1 (Okla. Civ. App. 2006).

19. See *infra* Part II.A.ii.a for a discussion of the foreseeable zone of danger. Of course, the foreseeable zone of danger concept in tort law has its roots in Justice Cardozo’s famous opinion in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

20. Throughout this Comment, the pronouns “he,” “his,” and “him” are used and are not meant to convey the masculine gender alone; the reader has been spared awkward constructions and unnecessary wordiness by this choice.

21. See *infra* Part II.2. for an analysis of golfers’ duties after the ball is hit under the negligence standard.

This standard conforms to the Rules of Golf,²² which contain four rules of safety.²³

This Comment argues that courts should reject the current trend and reaffirm the negligence standard as the appropriate standard for golf. The rationales for the recklessness standard—a standard that has its roots in sports where physical contact is the norm²⁴—simply do not hold up when applied to golf.²⁵ Occupying an uncertain penumbra between negligence and intent, recklessness is a nebulous standard incapable of being applied consistently.²⁶ In stark contrast, the negligence standard is the appropriate approach because it conforms to the well-established Rules of Golf.²⁷ As a result, the negligence standard provides golfers and courts with a clearly defined standard of care,²⁸ is in keeping with the spirit of the game,²⁹ is consistent with golfers' reasonable expectations,³⁰ and is consistent with the Restatement (Second) of Torts.³¹ Moreover, this standard merely asks golfers to act reasonably³²—a flexible and commonsense approach that courts and juries have great experience in applying—so that severely injured plaintiffs are not forced to bear the costs of preventable injuries caused by negligent conduct.³³

This Comment proceeds as follows: Section II.A outlines the negligence standard. Section II.B outlines the recklessness standard. Section II.C focuses on the Rules of Golf, golf etiquette, and the

22. See *infra* notes 194-205 and accompanying text for a discussion of the Rules of Golf.

23. See *infra* note 205 and accompanying text for a discussion of the four rules of golf safety.

24. See *infra* note 235 and accompanying text for a discussion of the point that the Recklessness standard has its roots in contact sports.

25. See *infra* Part II.B.1 for a discussion of the rationales for the recklessness standard in recreational sports. See *infra* Part III.A.A for an analysis of why the rationales for the recklessness standard fail when applied to golf.

26. See *infra* notes 281-87 for an analysis of the nebulous nature of the recklessness standard and the resulting inconsistencies that it produces.

27. See *infra* Part II.C.1 for an analysis of how the negligence standard conforms to the Rules of Golf.

28. See *infra* Part III.B.1.i for an analysis of how the negligence standard provides courts and golfers with a clearly defined standard of care.

29. See *infra* Part III.B.1.ii for an analysis of how the negligence standard is consistent with the long-standing traditions of golf and the spirit of the game.

30. See *infra* Part III.B.1.iii for an analysis of how the negligence standard is consistent with golfers' reasonable expectations.

31. See *infra* Part III.B.1.iv for an analysis of how the negligence standard is consistent with the Restatement (Second) of Torts.

32. See *infra* Part III.B.2 for an analysis of how the negligence standard merely asks participants to act reasonably, thereby holding golfers to a standard of care that can be easily met, and likewise providing courts and juries with a flexible and commonsense standard that can be easily assessed.

33. See *infra* notes 292-94 for a discussion of how the recklessness standard shifts costs from negligent injurers to innocent, and often severely injured, plaintiffs.

relationship between rule violations and liability (or lack thereof). In Section III.A, this Comment makes the argument that the recklessness standard is inappropriate for golf. Section III.B then explains why the negligence standard is the appropriate approach. Section III.C addresses critics by refuting potential objections to the negligence standard. Finally, Section III.D provides a few suggestions for future courts in applying the negligence standard, and Section III.E concludes with a few suggestions for future courts that insist on applying the recklessness standard.

II. OVERVIEW

Even in non-golf circles, it is common knowledge “that not every shot played by a golfer goes to the point where he intends it to go. If such were the case, every player would be perfect and the whole pleasure of the sport would be lost.”³⁴ Courts recognize that “every star sometimes, and every ‘dub’³⁵ oftentimes, hooks³⁶ or slices.³⁷”³⁸ Therefore, under neither the negligence standard nor the recklessness standard is there a duty to refrain from hitting a shot unskillfully or incompetently.³⁹ After agreeing on this, however, the negligence and recklessness jurisprudence go their separate ways. Accordingly, each standard is considered in turn.

A. A Century of Golf Jurisprudence: The Negligence Standard

It is black letter law that to succeed on a negligence claim, the plaintiff must establish that (1) the defendant owed him a duty of care, (2)

34. *Benjamin v. Nernberg*, 157 A. 10, 11 (Pa. Super. Ct. 1931). As of the writing of this Comment, at least thirteen courts have directly quoted this language. *See, e.g.*, *Thompson v. McNeill*, 559 N.E.2d 705, 709 (Ohio 1990). Countless others have paraphrased it.

35. A “dub” is an unskillful player. *DAVIES, supra* note 3, at 56.

36. A hook is a shot that curves strongly from the right to left when hit by a right-handed player. The converse occurs for a left-handed player. *Id.* at 92.

37. A slice is the exact opposite of a hook. A slice curves strongly from the left to right when hit by a right-handed player. The converse occurs for a left-handed player. *DAVIES, supra* note 3, at 156. A slice is “the most common fault in golf beyond the shadow of a doubt. At a conservative guess, 90 per cent [sic] of the people who take up the game quickly become chronic slicers unless they are caught in time by expert instruction.” *DANTE & DIEGEL, supra* note 12, at 43. One golf legend noted that “[m]any golfers are plagued with a slice or hook while trying to play a straight shot.” *BEN HOGAN, POWER GOLF* 84 (Gallery Books 1948).

38. *Getz v. Freed*, 105 A.2d 102, 103 (Pa.1954).

39. For a case reaching this conclusion under the recklessness standard, see, for example, *Allen v. Donath*, 875 S.W.2d 438, 443 (Vance, J., concurring) (noting defendant “owed no duty to avoid hitting the ball incompetently or unskillfully”). For a case reaching this conclusion under the negligence standard, see, for example, *Benjamin*, 157 A. at 11 (noting “many bad shots must result although every stroke is delivered with the best possible intention and without any negligence whatsoever”).

the defendant breached that duty, and (3) the plaintiff's injuries were (4) proximately caused by that breach.⁴⁰ Because liability hinges on duty, it is essential to note—especially for readers more acquainted with the links⁴¹ than the law—that duty “is not sacrosanct in itself, but is only an expression of the *sum total of those considerations of policy* which lead the law to say that the plaintiff is entitled to protection.”⁴² This policy decision is one for the courts.⁴³

Under the negligence standard, a golfer's duty is to act with reasonable care under the circumstances.⁴⁴ This Section discusses this duty under two time frames: (1) before the ball is hit, and (2) after the ball is hit.

1. Golfers' Duties Before the Ball is Hit

i. The General Rule

The negligence standard imposes the general rule that:

[B]efore driving, it is [a golfer's] duty to give timely [and adequate]⁴⁵ warning to persons unaware of his intention to hit whom he knows, or in the exercise of ordinary care should have known, are in line, or so close to the intended line of flight of the ball that danger to them reasonably might be anticipated.⁴⁶

In other words, a golfer has a duty to warn prior to hitting if, and only if, there are other individuals in the foreseeable zone of danger.⁴⁷ This duty is discharged once those in the foreseeable zone of danger either remove themselves from the danger zone⁴⁸ or reach a place of reasonable safety and have had an opportunity to prepare for the impending shot.⁴⁹

40. *E.g.*, Cook v. Johnston, 688 P.2d 215, 216 (Ariz. Ct. App. 1984).

41. Colloquially, “links” refers to a golf course of any kind. DAVIS, *supra* note 3, at 105. Technically, the term refers to the type of land characteristic of Scotland: low-lying seaside land—characteristically sandy, treeless, undulating, often with dunes and bent grass. *Id.* at 104.

42. WILLIAM L. PROSSER ET AL., PROSSER & KEATON ON THE LAW OF TORTS § 58.358 (5th ed. 1984) (emphasis added).

43. *E.g.*, Shin v. Ahn, 165 P.3d 581, 584 (Cal. 2007).

44. *E.g.*, Alexander v. Wrenn, 164 S.E. 715, 716 (Va. 1932).

45. *E.g.*, Getz v. Freed, 105 A.2d 102, 103 (Pa. 1954) (noting that the warning must be adequate).

46. *Alexander*, 164 S.E. at 716.

47. *See, e.g.*, Bartlett v. Chebuhar, 479 N.W.2d 321, 323 (Iowa 1992).

48. Allen v. Pinewood Country Club, 292 So.2d 786, 790 (La. Ct. App. 1974) (noting “the mere shouting of a warning is insufficient to discharge the duty to warn if the player does not permit the player ahead sufficient time to step aside to avoid the danger”). Indeed, “a warning followed by an immediate play, without ascertaining that the warning has been heeded, is the equivalent of no warning at all.” *Id.* *See infra*, Appendix, Figure 1 for a diagram of *Allen*.

49. *See infra* notes 80-82 and accompanying text for a discussion of the point that if a golfer is aware of a defendant's intention to hit and has reached a place of reasonable safety—although

ii. The Foreseeable Zone of Danger

While a golfer's duty to warn extends only to those within the foreseeable zone of danger (or the "foreseeable ambit of danger"),⁵⁰ there is no fixed rule of law that establishes the precise physical contours of this area.⁵¹ Therefore, courts determine the foreseeable zone of danger in two inter-related ways: (1) where it is foreseeable that the ball might travel based on the specific facts of the case⁵² and (2) based on prior law.⁵³

a. Establishing the Foreseeable Zone of Danger Based on the Specific Facts of the Case

As courts have uncontroversially noted, "[s]hanking the ball is a foreseeable and not uncommon occurrence in the game of golf. The same is true of hooking, slicing, pushing,⁵⁴ or pulling a golf shot."⁵⁵ And although they are far less dangerous (and less common), we would be remiss to forget about their friends topping,⁵⁶ smothering,⁵⁷ skying,⁵⁸ and sclaffing⁵⁹—all of which have been known to rear their

perhaps technically still within the foreseeable zone of danger—the defendant has discharged his duty of care.

50. *Ludwikoski v. Kurotsu*, 875 F. Supp. 727, 732 (D. Kan. 1995).

51. *Jenks v. McGranaghan*, 285 N.E.2d 876, 878 (N.Y. 1972).

52. *Bartlett*, 479 N.W.2d at 322-23; see *Boozer v. Arizona Country Club*, 434 P.2d 630, 633 (Ariz. 1967) (noting that "negligence is based on foreseeability").

53. See *infra* Part II.A.1.ii.b for a discussion regarding how courts determine the foreseeable zone of danger based on prior law.

54. A push is a shot that "flies in a fairly straight path to the right of a target line" when played by a right-handed player. The converse occurs for a left-handed player. *DAVIES, supra* note 3, at 134. "A pushed shot is usually a straight ball that goes to the right of the target. We say usually it is a straight ball because at times it can develop into a slice as well as a push." *DANTE & DIEGEL, supra* note 12, at 98. When a pushed shot also slices, the authors joke that the ball will be so off target that "you are just lucky to ever find it. The next county is the best place to start looking." *Id.*

55. *E.g., Thompson v. McNeill*, 559 N.E.2d 705, 709 (Ohio 1990).

56. Topping is a "vile member of the bad-shot family" and is caused by "one of three things: jerking the head up, swaying or raising the arc of the swing." *DANTE & DIEGEL, supra* note 12, at 71. Tragically, a topped shot will hardly advance past the teebox, and because it has the potential to shatter a golfer's confidence, "[n]o golfer needs to be reminded of the immediate and complete catastrophe that can follow a top." *Id.*

57. "A smother is caused, of course, by a face that is hooded at the moment it strikes the ball . . . [I]t is impossible, therefore, to hit the ball into the air. It must go into the ground quickly." *Id.* at 84-86. In fact, "[t]his choice little number can kill all your better instincts unless you correct it quickly. It is a deadening, soul-searing thing that can descend on you suddenly and blight your afternoon completely." *Id.* at 84.

58. A sky is "one of the peculiar and not too common bad shots of golf. It's the shot that soars high in the air and doesn't go very far." *Id.* at 105.

59. Sclaffing is the result of one or more swing faults, causing "the head [of the club] to hit the ground behind the ball." *Id.* at 115. The term, however, is rarely used today. *LORNE RUBENSTEIN & JEFF NEUMAN, A DISORDERLY COMPENDIUM OF GOLF* 264 (2006).

ugly heads and spoil a good round of golf.⁶⁰ Therefore, the majority rule in the negligence jurisprudence is that the foreseeable zone of danger is not merely confined to the intended line of flight, but instead “encompasses a wider zone of danger based on the facts and circumstances in each individual case.”⁶¹

The one fact that courts weigh most heavily when determining the foreseeability of a deviation from the intended line of flight—and thus the scope of the zone of danger—is the skill level of the golfer.⁶² The Supreme Court of Minnesota observed, “the poorer the player the greater is the zone of danger.”⁶³ A leading case is *Cook v. Johnston*, in which the court held that whether the defendant’s known propensity to shank extended the zone of danger was a jury question.⁶⁴ Similarly, and conversely, the District Court of Kansas held that a plaintiff was not within the foreseeable zone of danger largely because the defendant was a skilled golfer.⁶⁵ The court’s holding was based on uncontested evidence that the defendant:

[w]as an experienced golfer who plays dozens of times a year, that he has had professional training, and that he constantly practices

60. Few works on the subject of golf and torts would be complete without mentioning Mark Twain’s quip that “golf is a good walk spoiled.” See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 701 (2001) (noting Twain’s quote).

61. *Bartlett v. Chebuhar*, 479 N.W.2d 321, 322-23 (Iowa 1992) (emphasis added) (citing *Cook v. Johnston*, 688 P.2d 215, 217 (Ariz. Ct. App. 1984)); see *Ludwikoski v. Kurotsu*, 875 F. Supp. 727, 732 (D. Kan. 1995) (noting that the foreseeable zone of danger rule—which is not confined to the intended line of flight—is followed in the majority of jurisdictions); *Thomas v. Wheat*, 143 P.3d 767, 770 (Okla. Civ. App. 2006) (noting that the majority rule is that the zone of danger extends beyond the intended line of flight). For the minority rule, see *Cavin v. Kasser*, 820 S.W.2d 647, 650 (Mo. Ct. App. 1991) (stating the duty to warn extends only to “those within the range of the intended flight of the ball or the general direction of the drive”).

62. See *Ludwikoski*, 875 F. Supp. at 731 (noting golfer’s high level of skill made it less likely that he would injure plaintiff); *Hollinbeck v. Downey*, 113 N.W.2d 9, 12 (Minn. 1962) (noting “the poorer the player the greater is the zone of danger”); *Alexander v. Wrenn*, 164 S.E. 715, 717 (Va. 1932) (noting that the defendant was a “wild and erratic player and knew that a golf ball struck by him was liable to fly at almost any angle”); *Cook v. Johnston*, 688 P.2d 215, 217 (Ariz. Ct. App. 1984) (holding whether defendant’s “propensity to shank” widened the foreseeable zone of danger was a jury question).

63. *Hollinbeck*, 113 N.W.2d at 12.

64. *Cook*, 688 P.2d at 217 (Ariz. Ct. App. 1984). In *Cook*, the defendant’s shanking problem was so severe that the defendant scheduled six lessons with a club professional to help him cure it. *Id.* at 216. The first lesson did not get off to an auspicious start; according to the professional, the defendant shanked approximately one out of every three shots forty-five to fifty degrees from the intended line of flight. *Id.* at 217. (To get a perspective of this, note the fifty-degree line on the figures in the Appendix, *infra*. This line denotes fifty degrees from the intended line of flight). After he completed the second of his six scheduled lessons, the defendant played a round of golf with the plaintiff, in which he shanked a shot that hit the plaintiff in the eye, causing severe permanent injury. *Id.* at 216. One interesting question the court left open was whether the defendant had a duty to warn of his propensity to shank. *Id.* at 217.

65. *Ludwikoski*, 875 F. Supp. at 731.

that he had a smooth consistent swing, that he knew how to properly hold the club, that his tee shots on the first seventeen holes were straight down the fairway with no hook and only an occasional fade⁶⁶ to the right.⁶⁷

Other factors that the court suggested could extend the zone of danger are intoxication,⁶⁸ rushing to hit a shot,⁶⁹ or hitting a shot in a manner inconsistent with routine or common practice.⁷⁰ The court reasoned that an absence of these factors sufficiently reduced the foreseeable zone of danger so that the plaintiff was not within its boundaries when she was injured and therefore held that the defendant was not negligent as a matter of law.⁷¹

b. Establishing the Foreseeable Zone of Danger Based on Prior Law

In addition to considering the specific facts of the case, courts often turn to prior law to determine whether the plaintiff was within the foreseeable zone of danger. Under this analysis, a finding of negligence can be precluded “if the distance and angle are great enough [that the plaintiff was] not within the danger zone as defined by previous cases.”⁷² In other words, “somewhere between zero and ninety degrees, there is a dividing line—a deviation which might, as a matter of law, preclude a finding of negligence.”⁷³

At the most general level of this analysis, the Supreme Court of Arizona held that a finding of negligence could be precluded if the plaintiff was not within ninety degrees of the defendant’s intended line of flight.⁷⁴ In looking for authority to narrow this scope, the court noted that the plaintiff in *Benjamin v. Nernberg* was approximately fifty degrees from the intended line of flight and received a jury ver-

66. A fade is a “[c]ontrolled and moderate left-to-right curve on a shot by a right-handed player.” The converse occurs for a left-handed player. DAVIES, *supra* note 3, at 61.

67. *Ludwikoski*, 875 F. Supp. at 731.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 731-32.

72. *Anand v. Kapoor*, 877 N.Y.S.2d 425, 427 (N.Y. App. Div. 2009) (quoting *Jenks v. Mc-Granaghan*, 285 N.E.2d 876, 878 (N.Y. 1972)), *aff’d*, 15 N.Y.3d 946, 947-48 (2010).

73. *Boozer v. Arizona Country Club*, 434 P.2d 630, 633-34 (Ariz. 1967).

74. *Id.* What exactly does ninety degrees from the intended line of flight mean? If you draw a line from the tee toward the golfer’s target—if the ball follows that line, there is zero degrees deviation—a ninety degree deviation would mean that nobody standing behind a line drawn perpendicular to the intended line of flight would be within the zone of danger. See *infra* Appendix for a visual representation of this.

dict in his favor.⁷⁵ The trial court in *Benjamin*, however, entered a judgment notwithstanding the verdict, and the appellate court affirmed.⁷⁶ Perhaps because the trial judge in *Benjamin* overturned the jury and the appellate court affirmed, the fifty degree line has not been recognized among courts as the official boundary line for the zone of danger.⁷⁷ Or perhaps this is simply too wide of a zone to impose a duty to warn. At the very least, the fifty-degree line sheds light on the outer limits of the zone of danger: no plaintiff outside of fifty degrees from the intended line of flight has yet to be found to be within the foreseeable zone of danger.

iii. Exceptions to the General Rule

The negligence jurisprudence carves out at least four exceptions to the general duty to warn before hitting. First, a golfer has no duty to re-check the zone of danger once he fixes his concentration on the ball.⁷⁸ The New York Court of Appeals observed, “a golfer cannot be expected to break his concentration while addressing the ball the instant before he hits to look up and see if someone has just stepped into the danger zone.”⁷⁹

Second, even if the defendant is aware that the plaintiff is within the foreseeable zone of danger, there is no duty to warn if the plaintiff is

75. *Id.* at 633 (citing *Benjamin v. Nernberg*, 157 A. 10 (Pa. Super. Ct. 1931)). The plaintiff in *Benjamin* was “120 feet to the left [of the defendant] and forward . . . about 100 feet.” 157 A. at 10. The plaintiff in *Benjamin* is the farthest plaintiff from the intended line of flight to receive a jury verdict in his favor. See *infra* Appendix, Figure 1 for empirical evidence of the zone of danger under the negligence standard and note that no plaintiff has been able to sustain a cause of action when injured outside of fifty degrees from the intended line of flight. The fifty degree line is derived from *Benjamin*.

76. *Boozer*, 434 P.2d at 633; *Benjamin*, 157 A. at 11.

77. Furthermore, the *Benjamin* court—rather than provide the fifty-degree measurement—observed that the plaintiff was “120 feet to the left [of the defendant] and forward . . . about 100 feet.” 157 A. at 10. As a result, courts have largely overlooked the fifty-degree measurement. Simple trigonometry can be used to determine that these coordinates would mean that the plaintiff in *Benjamin* was 50.19 degrees from the intended line of flight. Because the court’s measurements were merely approximations (as are, presumably, all of the measurements provided by the courts discussed in this Comment), it is appropriate to round this number to fifty degrees. It appears that the first court to make this connection was *Boozer*, 434 P.2d at 633.

78. *Jenks v. McGranaghan*, 285 N.E.2d 876, 878-79 (N.Y. 1972). It could be said that a golfer has no duty to check the zone of danger once he “addresses” his golf ball. A golfer addresses his golf ball when he takes his stance and prepares to hit. DAVIES, *supra* note 3, at 11. According to the Rules of Golf, “a player has ‘addressed the ball’ when he has taken his stance and has also grounded his club.” U.S. GOLF ASS’N, *supra* note 8, at 5. However, it is more accurate to say that there is no duty to check the zone of danger once the golfer fixes his concentration on his golf ball because it is possible (although unlikely) to address the golf ball while still looking ahead towards the target.

79. *Jenks*, 285 N.E.2d at 878-79.

aware of the defendant's intention to hit⁸⁰ and the plaintiff is in a place of reasonable safety.⁸¹ In such a situation, a warning would be superfluous.⁸²

The third exception—although more a caveat than an exception—is the adult-activities rule.⁸³ In an action against a minor for negligence, the general rule is that the minor is held to the standard of care of a reasonable person of like age, intelligence, and experience under the circumstances.⁸⁴ The adult-activities rule is an exception courts often invoke when the minor engages in a dangerous activity generally only undertaken by adults and that requires an adult level of skill.⁸⁵ Examples include driving a car, tractor, motorcycle, or snowmobile.⁸⁶ In these situations, the minor is held to the adult standard of care because the very nature of the activity makes it dangerous regardless of whether it is conducted by a minor or an adult.⁸⁷ One court applied this exception to golf, reasoning that a golf ball in flight is a “dangerous missile,” creating the same dangers to others regardless of age.⁸⁸

Fourth, some negligence courts distinguish between the duty owed to golfers on other holes and golfers in one's own group. Under this distinction, there is no duty to warn golfers within the foreseeable zone of danger if they are on a different hole, and not within the intended line of flight.⁸⁹ Louisiana courts, for example, have consist-

80. See *Boyton v. Ryan*, 257 F.2d 70, 72-73 (3d Cir. 1958); *Wood v. Postelthwaite*, 496 P. 2d 988, 991 (Wash. Ct. App. 1972).

81. *Schmidt v. Youngs*, 544 N.W.2d 743, 744-45 (1996).

82. *Boyton*, 257 F.2d at 72; *Kelly v. Forester*, 311 S.W.2d 547 (Ky. 1958) (holding that a warning would be superfluous when plaintiff was aware of defendant's intention to hit and was located approximately eighty-five to ninety degrees to the right of plaintiff).

83. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 632-33 (N.Y. Cnty. Ct. 1968), *aff'd*, 312 N.Y.S.2d 951 (N.Y. App. Term 1970), *aff'd*, 318 N.Y.S.2d 925 (N.Y. App. Div. 1971). See RESTATEMENT (THIRD) OF TORTS § 10 cmt. f (2010) (noting that when “children choose to engage in dangerous activities characteristically engaged in by adults, no account is taken of their childhood” and they are held to the standard of care of a reasonably prudent adult).

84. *Neumann*, 294 N.Y.S.2d at 632.

85. *Id.*

86. RESTATEMENT (THIRD) OF TORTS § 10 cmt. f

87. *Neumann*, 294 N.Y.S.2d at 632.

88. *Id.* at 635 (holding eleven-year-old golfer to adult standard of care). *But* see *Kirchoffner v. Quam*, 264 N.W.2d 203, 207 (N.D. 1978) (noting that although the trend is to hold minors to adult standard of care when engaging in a dangerous activity normally only undertaken by adults, the court doubted whether it would hold defendant—a fifteen-year-old golfer—to adult standard of care if that question were properly before it).

89. *Jens v. McGranaghan*, 285 N.E.2d 876, 878 (N.Y. 1972) (stating there is generally “no duty to warn persons not in the intended line of flight on another tee or fairway”); *Cavin v. Kasser*, 820 S.W.2d 647, 650 (Mo. Ct. App. 1991) (stating “there is generally no duty to warn persons not in the intended line of flight on another tee or fairway”); *Baker v. Thibodaux*, 470 So.2d 245, 247 (La. Ct. App. 1985) (stating there is “no duty to give advance warning to persons on contiguous holes or fairways where the danger to them is not reasonably anticipated” (quot-

ently embraced this distinction⁹⁰ and, under certain circumstances, have held that there is no duty to warn persons on other holes—even holes that are parallel, contiguous, and run in opposite directions.⁹¹

2. *Golfers' Duties After the Ball is Hit*

i. The General Rule

“It appears to be an accepted rule of golf that, if no duty to warn exists prior to the striking of a ball, one does exist when it becomes apparent the ball is errant.”⁹² Once the ball is hit, therefore, a golfer has a duty to give a timely and adequate warning, customarily by yelling “fore” to all those who have become endangered by an errant shot.⁹³ This duty extends, of course, even to individuals not within the foreseeable zone of danger.⁹⁴ No matter how poor the shot, a timely and adequate warning discharges the duty and shields the golfer from liability.⁹⁵

ing *Murphy v. Podgurski*, 236 So. 2d 508, 509 (La. Ct. App. 1970)); *see also* *Rose v. Morris*, 104 S.E.2d 485, 488 (Ga. Ct. App. 1954) (holding that defendant did not breach his duty to warn and noting defendant and plaintiff were on different fairways). *See infra* Appendix, Figure 1 for a diagram of *Rose*.

90. *See Baker*, 470 So.2d at 247 (noting Louisiana jurisprudence “indicates a clear distinction between the duty owed to golfers on other tees and to players in one’s own group” and that a golfer “is under no duty to give advance warning to persons on contiguous holes or fairways where the danger to them is not reasonably anticipated” (quoting *Murphy v. Podgurski*, 236 So. 2d 508, 509 (La. Ct. App. 1970))).

91. *Baker*, 470 So.2d at 250 (affirming the lower court’s decision that defendant was not negligent when he failed to warn plaintiff of his intention to hit when plaintiff was on a parallel and contiguous hole). But the court’s reasoning could probably be explained, in part, by the twenty-five foot trees between holes. *Id.* at 249. It is worth noting that the Supreme Court of California (which follows the recklessness standard) explicitly refused this distinction, noting that “[t]he question of duty involves the relationship of the parties to the sport . . . [C]o participants have the same relationship to the sport whether they are in the same playing group or not.” *Shin v. Ahn*, 165 P.3d 581, 588 (Cal. 2007) (internal citations omitted).

92. *Cavin*, 820 S.W.2d at 651.

93. *Id.*

94. *See, e.g., Carrigan v. Roussell*, 426 A.2d 517, 521 (N.J. 1981) (holding that defendant had a duty to warn once the ball started heading towards plaintiff, who was not within the foreseeable zone of danger).

95. *See, e.g., id.* (noting that the defendant was not within the foreseeable zone of danger—and therefore there was no duty to warn before hitting—but a duty to warn arose once it became apparent that the ball was errant). Because the defendant satisfied this duty, the appellate court affirmed the trial court’s ruling that the plaintiff had no cause of action. *Id.* *See infra* Appendix, Figure 1 for a diagram illustrating *Carrigan*. Although a warning of “fore” discharges liability for poor shots, it does not exculpate reckless or intentional conduct. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 632 (N.Y. Cnty. Ct. 1968), *aff’d*, 312 N.Y.S.2d 951 (N.Y. App. Term 1970), *aff’d*, 318 N.Y.S.2d 925 (N.Y. App. Div. 1971).

ii. Exceptions to the General Rule

The negligence jurisprudence makes at least two exceptions to the general duty to warn after the ball is hit. The first is that—although the customary method of warning is by yelling “fore”—a golfer may have a duty to give a different warning if he is aware that this warning would be ineffective.⁹⁶ This exception derives from *Thomas v. Wheat*, a case in which the plaintiff did not respond to a warning of “fore” when the defendant’s playing partner hit a tee shot that nearly hit him.⁹⁷ After observing the plaintiff’s failure to respond, the defendant then proceeded to hit her tee shot, which hooked toward the plaintiff and struck him in the mouth.⁹⁸ Although the defendant and her fellow golfers gave a warning of “fore” once the defendant’s ball headed towards the plaintiff, the plaintiff testified that he never heard the warning.⁹⁹ The appellate court remanded the case for the jury to determine whether the warning was adequate, noting “the fact that the other golfer’s ‘fore’ warning had been ineffective might lead a reasonable person to conclude that a louder warning, different warning, or warning before the golf shot was necessary.”¹⁰⁰

The second exception is that there is no duty to warn if a warning would be futile.¹⁰¹ The Court of Appeals of New York stated “the pertinent question . . . is whether a warning, if given, would have been effective in preventing the accident.”¹⁰² A court is likely to consider a warning futile if the plaintiff is at such a short distance from the defendant that the plaintiff would not realistically be able to avoid being hit.¹⁰³ A warning might also be considered futile if the plaintiff would

96. *Thomas v. Wheat*, 143 P.3d 767, 770-71 (Okla. Civ. App. 2006). Although this is organized as an exception to the general duty to warn by yelling “fore,” it is not so much an exception as it is an application of the general rule that the warning—by “fore” or otherwise—must be adequate. See *supra* note 93 and accompanying text for a discussion of the duty to give adequate warning after hitting under the negligence standard.

97. *Thomas*, 143 P.3d 767.

98. *Id.* at 769.

99. *Id.* at 770-71.

100. *Id.* In addition, the court remanded the case to determine if the defendant’s propensity to hook shots in the direction of the plaintiff imposed a duty to warn before hitting.

101. *Rinaldo v. McGovern*, 587 N.E.2d 264 (N.Y. 1991); *Nussbaum v. Lacopo*, 265 N.E.2d 762, 766 (N.Y. 1970). *Cf. Westborough Country Club v. Palmer*, 204 F.2d 143, 148 (Mo. Ct. App. 1953) (noting that defendant-golfer’s failure to yell “fore” could not be the intervening proximate cause of an accident when the golfer was so close to the plaintiff that the warning would be futile).

102. *Rinaldo*, 587 N.E.2d at 266. But minimal effectiveness might not be enough to impose a duty. The court went on to say that there is no duty to warn if the chances that the warning would prevent the accident are too remote. *Id.*

103. See, e.g., *Thompson v. McNeill*, 559 N.E.2d 705, 709 n.2 (Ohio 1990) (applying recklessness standard, but noting that a warning would have availed plaintiff of nothing).

be unlikely to hear the warning,¹⁰⁴ unable to heed it,¹⁰⁵ or unlikely to respond.¹⁰⁶

An example of the latter situation arose in *Nussbaum v. Lacopo*.¹⁰⁷ In *Nussbaum*, the New York Court of Appeals refused to impose liability on a golfer whose hooked ball crossed twenty to thirty feet of rough and struck and injured the plaintiff while he read a newspaper on his patio.¹⁰⁸ Although the defendant did not yell “fore” or give another warning, the court held that there was no duty to warn because the plaintiff would be unlikely to respond.¹⁰⁹ The court reasoned that “[l]iving so close to a golf course, plaintiff would necessarily hear numerous warning shouts each day. As the warning would ordinarily be directed to other golfers, plaintiff could be expected to ignore them.”¹¹⁰

Further applying this line of reasoning, the New York Court of Appeals in *Rinaldo v. McGovern* refused to impose liability on the defendant when his sliced ball traveled outside the confines of the golf course and struck the window of the plaintiffs’ car as they were traveling on an adjacent road.¹¹¹ The plaintiffs brought suit charging, *inter alia*, negligence on the theory of failure to warn.¹¹² The Court of Appeals affirmed the trial court’s dismissal, reasoning that a warning would have been futile—it would have been highly unlikely that the plaintiffs, driving in their car, would have somehow heard the warning.¹¹³ And even if the plaintiffs could have heard the warning, it was even more unlikely that they could have successfully maneuvered their car to avoid being hit.¹¹⁴

B. The Recent Trend: The Recklessness Standard and Assumption of Risk

Under the recklessness standard, a golfer is not liable for mere negligence.¹¹⁵ Instead, a golfer’s duty is to abstain from inflicting injuries

104. *Rinaldo*, 587 N.E.2d at 266.

105. *Id.*

106. *Nussbaum*, 265 N.E.2d at 767.

107. *Id.*

108. *Id.* at 764.

109. *Id.* at 767.

110. *Id.* at 766.

111. *Rinaldo*, 587 N.E.2d at 265.

112. *Id.* at 266.

113. *Id.* at 266-67.

114. *Id.* at 266.

115. *Thompson v. McNeill*, 559 N.E.2d 705, 706 (Ohio 1990).

intentionally, willfully, wantonly, or recklessly.¹¹⁶ Recklessness is an intermediate standard located somewhere between negligence and intent,¹¹⁷ which explains why attempts at coming to a workable definition of recklessness have been largely unsuccessful.¹¹⁸

It is said that an individual acts recklessly “when he or she intentionally commits an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to those consequences.”¹¹⁹ And generally, “[r]ecklessness, unlike negligence, requires a conscious choice of a course of action, with knowledge or a reason to know that it will create serious dangers to others.”¹²⁰ But one’s conduct could be considered such an extreme deviation from the standard of reasonable care that it is deemed reckless even though the actor did not subjectively appreciate the risk.¹²¹

In the latter situation, negligent conduct rises to the level of recklessness based on the extent of the actor’s deviation from what would be expected from a reasonably prudent actor in the same or similar circumstances.¹²² The Restatement (Second) of Torts notes:

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct cre-

116. *Shin v. Ahn*, 165 P.3d 581, 583 (Cal. 2007); *Yoneda v. Tom*, 133 P.3d 796, 808-09 (Haw. 2006); *Schick v. Ferolito*, 767 A.2d 962, 969 (N.J. 2001); *Thompson*, 559 N.E.2d at 706; *Pfenning v. Lineman*, 922 N.E.2d 45, 52-53 (Ind. Ct. App. 2010); *Gray v. Giroux*, 730 N.E.2d 338, 340 (Mass. Ct. App. 2000); *Allen v. Donath*, 875 S.W.2d 438, 440 (Tex. Ct. App. 1994); *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614, 617 (Tex. Ct. App. 1993). Confusingly, “willful, wanton, or reckless” have been interpreted to mean the same thing and will be considered for purposes of this paper (as they generally are in courts) to fall under the umbrella of the recklessness standard. As Prosser and Keaton note, “although efforts have been made to distinguish [willful, wanton, and reckless], in practice such distinctions have consistently been ignored, and the three terms have been treated as meaning the same thing, or at least as coming out at the same legal exit.” WILLIAM L. PROSSER ET AL., *supra* note 42, § 34, at 212 (internal footnotes omitted).

117. *See, e.g., Thompson*, 559 N.E.2d at 707-08 (noting that recklessness is an intermediate standard).

118. *See infra* note 281 and accompanying text for a discussion of the confusion surrounding recklessness.

119. *Schick*, 767 A.2d at 969 (citing WILLIAM L. PROSSER ET AL., *supra* note 42, § 34, at 212 (emphasis added)).

120. *Id.*

121. *Id.*

122. *See id.*; RESTATEMENT (SECOND) OF TORTS § 500 (1965) (noting that reckless conduct involves a risk that is substantially greater than that which is necessary to make the conduct negligent).

ates an unreasonable risk of physical harm to another, *but also that such risk is substantially greater than that which is necessary to make his conduct negligent.*¹²³

In other words, “negligence may consist of an intentional act done with knowledge that it creates a risk of danger to others, but recklessness requires a substantially higher risk. *The quantum of risk is the important factor.*”¹²⁴

1. Rationales for the Recklessness Standard in Recreational Sports

In recreational sports generally, courts advocate the recklessness standard for several reasons. One is that imposing legal liability for conduct that violates the rules “might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.”¹²⁵ Similarly, the recklessness standard is said to be more appropriate than the negligence standard for furthering the dual policies of the “promotion of vigorous participation in recreational sports and the avoidance of a flood of litigation over sports accidents.”¹²⁶ In articulating these rationales for the recklessness standard, the California Supreme Court stated:

[h]olding participants liable for missed hits would only encourage lawsuits and deter players from enjoying the sport. Golf offers many healthful advantages to both the golfer and the community. The physical exercise in the fresh air with the smell of the pines and eucalyptus renews the spirit and refreshes the body. The sport offers an opportunity for both recreation with friends and the chance to meet other citizens with like interests. A foursome can be a very social event,

123. RESTATEMENT (SECOND) OF TORTS § 500 1965. The Restatement (Third) of Torts defines recklessness as follows:

A person acts with recklessness in engaging in conduct if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make that risk obvious to anyone in the person’s situation, and
 (b) the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.

RESTATEMENT (THIRD) OF TORTS § 2. Because the Third Restatement has only recently become official, this Comment focuses primarily on the Second Restatement as it provides the definition of recklessness used by the courts discussed in this Comment. However, see *infra* notes 281, 387-391 for a discussion of how the Third Restatement may increase the likelihood of finding conduct on the golf course to be reckless.

124. *Schick*, 767 A.2d at 969 (emphasis added).

125. *Dilger v. Moyles*, 54 Cal. App. 4th 1452, 1454 (Cal. Ct. App. 1997) (quoting *Knight v. Jewett*, 834 P.2d 696, 716 (Cal. 1992)).

126. *Schick*, 767 A.2d at 965 (referring to recreational sports generally, and applying the same rationales to golf).

relieving each golfer of the stresses of business and everyday urban life. Neighborhoods benefit by the scenic green belts golf brings to their communities, and wild life enjoy and flourish in a friendly habitat. Social policy dictates that the law should not discourage participation in such an activity whose benefits to the individual player and community at large are so great.¹²⁷

The New Jersey Supreme Court noted at least two additional rationales for the recklessness standard in recreational sports.¹²⁸ First, “a legal duty of care, based on the standard of what, objectively, an average reasonable person would do under the circumstances is illusory, and is not susceptible to sound and consistent application on a case-by-cases basis.”¹²⁹ Second, “[d]ifferent standards applied to different sports would lead to confusion among potential litigants.”¹³⁰ In addition to these rationales, some courts have argued that injury is an inherent risk assumed by participants of all sports, including golf.¹³¹

2. *Adoption of the Recklessness Standard to Golf: 1990 to 2011*

The first court to adopt the recklessness standard for golf was the Ohio Supreme Court.¹³² In 1990, *Thompson v. McNeill* announced that “between participants in [golf], only injuries caused by intentional conduct, or in some instances reckless misconduct, may give rise to a cause of action. There is no liability for injuries caused by negligent conduct.”¹³³ The court reasoned that “inadvertent harm is often built into . . . sport,” and that in golf, participants are “subjected to risk of harm from balls struck . . . at considerable speed.”¹³⁴ The court, however, noted an inverse relationship between the dangerousness of a sport and duty: the more dangerous the sport, the lesser the duty.¹³⁵ Therefore, “participants in bodily contact games such as basketball (and lacrosse) owe a lesser duty to each other than do golfers and others involved in non-physical contact sports.”¹³⁶ The court also noted the importance of considering “the nature of the sport involved, the rules and regulations which govern the sport, the customs and

127. *Shin*, 165 P.3d at 587 (quoting *Dilger*, 54 Cal. App. 4th at 1454-55).

128. *Schick*, 767 A.2d at 965.

129. *Id.* (citing *Crawn v. Campo*, 643 A.2d 600, 604 (N.J. 1994)).

130. *Id.* at 968 (citing Melissa Cohen, Note, *Co-Participants in Recreational Activities Owe Each Other a Duty not to Act Recklessly*, 4 SETON HALL J. SPORT. L. 187, 202 (2000)).

131. *Id.*; *Thompson v. McNeil*, 559 N.E.2d 705, 707 (Ohio 1990); *Dilger*, 54 Cal. App. 4th at 1454-55.

132. *Thompson*, 559 N.E.2d 705.

133. *Id.* at 706.

134. *Id.* at 707.

135. *Id.* at 708-09.

136. *Id.* at 708.

practices which are generally accepted and which have evolved with the development of the sport, and the facts and circumstances of the particular case.”¹³⁷

In *Thompson*, the defendant hit her second shot on the twelfth hole into a water hazard, and the plaintiff courteously went to search for the defendant’s ball near the water hazard, twelve to fifteen yards from the defendant.¹³⁸ It was at this time that the defendant dropped a ball from where she hit her second shot and hit a third,¹³⁹ consistent with the Rules of Golf.¹⁴⁰ Unfortunately, this shot was shanked approximately ninety degrees from its intended line of flight and struck the plaintiff in the right eye, causing severe injury.¹⁴¹ The facts were in dispute both as to whether the defendant announced her intention to hit prior to hitting and whether she gave warning once it became apparent that her ball was heading towards the plaintiff.¹⁴²

The court found that this conduct was not reckless as a matter of law and awarded summary judgment to the defendant.¹⁴³ The court noted that “[s]hanking the ball is a foreseeable and not uncommon occurrence in the game of golf,”¹⁴⁴ and the defendant’s third shot was foreseeable and within the Rules of the game.¹⁴⁵ In addition, the court reasoned that the plaintiff was at such a sharp angle that she was not in the intended path of the ball.¹⁴⁶ In dicta, the court noted that the defendant’s conduct was not even negligent because the plaintiff’s position relative to the defendant placed her outside the zone of danger, and therefore, the injury was merely the result of a “freak” shot.¹⁴⁷

Four years later, the recklessness standard was once again adopted in golf, this time by a Texas appellate court. In *Hathaway v. Tascosa Country Club, Inc.*, the plaintiff suffered permanent vision loss in his left eye when he was struck by a hooked golf ball hit by the defendant from the driving range.¹⁴⁸ Once the defendant realized that the shot

137. *Id.* at 708-09.

138. *Id.* at 706. See *infra* Appendix, Figure 2 for a diagram of *Thompson*.

139. *Thompson*, 559 N.E.2d at 705.

140. U.S. GOLF ASS’N, *supra* note 8, at 78 (Rule 26-1). If a golfer’s ball is in a water hazard, the golfer may play the ball from the spot where the original ball was last played and take a one stroke penalty. *Id.*

141. *Thompson*, 559 N.E.2d at 705.

142. *Id.*

143. *Id.* at 709.

144. *Id.*

145. *Id.*

146. *Id.* at 709 n.2.

147. *Id.* Interestingly, therefore, the court did not need to adopt the recklessness standard to reach this disposition.

148. *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d. 614, 615 (Tex. Ct. App. 1993).

was hooking outside the confines of the driving range, he yelled “fore,” but the plaintiff, driving in a golf cart on an adjacent hole, was unable to avoid being hit.¹⁴⁹ Relying on *Thompson* and a Texas Appellate case that applied the recklessness standard to polo,¹⁵⁰ the *Hathaway* court adopted the recklessness standard to golf and affirmed summary judgment for the defendant.¹⁵¹ Like the *Thompson* court, the *Hathaway* court noted that the defendant’s conduct did not even amount to negligence.¹⁵²

Citing *Thompson* and *Hathaway* for support, the recklessness jurisprudence was extended in 2001 when the Supreme Court of New Jersey decided the case of *Schick v. Ferolito* and held that the recklessness standard applies to all recreational sports, including golf.¹⁵³ Indeed, the court trumpeted “[recklessness] is the pertinent standard for assessing the duty of one sports participant to another concerning conduct on golf courses and tennis courts, as well as conduct on basketball courts and ice rinks.”¹⁵⁴

In *Schick*, the plaintiff claimed that the defendant hit an unannounced mulligan¹⁵⁵ after all members of the foursome had teed off.¹⁵⁶ When the defendant hit the mulligan, the plaintiff was in his golf cart approximately thirty-five feet ahead of the tee-box at a forty-five degree angle to the left.¹⁵⁷ The plaintiff alleged that the defendant already hit a first shot, which was sliced to the right—a poor shot, but still in play.¹⁵⁸ The defendant’s account of the accident was somewhat different: he did not remember whether the injury-causing shot was a mulligan, but claimed that before teeing off, he made eye contact with the plaintiff and gave a hand warning for him to move aside.¹⁵⁹

In an opinion by Justice LaVecchia, the majority of the court found that there were disputed material facts and remanded the case for the jury to assess whether the defendant’s conduct constituted reckless-

149. *Id.* at 615.

150. *Connell v. Payne*, 814 S.W.2d. 486 (Tex. Ct. App. 1991) (writ denied).

151. *Hathaway*, 846 S.W.2d at 616-18.

152. *Id.* at 616. Again, this is a case where the court did not need to adopt the recklessness standard to decide the case, but opted to do so anyway.

153. *Schick v. Ferolito*, 767 A.2d 962, 966-67 (N.J. 2001).

154. *Id.* at 968.

155. A mulligan is a replacement shot taken when a golfer is unsatisfied with his original shot. It is prohibited by the Rules, but often customary in informal games. See *infra* Part III.C.ii for a discussion of mulligans.

156. 767 A.2d at 963.

157. *Id.* at 964. See *infra* Appendix, Figure 3 for a diagram of *Schick*.

158. *Id.* at 964.

159. *Id.*

ness.¹⁶⁰ Justice Verniero concurred in adopting the recklessness standard to golf, but dissented in the disposition, finding that the defendant's conduct was not reckless as a matter of law.¹⁶¹ Verniero is of the opinion that “[o]nly the most egregious acts of golfers should give rise to liability”¹⁶² and “[i]mplicit in the recklessness standard is a requirement that the conduct be egregious.”¹⁶³

i. Assumption of Risk Under the Recklessness Standard

Unlike New Jersey, which abrogated the doctrine of assumption of risk decades ago,¹⁶⁴ California,¹⁶⁵ Hawaii,¹⁶⁶ and (now) New York¹⁶⁷ apply the defense of assumption of risk in recreational golf. There are two types of assumption of risk: primary and secondary.¹⁶⁸ The doctrine of primary assumption of risk “bars liability because the plaintiff is said to have assumed the particular risks inherent in a sport by choosing to participate.”¹⁶⁹ While a golfer “owes no duty to a co-participant for actions involving an inherent risk,”¹⁷⁰ the golfer can be held liable if “he or she intentionally injures another player or his or her conduct was sufficiently reckless to be outside the normal or ordinary part of the game.”¹⁷¹ Thus, the doctrine arrives at the recklessness standard because “the defendant owes no duty to protect a plaintiff from particular harms arising from ordinary, or simple negligence.”¹⁷²

Primary assumption of risk is a legal conclusion that abrogates the defendant's duty entirely—in the case of recreational sports, the duty to refrain from acting negligently—and therefore, like contributory negligence, bars recovery completely.¹⁷³ The secondary assumption of risk doctrine, like comparative negligence, relates to the allocation of damages, not the question of duty.¹⁷⁴ Therefore, if a duty exists (because it is not barred by the primary assumption of the risk doctrine)

160. *Id.* at 970.

161. *Id.* at 970-71 (Verniero, J., concurring and dissenting).

162. *Id.*

163. *Id.*

164. *McGrath v. American Cyanamid Co.*, 196 A.2d 238, 240-41 (N.J. 1963) (noting that any reference to “assumption of risk” should be banished).

165. *Shin v. Ahn*, 165 P.3d 581, 584 (Cal. 2007).

166. *Yoneda v. Tom*, 133 P.3d 796, 808-09 (Haw. 2006).

167. *Anand v. Kapoor*, 15 N.Y.3d 946, 947-48 (2010).

168. *Shin*, 165 P.3d at 584.

169. *Id.*

170. *Yoneda*, 133 P.3d at 809.

171. *Id.*

172. *Shin*, 165 P.3d at 584.

173. *Id.*

174. *Id.* at 591.

and that duty is breached, secondary assumption of risk merges into comparative negligence, and the plaintiff's damages may be reduced in proportion to the parties' respective fault.¹⁷⁵

In 2008, the California Supreme Court heard *Shin v. Ahn*—a case the court called the next generation of its *Knight* jurisprudence¹⁷⁶—and extended the primary assumption of risk doctrine to golf.¹⁷⁷ In an opinion by Justice Corrigan, the court held that “golfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”¹⁷⁸

In *Shin*, the plaintiff, the defendant, a third golfer, and a fourth unidentified man who left the course before the injury occurred, were grouped together for a round of golf.¹⁷⁹ On the thirteenth hole, the plaintiff, while checking the messages on his cell phone, was struck in the head by the defendant's pulled shot and permanently injured.¹⁸⁰ When the injury occurred, the plaintiff was twenty-five to thirty-five feet in front of the defendant at a forty to forty-five degree angle from the intended flight of the ball.¹⁸¹ The court remanded the case for the jury to determine whether the defendant's conduct was so reckless as to be totally outside the range of the ordinary activity involved in golf.¹⁸²

In a vehement dissent, Justice Kennard wrote that the primary assumption of risk doctrine—a rule that she has stated her disagreement with since the *Knight* decision in 1992—was “tearing apart the fabric of tort law.”¹⁸³ She pointed out that “because the question of what is ‘inherent’ in a sport is amorphous and fact-intensive, it is impossible for trial courts ‘to discern, at an early stage in the proceedings, which risks are inherent in a given sport.’”¹⁸⁴ Thus, Justice Kennard would have remanded the case to determine whether the defendant acted negligently, not recklessly.¹⁸⁵

Recently, in *Anand v Kapoor*, the Appellate Division of the Supreme Court of New York overturned a long line of negligence juris-

175. *Id.*

176. *Id.* at 582.

177. *Id.* at 583 (Cal. 2007).

178. *Id.* at 582 (quoting *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992)).

179. *Shin v. Ahn*, 141 Cal. App. 4th 726, 730 (Cal. Ct. App. 2006).

180. *Id.*

181. *Shin*, 165 P.3d at 583. See *infra* Appendix, Figure 4 for a diagram of *Shin*.

182. *Id.* at 584.

183. *Id.* at 593 (Kennard, J., dissenting) (internal citations omitted).

184. *Id.* (quoting *Knight v. Jewett*, 834 P.2d 696, 723 (Cal. 1992) (Kennard, J., dissenting)).

185. *Id.*

prudence in that state and applied the doctrine of primary assumption of risk to golf.¹⁸⁶ The court found that liability premised on a negligent failure to warn before hitting the ball is inconsistent with the state's modern version of primary assumption of risk.¹⁸⁷ The New York Court of Appeals affirmed, noting that "being hit without warning by a shanked shot while one searches for one's own ball—reflects a commonly appreciated risk of golf."¹⁸⁸

3. *Rejection of the Recklessness Standard*

In 1997, an Illinois Appellate court in *Zurla v. Hydel* stoutly rejected the recklessness standard and held that "a golfer injured by a golf ball need only allege and prove traditional negligence in order to recover for damages, rather than willful or wanton conduct."¹⁸⁹ The *Zurla* court exposed several shortcomings of the recklessness jurisprudence, including its failure to consider the customs of golf and the way in which the sport is played, as well as the mistaken idea that injury is inherent in golf.¹⁹⁰ In an opinion that displayed an intimate understanding of the game, the court observed:

[g]olf is simply not the type of game in which participants are inherently, inevitably or customarily struck by the ball. Unlike the contact sports recognized by the cases, the only defense of the target in golf is made by the principles of Sir Isaac Newton, the natural obstacles of Mother Nature and the cunning of those who have designed the course. There is never a need for players to touch another. Rather, golf is a sport which is contemplative and careful, with emphasis placed on control and finesse, rather than speed or raw strength. Although the game of golf certainly presents significant dangers, these dangers are more psychological than physical. Moreover, the physical dangers that exist are diminished by long-standing traditions in which courtesy between the players prevails. In such an environment, players have the time to consider actions and to guard against injury to those who may be in harms way.¹⁹¹

186. *Anand v. Kapoor*, 877 N.Y.S.2d 425; (App Div. 2009), *aff'd*, 942 N.E.2d 295 (N.Y. 2010). See *infra* Appendix, Figure 5 for a diagram of *Anand*.

187. *Id.*

188. *Id.* (internal quotations omitted). See *infra* Appendix, Figure 5 for a diagram of *Anand*. Like *Thompson and Hathaway*, this case could have been decided under the negligence standard because the plaintiff was not within the zone of danger. See 877 N.Y.S.2d 425 (noting plaintiff was fifty to eighty degrees from defendant's intended line of flight).

189. *Zurla v. Hydel*. 681 N.E.2d 148, 152 (Ill. App. Ct. 1997).

190. *Id.* at 152.

191. *Id.*

In addition, the court touched on the fact that golfers expect—and rely on—other players to abide by the Rules:

[a] golf course is not usually considered a dangerous place, nor the playing of golf a hazardous undertaking. It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation.¹⁹²

Another reason the Illinois court denied the recklessness standard was because it “undermines the reasonable incentive golfers have to guard against injuries to one another, ultimately becoming a self-fulfilling prophesy.”¹⁹³

C. *The Rules of Golf and Golf Etiquette*

The Rules of Golf¹⁹⁴ are written jointly¹⁹⁵ by the United States Golf Association (the USGA), and Europe’s R&A.¹⁹⁶ The USGA governs golf in the United States and Mexico, while the R&A governs golf in 126 countries throughout Europe, Africa, Asia, and the Americas.¹⁹⁷ The latest version of the Rules is a product of more than 250 years of drafting, and although there are some minor stylistic differences between the USGA and R&A versions, both sets of rules are essentially the same because both organizations work “closely to produce a uniform code of Rules so that, wherever the game is played around the world, the same laws apply.”¹⁹⁸

The importance of etiquette underscores both sets of rules. The R&A notes that “[e]tiquette is an essential and inextricable part of the game, which has come to define golf’s values worldwide,”¹⁹⁹ and that

192. *Id.* (quoting *Everett v. Goodwin*, 161 S.E. 316, 318 (N.C. 1931) (internal quotations omitted)).

193. *Id.*

194. U.S. GOLF ASS’N, *supra* note 8; THE R&A, GOLF RULES ILLUSTRATED (2010).

195. THE R&A, <http://www.randa.org/en/RandA.aspx> (last visited Feb. 21, 2001).

196. Like the USGA, the R&A is incorporated as a non-profit 501(c)(3) organization. While its official name in its articles of incorporation is actually the R&A, the name derives from the Royal & Ancient Golf Club of St. Andrews, Scotland—the home of golf. ST. ANDREWS LINKS, <http://www.standrews.org.uk/About-Us/History.aspx> (last visited Feb. 21, 2011); *see also* ST. ANDREWS LINKS, <http://www.standrews.org.uk/About-Us/The-R-A.aspx> (last visited, Feb. 21, 2011) and THE R&A, <http://www.randa.org/en/Our-Heritage.aspx> (last visited, Feb. 21, 2011) for further information regarding the relationship between the R&A, the Royal & Ancient Golf Club, and St. Andrews.

197. THE R&A, *supra* note 195.

198. THE R&A, <http://www.randa.org/en/Rules-and-Amateur-Status.aspx> (last visited Feb. 21, 2011).

199. THE R&A, <http://www.randa.org/en/Rules-and-Amateur-Status/Etiquette.aspx> (last visited Feb. 21, 2011).

“honesty, integrity, and courtesy” are the three words that represent the spirit of the game.²⁰⁰ Both versions note that if proper etiquette is observed, “all players will gain maximum enjoyment from the game.”²⁰¹ In fact, the rules of etiquette are outlined on the first page of the Rules, which notes that “*the overriding principle is that consideration should be shown to others on the course at all times.*”²⁰² Both versions continue to outline “The Spirit of the Game” (a subset of golf etiquette), which is that:

[g]olf is played, for the most part, without the supervision of a referee or umpire. *The game relies on the integrity of the individual to show consideration for other players and to abide by the Rules.* All players should conduct themselves in a disciplined manner, demonstrating courtesy and sportsmanship at all times, irrespective of how competitive they may be.²⁰³

Immediately following this section—and still on the first page of the Rules—are the four, and only, rules of golf safety. These rules, which are the core duties imposed on golfers under the negligence standard,²⁰⁴ provide:

1) Players should ensure that no one is standing close by or in a position to be hit by the club, the ball or any stones, pebbles, twigs or the like when they make a stroke or practice swing.

2) Players should not play until the players in front of them are out of range.

3) Players should always alert greenstaff nearby or ahead when they are about to make a stroke that might endanger them.

4) If a player plays a ball in a direction where there is a danger of hitting someone, he should immediately shout a warning. The traditional word of warning in such situations is “fore.”²⁰⁵

This Section proceeds by discussing the respective roles played by these rules of safety in assessing liability under the negligence standard and the recklessness standard. The Discussion concludes by further examining specific Rules violations under each standard before

200. THE R&A, <http://www.randa.org/en/Playing-Golf/Spirit-of-the-Game.aspx> (last visited Feb. 21, 2011).

201. U.S. GOLF ASS'N, *supra* note 8, 1; THE R & A, *supra* note 194, at 10.

202. U.S. GOLF ASS'N, *supra* note 8, at 1 (emphasis added); THE R & A, *supra* note 194, at 10 (emphasis added). Although this is technically the tenth page of the R & A version, it is still the first page of the Rules because the R&A book begins by noting some changes to the latest version of the Rules and provides a “Quick Guide To the Rules of Golf.”

203. U.S. GOLF ASS'N, *supra* note 8, at 1 (emphasis added); THE R & A, *supra* note 194, at 10.

204. See *infra* Part II.C.1 for a discussion of how the rules of golf safety are the core duties under the negligence standard.

205. U.S. GOLF ASS'N, *supra* note 8, at 1 (emphasis added); accord THE R & A, *supra* note 194, at 10.

explaining why the four rules of golf safety provide tremendous support for applying the negligence standard.

1. The Rules of Golf and Golf Etiquette Under the Negligence Standard

The rules of golf safety are the core duties imposed on golfers under the negligence standard: Rules one, two, and three are equivalent to golfers' duties before the ball is hit.²⁰⁶ Essentially, these rules equate to the general duty not to hit without first giving timely and adequate warning to those in the foreseeable zone of danger.²⁰⁷ Rule four is equivalent to golfers' duties after the ball is hit.²⁰⁸ With these rules as the core of the standard, the negligence jurisprudence provides the gloss.²⁰⁹

It is unsurprising, therefore, that a violation of the safety rules lends to a finding of negligence,²¹⁰ while compliance with the safety rules is persuasive evidence that no duty was breached.²¹¹ However, compliance with (or violation of) the Rules does not establish *per se* reasonableness (or unreasonableness).²¹² Ultimately, the negligence analysis comes down to "what a reasonable person would have done under the circumstances."²¹³

2. The Rules of Golf and Golf Etiquette Under the Recklessness Standard

Like the negligence analysis, the Rules under the recklessness standard are not dispositive in assessing liability.²¹⁴ However, recklessness courts seem to give less deference, unsurprisingly, to the Rules than

206. Compare the rules of golf safety, *supra* note 205, with golfers' duties before the ball is hit under the negligence standard, *supra* Part II.A.1.i.

207. See *supra* Part II.A.1.i for a discussion of golfers' general duty to give timely and adequate warning to individuals in the foreseeable zone of danger under the negligence standard.

208. Compare the rules of golf safety, *supra* note 205, with golfers' duties after the ball is hit under the negligence standard, *supra* notes 92-95.

209. For example, the negligence jurisprudence outlines approaches for determining the foreseeable zone of danger, *supra* Part II.A.1.ii, and makes exceptions to the general duties to warn before hitting, *supra* Part II.A.iii, and after hitting, *supra* Part II.A.2.ii.

210. See, e.g., *Getz v. Freed*, 105 A.2d 102, 103-04 (Pa. 1954) (noting that defendant was negligent when he failed to warn of his intention to hit an unannounced mulligan).

211. See, e.g., *Cavin v. Kasser*, 820 S.W.2d 647, 650 (Mo. Ct. App. 1991) (noting that defendant had no duty to warn of his intention to play because no evidence existed that he "disregarded any rule or custom of the game").

212. See, e.g., *Thomas v. Wheat*, 143 P.3d 767, 771 (Okla. Civ. App. 2006).

213. *Id.*

214. *Shin v. Ahn*, 165 P.3d 581, 590 (Cal. 2007) (noting that a violation of the Rules does not establish liability *per se*); *Schick v. Ferolito*, 767 A.2d 962, 969 (N.J. 2001) (noting that a violation of the Rules "should not compel a determination of recklessness").

negligence courts. For example, the California Court of Appeals in *Dilger v. Moyles* noted that “golf etiquette does not necessarily rise to the level of a duty.”²¹⁵ Similarly, the *Shin* court noted that “the sanction for a violation of a rule of etiquette [or a rule of safety] is social disapproval, not legal liability.”²¹⁶

3. Specific Rule Violations Under Both Standards

i. Failure to Give Warning

While it is well established that a failure to yell “fore” or give other timely warning—both before and after the ball is hit—to those in the foreseeable zone of danger is a breach of the duty to use ordinary care,²¹⁷ it is unclear when such a failure will rise to the level of recklessness. For example, the New Jersey Supreme Court remanded the *Schick* case to determine whether the defendant’s failure to allow the plaintiff to move out of the “line of fire” after acknowledging his presence and giving him a warning constituted recklessness.²¹⁸ Justice Verniero, in a dissenting and concurring opinion, argued that this conduct was not reckless as a matter of law and, therefore, summary judgment should have been awarded for the defendant.²¹⁹

Part of this uncertainty arises because some recklessness courts focus their analysis on the intended line of flight rather than the foreseeable zone of danger.²²⁰ The Ohio Supreme Court, the first to adopt the recklessness standard for golf, noted that a golfer’s failure to yell “fore” when he knows another individual is within the *intended line of flight* “could amount to reckless indifference to the rights of others.”²²¹ A California appellate court in *Dilger v. Moyles* broadly held that a failure to warn is not reckless because it “does not alter the inherent risk of the sport—being struck by a golf ball,”²²² but the extent of this holding is uncertain because the defendant could not see the plaintiff, and the plaintiff was not within the intended line of

215. *Dilger v. Moyles*, 54 Cal. App. 4th 1452, 1455 (Cal. Ct. App. 1997).

216. *Shin*, 165 P.3d at 590.

217. See *supra* Parts II.A.1.i and II.A.2.i for a discussion of the duty to give timely and adequate warning under the negligence standard before and after hitting, respectively.

218. *Schick*, 767 A.2d at 970.

219. *Id.* at 971.

220. See, e.g., *Pfenning v. Lineman*, 922 N.E. 2d 45, 53-54 (Ind. Ct. App. 2010) (holding that a failure to warn was not reckless because the plaintiff was not within the intended line of flight and the defendant could not see the plaintiff); *Gray v. Giroux*, 730 N.E.2d 338, 341 (Mass. Ct. App. 2000) (holding that a failure to warn was not reckless when plaintiff was not within the intended line of flight, and defendant did not see plaintiff).

221. *Thompson v. McNeill*, 559 N.E.2d 705, 707 (Ohio 1990).

222. *Dilger v. Moyles*, 54 Cal. App. 4th 1452, 1455 (Cal. Ct. App. 1997).

flight.²²³ Although it is not entirely clear when a failure to warn will constitute recklessness, such an omission is less likely to give rise to liability under the recklessness standard—by virtue of its lower standard of care—than under the negligence standard.²²⁴

ii. Unannounced Mulligans

A mulligan is a shot taken when a golfer gets permission to take a replacement shot.²²⁵ It is essentially a “do-over” that a golfer might feel inclined to take if unsatisfied with his original shot. Unlike a provisional shot,²²⁶ which requires a golfer to take a penalty and is therefore allowed by the Rules, a mulligan—because it results in no penalty—is prohibited by the Rules.²²⁷ At first glance, mulligans seem to present a somewhat dicey issue because although they are prohibited by the Rules,²²⁸ they are often customary in informal games.²²⁹ Indeed, every member of the threesome in *Anand* took a “breakfast

223. *Id.* at 1453-54.

224. *See e.g., id.* at 1456 (noting that defendant’s failure to warn was possibly negligent, but not reckless); *see also* Ian M. Burnstein, *Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard*, 71 U. DET. MERCY L. REV. 993, 1020-21 (1994) (noting that “courts which adopt the recklessness standard are . . . prone to deny recovery for rule violations. . . . In contrast, courts which apply the negligence standard are more apt to provide the plaintiff recovery for a blatant rule violation”).

225. A mulligan is “[p]ermission by a player (forbidden under the rules) to an opponent to replay a mis-played shot, especially a tee-shot.” DAVIES, *supra* note 3, at 56. Colloquially, “mulligan” also refers to the actual shot that is taken after permission is granted.

226. A provisional shot is taken by a golfer when a ball is lost or out of bounds. U.S. GOLF ASS’N, *supra* note 8, at 80-81 (Rule 27). The *Schick* court noted the strict requirements surrounding the announcement of an intention to hit a provisional ball:

[T]he formal rules of the game allow for the taking of a second, or “provisional shot,” if certain conditions are met. The rules prescribe a strict form of notice to one’s playing partners of intent to take a provisional shot. Decisions on the Rules of Golf prescribe that the player must inform his opponent or fellow player that he intends to play a provisional ball and he must mention the words “provisional ball.” The following statements have been ruled not to satisfy the requirement of announcing a provisional ball: “That might be lost, I am going to re-load.” “I’d better hit another one.”

Schick v. Ferolito, 767 A.2d at 969 (internal citations omitted).

227. *See* U.S. GOLF ASS’N, *supra* note 8, at 19 (Rule 1-3 prohibits players from agreeing to “exclude the operation of any Rule or to waive any penalty incurred”).

228. Unlike a failure to yell “fore,” mulligans are not a violation of the Rules of Golf Safety, but are rather a violation of the camp of rules designed to enhance competition. Nonetheless, because they are not within the Rules, they are less foreseeable.

229. *Schick*, 767 A.2d at 969 (noting that “[a]lthough the formal rules of golf do not recognize the term ‘mulligan,’ informal custom may permit that familiar ‘do-over’”). Usually, however, it is appropriate to ask for permission—or at least announce that you have given yourself permission—before hitting a mulligan. *See* GREG ROWLEY, *GOLF, NAKED: THE BARE ESSENTIALS REVEALED* 124 (2009) (noting that a golfer on the first tee should always ask for permission to hit a mulligan *even before hitting his first shot*).

ball”²³⁰ off the first tee without controversy.²³¹ And “mulligan” is so ubiquitous in common parlance that Justice Verniero even suggested that the New Jersey Supreme Court could take judicial notice of the term.²³²

As with cases involving a failure to warn, whether injury is caused by an unannounced mulligan is not dispositive of liability under either standard, but merely a factor to consider.²³³ While the circumstances under which the taking of unannounced mulligans will rise to the level of recklessness are uncertain, negligence courts have the advantage of considering these issues under the foreseeable zone of danger analysis, commensurate with ordinary care.²³⁴ In Part III, this Comment discusses the advantages of a uniform implementation of the negligence standard.

III. DISCUSSION

Future courts should reject the current trend and reaffirm the negligence standard as the appropriate standard for golf. The rationales for the recklessness standard—a standard that has its roots in sports where physical contact is the norm²³⁵—simply do not hold up when

230. A breakfast ball is a mulligan taken off the first tee. *See id.* at 124 (noting that a mulligan is “also called a breakfast ball, brunch ball, or lunch ball” depending on the time of day). For further information about breakfast balls, *see also* Alistair Tait, *Breakfast Ball? Are you Kidding me*, GOLF WEEK (Nov. 7, 2009), available at <http://www.golfweek.com/news/2009/nov/07/breakfast-ball-are-you-kidding-me>.

231. *Anand v. Kapoor*, 877 N.Y.S.2d 425 (N.Y. App. Div. 2009).

232. *Schick*, 767 A.2d at 973 (Verniero, J., concurring and dissenting).

233. *Id.* at 970 (noting that whether defendant’s shot was an unannounced mulligan was not dispositive of liability, but rather the full circumstances around the shot needed to be considered to determine recklessness). In *Allen v. Donath*, 875 S.W.2d 438 (Tex. Ct. App. 1994), neither party disputed that the defendant had a duty to warn of his intention to hit a mulligan, but the jury did not find that a failure to do so constituted recklessness. While still not dispositive of liability, negligence courts seem to have less sympathy for the golfer who injures another as a result of an announced mulligan. *See Getz v. Freed*, 105 A.2d 102, 103 (Pa. 1954) (noting “[d]efendant was undoubtedly guilty of negligence in driving a third ball when his second drive was in the fairway”). Indeed, the Supreme Court of Pennsylvania noted that “all golfers know” it is negligent for a golfer to take an unannounced mulligan when his prior drive is in play. *Id.* Furthermore, the fact that mulligans might be customary does not mean that they are consistent with ordinary care. As the Supreme Court of North Carolina noted:

Since negligence is the failure to do that which an ordinarily prudent man would do, or the doing of that which an ordinarily prudent man would not do, under the same circumstances, an ordinary custom, while relevant and admissible in evidence on the issue of negligence, is not conclusive, especially where the custom is clearly a careless or dangerous one. *McWilliams v. Parham*, 160 S.E.2d 692, 696 (N.C. 1968).

234. *See supra* Part II.A.1.i for a discussion of the point that ordinary care imposes a duty on golfers to warn individuals in the foreseeable zone of danger of an intention to hit.

235. *See Schick*, 767 A.2d at 968 (noting that the recklessness standard is the standard in New Jersey for recreational sports generally and extending this rule to golf); *Thompson v. McNeill*,

applied to golf.²³⁶ Occupying an uncertain penumbra between negligence and intent, recklessness is a nebulous standard incapable of being applied consistently.²³⁷ In stark contrast, the negligence standard is the appropriate approach because it conforms to the well-established Rules of Golf.²³⁸ As a result, the negligence standard provides courts and golfers with a clearly defined standard of care,²³⁹ is in keeping with the spirit of the game,²⁴⁰ is consistent with golfers' reasonable expectations,²⁴¹ and is consistent with the Restatement (Second) of Torts.²⁴² Moreover, this standard merely asks golfers to act reasonably²⁴³—a flexible and commonsense approach that courts and juries have great experience in applying—so that severely injured plaintiffs are not forced to bear the costs of preventable injuries caused by negligent conduct.²⁴⁴

Section III.A of this discussion explains why the recklessness standard is inappropriate for golf. First, Section III.A.1. explains why the rationales for the recklessness standard, although sensible in other sports, do not swing on the course. Next, Section III.A.2 points out some problems with the recklessness standard more generally. After putting the recklessness standard back in the bag, Section III.B explains why the negligence standard is the appropriate approach. Section III.C addresses critics by refuting potential objections to the

559 N.E.2d 705, 707 (Ohio 1990) (adopting the recklessness standard after it was first announced in *Hanson v. Kynast*, 526 N.E.2d 327 (Ohio Ct. App. 1987), which involved a Division 1 college lacrosse game).

236. See *infra* Part III.A.1 for an analysis of the rationales for the recklessness standard in recreational sports and the argument that they do not hold up when applied to the more genteel game of golf.

237. See *infra* Part III.A.2 for a discussion of the nebulous nature of the recklessness standard and the argument that it is impossible for courts and juries to apply consistently.

238. See *supra* Part II.C.1 for an analysis of the conformity between the Rules of Golf and the negligence standard.

239. See *infra* Part III.B.1.i for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, provides courts and golfers with a clearly defined standard of care.

240. See *infra* Part III.B.1.ii for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, is consistent with the long-standing traditions of golf and the spirit of the game.

241. See *infra* Part III.B.1.iii for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, is consistent with golfers' reasonable expectations.

242. See *infra* Part III.B.1.iv for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, is consistent with the Restatement (Second) of Torts.

243. See *supra* Part III.B.2 for an analysis of the argument that the negligence standard is the appropriate approach because it merely asks golfers to act reasonably—a flexible and commonsense standard that courts and juries have great experience in applying.

244. See *infra* notes 292-94 and accompanying text for a discussion of the argument that the negligence standard, unlike the recklessness standard, does not force negligently injured plaintiffs to bear the costs of preventable injuries.

negligence standard. Finally, Section III.D provides a few suggestions for future courts applying the negligence standard, and Section III.E provides a few suggestions for courts that insist on applying the recklessness standard.

A. *The Recklessness Standard is Inappropriate for Golf*

1. *The Rationales for the Recklessness Standard Fail when Applied to Golf*

The primary rationales for the recklessness standard in recreational sports are: (1) the promotion of participation in recreational sports, (2) the desire not to chill conduct that straddles the borderlines of the rules, (3) the avoidance of excessive litigation, (4) consistency among recreational sports, (5) the difficulty in ascertaining what might be reasonable care on a case-by-case basis, and (6) the conclusion that injury is an inherent risk of sports that all athletes assume by participating.²⁴⁵ Although sensible in other recreational sports, these rationales fail when applied to golf.²⁴⁶

The first rationale—so the argument goes—is that by decreasing the potential for legal liability, the recklessness standard promotes participation in recreational sports.²⁴⁷ While this makes sense in contact sports like lacrosse,²⁴⁸ it is unpersuasive when applied to golf. In fact, quite the opposite conclusion could reasonably be drawn: many golfers are likely to be discouraged from playing due to concerns of being negligently injured without compensation.²⁴⁹ Consider a reasonable

245. See *supra* Part II.B.1 for a discussion of the rationales behind applying the recklessness standard to recreational sports.

246. This has been pointed out in an excellent law review article by Daniel E. Lazaroff, Professor of Law and Economics at Loyola University-Los Angeles and Director of the Loyola Sports Law Institute. Daniel E. Lazaroff, *Golfer's Tort Liability—A Critique of an Emerging Standard*, 24 HASTINGS COMM. & ENT. L.J. 317, 329 (2002). Unfortunately, however, courts in the last decade have continued to miss this point and continue to obstinately opt for the recklessness standard over the negligence approach. See *supra* Part II.2 for a discussion of the recent trend of applying the recklessness standard to golf.

247. See *supra* note 126 and accompanying text for a discussion of the argument that the recklessness standard promotes participation in recreational sports.

248. In the context of recreational sports, the recklessness standard in Ohio—the first state to adopt the recklessness standard for golf—was first announced in a Division college 1 lacrosse game. *Hanson v. Kynast*, 526 N.E.2d 327 (Ohio Ct. App. 1987). See also Lazaroff, *supra* note 246, at 329 (arguing that it makes sense to apply a recklessness standard in sports such as boxing, kickboxing, full contact karate, ice hockey, and football because the physical nature of these sports makes it impossible for participants to use reasonable care).

249. See Recent Case, *Shin v. Ahn*, 165 P.3d 581 (Cal. 2007), 121 HARV. L. REV. 1253, 1259 (2008) (arguing that “[a]lthough some recreational athletes may be emboldened by the tort protections they enjoy, others might shy away from vigorous participation in sports, out of fear of absorbing the burden of nonremediable, nonreckless injuries”).

golfer's cost-benefit analysis under both standards. Under the negligence standard, the costs are low: golfers have a duty to act reasonably, which essentially means following the four rules of golf safety.²⁵⁰ The benefits are great: if a golfer becomes endangered by a wayward golf ball—an object capable of causing a loss of consciousness, vision, or life—the standard requires that the golfer be given a warning so as to have a chance of avoiding injury.²⁵¹

Now, consider the recklessness standard. Although the minimal (or practically nonexistent) costs associated with giving warning are reduced, the overall benefits of playing golf are likewise reduced because the golf course becomes less safe.²⁵² The increased hazards created by the recklessness standard compromise the peace of mind golfers seek on the course.²⁵³ Furthermore, because the recklessness standard produces an environment where golfers cannot expect to rely on fellow participants for a warning, players are forced to divert attention from enjoying the game to protecting themselves from negligent injurers. A comparison of these two analyses suggests that a reasonable golfer would rather hit the links in a state that follows the negligence standard as opposed to the recklessness standard. And even if an unreasonable golfer prefers the recklessness standard, that is not the type of golfer whose behavior should be encouraged on the course.²⁵⁴

The second rationale—that chilling borderline proscribed and prohibited conduct would fundamentally alter the sport²⁵⁵—also fails to have the same force in golf that it does in other sports. Unlike ice hockey or football, for example, where an athlete gains a competitive

250. See *supra* Part II.C.1 for a discussion of the point that the four rules of golf safety are the core duties imposed under the negligence standard.

251. See *supra* Parts II.A.1.i and II.A.1.2.i for a discussion of the duties to warn under the negligence standard before and after the ball is hit, respectively.

252. See *supra* Part II.C.3.i for a discussion of the point that the recklessness standard often shields golfers from liability under the recklessness standard.

253. Indeed, the reckless jurisprudence supports this point. See *supra* note 127 and accompanying text for a discussion of the psychological benefits that golfers seek by engaging in the sport.

254. Cf. Lazaroff, *supra* note 246, at 333-34 (arguing that under the negligence standard, the “only behavior that would be ‘chilled’ would be undesirable conduct that is not inherent in golf and is antithetical to its rules, customs, and traditions”). This Comment does not argue that bad golfers should be discouraged from playing golf; golfers of all skill levels should hit the links. What this Comment does argue is that unreasonable behavior on the golf course should not be immunized from liability. See *infra* Part III.C.1 for a discussion of the argument that the negligence standard is not too harsh on bad golfers.

255. See *supra* note 125 and accompanying text for a discussion of the argument that the recklessness standard is preferred over the negligence standard because it does not chill borderline prohibited and proscribed conduct in sports.

advantage by playing aggressively—and thus aggressive play is a fundamental part of the sport—a golfer gains no competitive advantage by playing aggressively.²⁵⁶ Prohibiting borderline conduct would thus not fundamentally alter the nature of golf.²⁵⁷ Indeed,

[t]here can be no serious argument that waiting to make a stroke until others are out of range of the club or ball inhibits anything in the inherent nature of the sport. Further, shouting a warning of “fore” or signaling with a wave when a shot goes astray is also something that golfers can easily do without detracting from the competition. Attempting to protect other players within the “zone of danger” would not alter the competition.²⁵⁸

Similarly, unlike other sports in which there is little or no time to consider one’s actions, golf is “contemplative and careful, with emphasis placed on control and finesse, rather than speed or raw strength.”²⁵⁹ The golf course is an environment where “players have the time to consider the consequences of their actions and to guard against injury to those who may be in harms [sic] way.”²⁶⁰ Accordingly, a negligence standard would not fundamentally alter the sport, and the recklessness standard is unnecessary.

The third rationale—the avoidance of excessive litigation²⁶¹—is well-intentioned, but also off the mark. Presumably, the theory behind this rationale is that the recklessness standard will produce less litigation because the standard is more difficult to satisfy. But as *Zurla v. Hydell* pointed out, the recklessness standard may decrease incentives to use ordinary care, thereby making the golf course a more dangerous place.²⁶² According to the *Zurla* court, more injuries—and thus more litigation—are likely to result in a self-fulfilling prophecy.²⁶³

While perhaps overstated, this argument is persuasive in light of recent media coverage surrounding *Anand v. Kapoor*.²⁶⁴ Recent headlines—which include “Golfing shankers told there is no need for ‘Fore!’,” “If You Yell ‘Fore’ on a Golf Course, Are You Wasting Your

256. See Lazaroff, *supra* note 246, at 331.

257. *Id.*

258. *Id.*

259. *Zurla v. Hydell*, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997).

260. *Id.*

261. See *supra* note 126 and accompanying text for a discussion of the argument that the recklessness standard avoids excessive litigation.

262. *Zurla*, 681 N.E.2d at 152 (Ill. App. Ct. 1997); see also Lazaroff, *supra* note 246, at 331 (“If golfers know that they may be held liable for careless behavior, there will be a greater incentive to behave accordingly”).

263. *Zurla*, 681 N.E.2d at 152.

264. *Anand v. Kapoor*, 877 N.Y.S.2d 425 (App. Div. 2009), *aff’d*, 942 N.E.2d 295 (N.Y. 2010).

Breath?,” and “Court: Shanked shots an expected risk”—suggest that the recklessness standard encourages unreasonable behavior.²⁶⁵ On a more fundamental level, even if the recklessness standard actually does decrease the amount of golf-related litigation, it does not follow that this goal justifies depriving negligently injured plaintiffs of remedies.²⁶⁶

The fourth rationale—the preference for consistency among recreational sports²⁶⁷—is even more dubious.²⁶⁸ The court in *Schick v. Ferolito* argued that different standards would “lead to confusion among potential litigants.”²⁶⁹ To take this argument seriously, however, one must believe that the current state of the law leaves litigants so hopelessly confused that depriving negligently injured golfers of fair compensation should be made secondary to the goal of having one uniform standard of care for the entire universe of recreational sports (which is a misguided goal in the first place because there are great disparities in risk, level of physical contact, customs, ability to prevent harm, and the like among different recreational sports). Likewise, it is far from unreasonable to ask lawyers to research the standard of care before filing a lawsuit; it would be unreasonable to expect the opposite. And even in jurisdictions where the standard for all recreational sports is recklessness, defining reckless conduct still turns on the context of the sport,²⁷⁰ so some amount of inconsistency is therefore inevitable.

The fifth rationale—the supposed difficulty of ascertaining reasonable conduct on a case-by-case basis²⁷¹—is perhaps the most mistaken of all. The rules of golf safety, which courts can easily refer to, clearly

265. See *supra* note 11 and accompanying text for a discussion of the recent media coverage surrounding *Anand*.

266. See *supra* notes 40-41 and accompanying text for a discussion of the role of courts in determining policy. See Burnstein, *supra* note 224, at 1021 (arguing that “it is unjustifiable to discriminate against [those who have been injured as a result of negligence] in order to prevent the increase in litigation”).

267. See *supra* note 130 and accompanying text for a discussion of the argument for consistency among all recreational sports.

268. See Lazaroff, *supra* note 267, at 329 (arguing that “maintaining consistency among all sports tort cases may simplify matters, but it does not necessarily reflect sound public policy”).

269. *Schick v. Ferolito*, 767 A.2d 962, 968 (N.J. 2001).

270. See *supra* notes 135-37 and accompanying text for a discussion of the point that defining reckless conduct turns on the context of the sport.

271. See *supra* note 129 and accompanying text for a discussion of the argument that the recklessness standard avoids the problem of defining objectively reasonable conduct on a case-by-case basis.

demarcate reasonable and unreasonable conduct.²⁷² If, for some reason, the Rules are not dispositive in a given situation, courts can easily fall back on the objective standard of ordinary care in light of a consideration of the totality of the circumstances.²⁷³ The courts have at their disposal a rich history of negligence jurisprudence—both on and off the golf course²⁷⁴—to enable them to do this effectively.²⁷⁵ Furthermore, if determining what is reasonable is difficult on a case-by-case basis, then merely making the standard more difficult for plaintiffs to satisfy—and more difficult for courts and juries to apply²⁷⁶—fails to solve this problem because a determination of what is reckless still requires a determination of what is reasonable.²⁷⁷

The sixth rationale—that injury is inherent in sport and therefore all athletes assume the risk of negligence²⁷⁸—is unpersuasive in the genteel game of golf. Although the occasional golf injury might be unavoidable, “golf is simply not the type of game in which participants are inherently . . . or customarily struck by the ball.”²⁷⁹ If golf was such a game, it would indeed be quite strange that so much business occurs on the golf course.²⁸⁰

272. See *infra* Part II.B.1.i for an analysis of how the Rules of Golf—which are readily accessible and anchored in common sense—provide courts and golfers with a clearly defined standard of care.

273. See *supra* Part II.C.1. for a discussion of the point that the standard of ordinary care is a safeguard to ensure a sensible result in golf-related litigation.

274. Erica K. Rosenthal, Note, *Inside the Lines: Basing Negligence Liability in Sports For Safety-Based Rule Violations on the Level of Play*, 72 *Fordham L. Rev.* 2631, 2634 (2004) (noting that the negligence standard is the most common standard for assessing liability in modern tort law).

275. See *supra* Part II.A.1 for a discussion of a century of golf jurisprudence under the negligence standard. See *infra* Part III.B.2. for a further discussion of the argument that the negligence standard is a flexible and commonsense approach that courts and juries can apply effectively.

276. See *supra* notes 281-87, 357 for a discussion of difficulties surrounding the recklessness standard.

277. See *supra* notes 122-24 and accompanying text for a discussion of the point that a determination of what is reckless depends on a determination of what is reasonable.

278. See *supra* note 131 and accompanying text for a discussion of the argument that injury is inherent in all sporting activity and therefore participants should be shielded from liability for negligent injuries.

279. *Zurla v. Hydel*, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997).

280. See, e.g., Will Buckley, *Mega business finds the rough when forging links with Scotland: Playing golf and making money both come easy to New York's Mr. Popular*, *GUARDIAN.CO.UK* (Nov. 11, 2007), available at <http://www.guardian.co.uk/sport/2007/nov/11/golf.news>. Donald Trump notes that he has executed many business deals on the golf course, partly because he thinks he can learn a lot about a person by playing golf with him. *Id.* Interestingly, perhaps some of the laws from this country's highest court were contemplated on the golf course. See generally, Ross E. Davies, *The Ancient and Judicial Game: James Wilson, John Marshall Harlan, and the Beginnings of Golf at the Supreme Court*, 35 *J. SUP. CT. HIST.* (forthcoming 2010) (providing a history of golf and the Supreme Court).

2. Other problems with the Recklessness Standard

There are at least three other reasons why the recklessness standard should be kept off the course. First, recklessness is a nebulous standard.²⁸¹ Different courts use different formulas for defining recklessness, leading to further confusion.²⁸² The result is that the recklessness jurisprudence is a mess.²⁸³ In golf, the contours of recklessness are amorphous.²⁸⁴ An absence of clarity makes it difficult for courts to determine whether to dismiss a case or allow it to proceed to a jury.²⁸⁵ This difficulty has surfaced in the case law. The justices in *Schick*—able jurists, indeed—could not reach a unanimous decision on whether the case should have been dismissed or remanded to the jury.²⁸⁶ The troubled state of the recklessness jurisprudence leaves golfers and courts to guess what constitutes actionable conduct—the very problem that the recklessness courts sought to remedy.²⁸⁷

A second—and even more troubling—problem is that the recklessness standard seems to forget that the primary purpose of tort law is compensation, not punishment.²⁸⁸ The recklessness standard allows

281. See generally Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH U. L. REV. 111 (2008). Rapp notes that “recklessness has remained one of the murkiest standards in tort. It has rarely been the subject of academic analysis. In the courts, the definition of recklessness has remained elusive.” *Id.* at 114-15. Rapp also considers several cases dealing with errant golf shots to show the difficulties courts have with determining whether certain conduct constitutes recklessness. *Id.* at 145-46. Rapp suggests that because the Third Restatement—unlike the First and Second Restatements—considers risk in relation to the cost of avoidance, courts may be more likely to find conduct reckless on the golf course in the future. *Id.* However, he notes that this is one of the more controversial provisions in the Third Restatement, and it is unclear whether courts will accept this analysis. *Id.* at 144.

282. Burnstein, *supra* note 224, at 1013; Rapp, *supra* note 281, at 135 (noting that the inconsistent approaches at defining recklessness have created confusion and unpredictability).

283. See *supra* note 281 for a discussion of the mess surrounding recklessness.

284. See *supra* notes 223-30 and accompanying text for the ambiguity surrounding whether a failure to warn constitutes recklessness.

285. See *supra* notes 223-30 and accompanying text for the ambiguity surrounding failure to warn cases under the recklessness standard. Justice Kennard pointed out the difficulty in determining what conduct constitutes recklessness in her dissent in *Shin v. Ahn*, 165 P.3d 581, 593 (Cal. 2007) (Kennard, J., dissenting) (noting that “because the question of what is ‘inherent’ in a sport is amorphous and fact-intensive, it is impossible for trial courts ‘to discern, at an early stage in the proceedings, which risks are inherent in a given sport’”). See *supra* notes 183-85 and accompanying text for a discussion of Justice Kennard’s dissent.

286. *Schick v. Ferolito*, 767 A.2d 962 (N.J. 2001).

287. *Id.* at 965 (N.J. 2001) (arguing for the recklessness standard because “a legal duty of care, based on the standard of what, objectively, an average reasonable person would do under the circumstances is illusory, and is not susceptible to sound and consistent application on a case-by-case basis”).

288. As Prosser & Keaton note:
[While the purpose of the criminal law is] to protect and vindicate the interests of the public as a whole, by punishing . . . the offender

. . . .

plaintiffs to recover only in cases in which punitive—and not merely compensatory—damages may be awarded.²⁸⁹ This all-or-nothing approach implies that plaintiffs should be compensated only when a defendant's conduct was such an extreme departure from social norms that it is worthy of punishment.²⁹⁰ This approach misses the point of tort law and is therefore bad policy.²⁹¹

A third—and equally troubling—problem with the recklessness standard is that it shifts costs from negligent actors to innocent victims.²⁹² This policy decision—which expresses a preference to leave severely injured plaintiffs uncompensated rather than to ask participants to act reasonably—deserves serious reconsideration. One goal of tort law, known as the “insurance rationale,” is to spread risk throughout society so that costs are not strictly borne by innocent

The civil action in tort, on the other hand, is commenced and maintained by the injured person, and its primary purpose is to compensate the damage suffered, at the expense of the wrongdoer. WILLIAM L. PROSSER ET AL., *supra* note 42, § 2, at 7 (citing C.S. KENNY, *OUTLINES OF CRIMINAL LAW* (15th. ed. 1936)). Rapp, *supra* note 281, at 179 (“Tort law is not about punishment. Tort law is about assigning financial responsibility for injuries”).

Although punishment may be one purpose of tort law, it is clear that it is a peripheral purpose compared to compensation. See RESTATEMENT (SECOND) OF TORTS 901, which notes the purposes of the law of torts: “(a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties to deter retaliation or violent and unlawful self-help.”

289. See WILLIAM L. PROSSER ET AL., *supra* note 42, § 34, at 213 (noting that reckless conduct may justify an award of punitive damages); see also *Schick*, 767 A.2d at 975 (arguing that summary judgment should have been awarded for the defendant because the court's disposition “exposes this and similarly-situated defendants to the possibility of punitive damages”).

290. See WILLIAM L. PROSSER ET AL., *supra* note 42, § 2, at 9 (noting punitive damages “are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example”).

291. Concededly, an argument of this sort could potentially be made about any liability scheme in which negligence does not provide a cause of action. But denying compensation for negligent harm is appropriate only when social policy trades off compensation for some more important goal. See Ray Yasser, *Perspective: In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable?*, 5 SETON HALL J. SPORTS L. 253, 270 (1995) (“In a few limited areas, actors are insulated from liability for ordinary negligence. These exemptions . . . are rooted in policy.”) An example is defamation law, where reckless disregard to the truth or intentional falsity is required to sustain a cause of action. *Id.* at 270-71. This policy decision is grounded in the fact that “we are a people deeply committed to free speech and a wide-open, robust discussion of issues of public concern. In order to give speech the breathing room it needs to thrive, negligent speakers are insulated from liability.” *Id.* Unlike free speech—which goes to the heart of the Constitution—there is no equivalent justification for providing “breathing room” for negligent golf. *Cf. id.* at 271-72 (arguing that sports, unlike free speech, do not require “breathing room” so as to shield negligent actors from liability).

292. See Recent Case, *supra* note 249, at 1259 (“[I]n protecting sports-related injurers, [the recklessness standard] expos[es] sport injury victims to the risk of bearing the full costs of harms inflicted on them by nonreckless fellow participants”).

plaintiffs.²⁹³ It makes little sense to saddle innocent plaintiffs with the costs of severe injuries if they can be paid for by the negligent actor or the negligent actor's insurance.²⁹⁴

Because the recklessness standard is not only based on rationales that fail when applied to golf, but is also plagued with a host of other deficiencies, an alternative approach is necessary. Fortunately, the negligence standard provides the solution.

B. *The Negligence Standard is the Appropriate Approach*

The negligence standard is the appropriate approach because it conforms to the well-established Rules of Golf.²⁹⁵ As a result, the negligence standard provides golfers and courts with a clearly defined standard of care,²⁹⁶ is in keeping with the spirit of the game,²⁹⁷ is consistent with golfers' reasonable expectations,²⁹⁸ and is consistent with the Restatement (Second) of Torts.²⁹⁹ Moreover, this standard merely

293. One commentator noted:

[T]he ability of defendants to spread the costs of plaintiffs' accidents has come to be regarded as one of the great benefits of the tort system, and indeed one of the leading reasons for imposing liability. This is what I call the 'insurance rationale' for tort liability—the idea that some defendants ought to be assessed with liability, in part because of their ability to insure and spread the loss.

MARK C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM 1 (1995).

294. Generally, liability insurance contracts include express provisions that either require that an injury be "accidental" or preclude coverage for intended results. ROBERT W. KEATON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 5.4(a), 498 (1988). "The term 'accidental' is broader than the term 'negligence' and thus includes negligence." *Safeco Ins. Co v. Robert S.*, 28 P.3d 889, 894 (Cal. 2001) (internal citations omitted). Liability insurance generally also provides coverage for reckless conduct so long as the insurance contract does not include an exclusionary provision. *Cf. id.* at 893-94 (finding that the insurer would need to include an exclusionary provision in the insurance contract to exonerate itself from coverage of gross negligence). One issue that the courts are split on is whether—in the absence of an exclusionary provision—liability insurance does or should provide coverage for punitive damages that the insured is ordered to pay. *See KEATON ET AL.*, INSURANCE LAW § 5.3(g), at 494-97. Some jurisdictions have created a judicially imposed public policy exception that liability insurance does not cover punitive damages. *Id.* at 495. However, in many of these jurisdictions, the exception only applies when punitive damages are awarded for intentional—and not merely reckless—conduct. *Id.*

295. *See supra* Part II.C.1 for an analysis of how the negligence standard conforms to the Rules of Golf.

296. *See infra* Part III.B.1.i for an analysis of how the negligence standard, because it conforms to the Rules of Golf, provides courts and golfers with a clearly defined standard of care.

297. *See infra* Part III.B.1.ii for an analysis of how the negligence standard, because it conforms to the Rules of Golf, is consistent with the long-standing traditions of golf and the spirit of the game.

298. *See infra* Part III.B.1.iii for an analysis of how the negligence standard, because it conforms to the Rules of Golf, is consistent with golfers' reasonable expectations.

299. *See infra* Part III.B.1.iv for an analysis of how the negligence standard, because it conforms to the Rules of Golf, is consistent with the Restatement (Second) of Torts.

asks golfers to act reasonably—a flexible and commonsense approach that courts and juries have great experience in applying.³⁰⁰ This Section makes each of these arguments in turn.

1. *The Negligence Standard Conforms to the Well-Established Rules of Golf*

i. The Negligence Standard Provides Courts and Golfers with a Clearly Defined Standard of Care

Because it conforms to the four rules of golf safety,³⁰¹ the negligence standard provides courts and golfers with a clearly defined basis for determining the relevant standard of care. This approach has great appeal because the Rules are widely disseminated and anchored in common sense.³⁰²

The USGA goes out of its way to make the Rules easily accessible for golfers of all skill levels. The rules of safety are placed prominently in the Rule Book, on the first page.³⁰³ Every member of the USGA is provided with a copy of the Rule Book upon receipt of yearly dues.³⁰⁴ Dues are only ten dollars, and anyone is welcome to join.³⁰⁵ Experienced golfers tend to know the Rule; as the Seventh Circuit remarked, “The official ‘Rules of Golf’ by the USGA (and the Royal and Ancient Golf Club of St. Andrews, Scotland) is a staple in the bag of all true golfers.”³⁰⁶

But it is not even necessary to be a true golfer or a member of the USGA (or even a golfer at all) to access the Rules—they can be accessed for free online.³⁰⁷ Moreover, it is common for private golf clubs to have copies available at no cost, while public courses generally have them available for sale.³⁰⁸ In addition, golfers can actually call the USGA—even during a round of golf—to resolve Rules disputes over

300. See *infra* Part III.B.2 for a discussion of how the negligence standard merely asks golfers to act reasonably—a flexible and commonsense approach that can be followed by golfers and accurately assessed by courts and juries.

301. See *supra* Part II.C.1 for an analysis of how the negligence standard conforms to the rules of golf safety.

302. Furthermore, the Rules are made by those in the best position to understand the game and define appropriate conduct. See Rosenthal, *supra* note 274, at 2673.

303. U.S. GOLF ASS’N, *supra* note 295, at 1.

304. Interview with Joseph W. Anthony, Former General Counsel of the USGA (2009-10) (Feb. 16, 2011).

305. *Id.*

306. *Olinger v. U.S. Golf Ass’n*, 205 F.3d 1001, 1002 (7th Cir. 2000). The Former General Counsel of the USGA also noted that “every golfer I know who is serious about the game has a copy of the rule book in his bag.” Interview with Joseph W. Anthony, *supra* note 304.

307. U.S. GOLF ASS’N, <http://www.usga.org/Rules> (last visited Jan 24, 2011).

308. Interview with Joseph W. Anthony, *supra* note 304.

the phone.³⁰⁹ Fortunately, the rules of golf safety are so firmly anchored in common sense that they need no explanation.³¹⁰

Because one function of tort law is to deter socially undesirable behavior,³¹¹ the law should be both accessible and sensible so that members of society are on notice as to what is reasonably expected of them.³¹² The negligence standard, because it conforms to the Rules of Golf, satisfies this function.

ii. The Negligence Standard is Consistent with the Long-Standing Traditions of Golf and the Spirit of the Game

As the *Zurla* court noted, golf is characterized by “long-standing traditions in which courtesy between the players prevails.”³¹³ Indeed, “[e]tiquette is an essential and inextricable part of the game, which has come to define golf’s values worldwide.”³¹⁴ Marked by courtesy and sportsmanship, golf etiquette rises to the point where golfers call penalties on themselves.³¹⁵ A standard of reasonable care, which conforms to the Rules of Golf, is thus commensurate with the long-standing traditions of golf and the spirit of the game.³¹⁶

309. *Id.*

310. See *Zurla v. Hydel*, 681 N.E.2d 148, 152 (Ill. App. Ct. 1997) (“It is a matter of common knowledge that players are expected not to drive their balls without giving warning when within hitting distance of persons in the field of play, and that countless persons traverse golf courses the world over in reliance on that very general expectation”). Indeed, the Rules of Safety basically point out the obvious point that it is simply unsafe to hit when someone might be hit by a shot. See *supra* note 205 for a discussion of the Four Rules of Golf Safety.

311. See *supra* note 282 and accompanying text for a discussion of this function of tort law; see also PROSSER, *supra* note 42, § 1, at 4 (noting that “the law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole”).

312. Indeed, determining rights is one of the purposes of tort law. See *supra* note 313 and accompanying text for a discussion of the purposes of tort law.

313. *Zurla*, 681 N.E.2d at 152.

314. THE R&A, <http://www.randa.org/en/Rules-and-Amateur-Status/Etiquette.aspx> (last visited Feb. 21, 2011).

315. PRESSFIELD, *supra* note 1, at 121-22; see also Lazaroff, *supra* note 246, at 331 (noting that golfers call penalties on themselves even when the penalties would have otherwise gone undetected).

316. As the former General Counsel of the USGA, Joseph W. Anthony, pointed out “when you look at the spirit of the game, the three overriding principles are honesty, integrity, and courtesy. To substitute recklessness—in the place of negligence—as the standard [for golf course injuries] is inconsistent with how the game has been played for all these years.” Interview with Joseph W. Anthony, *supra* note 304 (referring to THE R&A, SPIRIT OF THE GAME, available at <http://www.randa.org/en/Playing-Golf/Spirit-of-the-Game.aspx>).

iii. The Negligence Standard is Consistent with Golfers' Reasonable Expectations

Golfers expect—and rely on—other golfers to abstain from rule violations.³¹⁷ As the Rules note, golf “relies on the integrity of the individual to show consideration for other players and to abide by the Rules.”³¹⁸ Only “if [the rules of golf etiquette] are followed, [will] all players gain maximum enjoyment from the game.”³¹⁹ In particular, golfers expect the customary warning of “fore” when they become endangered by an errant golf ball.³²⁰ The fact that this warning “seems to be recognized by golfers the world over,”³²¹ is further evidence of this.³²²

Golfers' expectations are likewise supported by the disciplinary provisions of the Rules.³²³ The Rules provide that if a player consistently disregards a rule of golf etiquette, it is recommended that disciplinary action be taken.³²⁴ One suggested remedy is to prohibit the offending golfer from playing, which the Rules note is “justifiable in terms of protecting the interests of *the majority of golfers* who wish to play in accordance with” the Rules.³²⁵ The negligence standard, because it conforms to the Rules of Golf, is thus consistent with golfers' reasonable expectations.

iv. The Negligence Standard is Consistent with the Restatement (Second) of Torts

The Second Restatement of Torts supports the negligence standard. The Second Restatement notes that “participating in . . . a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are defined to protect the participants and not merely to secure the better playing of the game as a test of skill.”³²⁶ Under the Second Restatement view, therefore, participants do not consent to violations of safety rules. Because the neg-

317. *Zurla*, 681 N.E.2d at 152.

318. U.S. GOLF ASS'N, *supra* note 8, at 1; THE R&A, *supra* note 194 at 10.

319. U.S. GOLF ASS'N, *supra* note 8, at 1; THE R&A, *supra* note 194, at 10.

320. *Zurla*, 681 N.E.2d at 152; Interview with Joseph W. Anthony, *supra* note 304.

321. *Alexander v. Wrenn*, 164 S.E. 715, 717 (Va. 1932) (noting that the duty to give “fore” “seems to be recognized by golfers the world over, and [golfers] are so accustomed to its everyday application that the word ‘fore’ is usually associated with the game and is recognized by them as a warning cry”).

322. *Id.*

323. U.S. GOLF ASS'N, *supra* note 195, at 4 (providing disciplinary recommendations for golfers who consistently fail to follow golf etiquette).

324. *Id.*

325. *Id.* (emphasis added).

326. RESTATEMENT (SECOND) OF TORTS (1965) 86, § 50, Cmt. b.

ligence standard conforms to the rules of golf safety, the negligence standard is consistent with the Restatement (Second) of Torts.³²⁷

2. *The Negligence Standard Merely Asks Golfers to Act Reasonably*

Ultimately, the negligence standard is the appropriate approach because it merely asks golfers to act reasonably.³²⁸ Reasonableness is what is required of individuals in nearly all aspects of life;³²⁹ a tee time should not be a license to act unreasonably. Likewise, courts and juries are well-suited for assessing reasonableness—negligence is the most common standard for assessing liability in modern tort law,³³⁰ and it is a standard firmly rooted in common sense.³³¹ With the Rules of Golf as a valuable tool for determining whether the defendant acted reasonably, the final decision hinges on negligence law³³²—a safeguard to ensure a sensible result.³³³

C. *Refuting Potential Objections to the Negligence Standard*

1. *The Negligence Standard is Not Too Harsh on Defendants or Bad Golfers*

One potential objection to the negligence standard is that it is too harsh on defendants and bad golfers.³³⁴ Negligence, however, is not strict liability; the mere occurrence of an injury will not expose golfers to liability.³³⁵ Nor will the mere occurrence of a poor shot lend itself

327. The Third Restatement is silent on this issue.

328. See *supra* notes 17, 46, 233 and accompanying text for a discussion of the point that the ultimate determination under the negligence standard is whether the golfer acted reasonably.

329. Yasser, *Perspective: In the Heat of Competition: Tort Liability of One Participant to Another: Why Can't Participants be Required to be Reasonable?*, *supra* note 291, at 271.

330. See Note, *supra* note 293, at 2634.

331. See, e.g., Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Appeal For Jury Adjudication*, 88 MICH. L. REV. 2348, 2389 (noting that a negligence standard appeals to a jury's own commonsense judgment). Wells also argues that jurors' own notions about commonsense concepts such as responsibility trump legal rules when assessing liability. *Id.* If this is true, then certainly a standard such as negligence, which puts these issues right on the table for the jury to assess, is better than recklessness, which badly obfuscates these issues.

332. See *supra* notes 206-09 and accompanying text for a discussion of this point.

333. Cf. Lazaroff, *supra* note 246, at 323 (noting that the negligence standard allows jurors to consider all of the circumstances surrounding an injury to determine "whether a reasonably prudent golfer should have foreseen the consequences and acted differently").

334. Although research has not discovered an explicit articulation of this argument, these concerns seem to underlie the rationales for the recklessness standard—a standard that makes it more difficult to impose liability on golfers—because poor golfers are more likely to hit wayward shots than good golfers. See *supra* Part II.B.1 for a discussion of the rationales for the recklessness standard.

335. Indeed, strict liability arguments have been flatly rejected by the courts and recognized as "contrary to all [existing] authority." *Carrigan v. Roussell*, 426 A.2d 517, 521 (N.J. Super. Ct. App. Div. 1981); Lazaroff, *supra* note 246, at 332 ("[T]he fact remains that strict liability is not

to the doctrine of *res ipsa loquitor*.³³⁶ Indeed, the negligence standard—although it does impose a greater standard of care on golfers than recklessness—will not expose golfers to liability for poor shots so long as they exercise ordinary care.³³⁷ And violations of the rules of golf safety are not negligent per se.³³⁸ Moreover, the defenses of contributory and comparative negligence can be raised if the plaintiff was unreasonable in placing himself in the zone of danger.³³⁹

2. *The Negligence Standard is the Appropriate Approach Even Though Golfers are Sometimes Unable to React to a Warning of “Fore!”*

Another potential objection to the negligence standard is that there should be no duty to yell “fore” because golfers are often unable to react quick enough to avoid injury when a golf ball is mid-flight.”³⁴⁰ The negligence standard, however, is the more appropriate approach for this exact reason: if it is unrealistic to react to a warning of “fore” when a golf ball is mid-flight, then the solution is to encourage golfers to warn before hitting—which the negligence standard does.³⁴¹ Furthermore, any concerns about this issue should be assuaged by the

what is being proposed [by the negligence standard]. The mere occurrence of an injury would not, in itself, create tort liability”).

336. *Res ipsa loquitor*, Latin for “the thing speaks for itself,” is an evidentiary principle that raises a presumption of negligence upon the happening of an event that does not usually occur in the absence of negligence. WILLIAM L. PROSSER ET AL., *supra* note 42, § 39, at 244-45. For cases that have rejected the doctrine in golf, see *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 319 (1970) (refusing to permit an application of *res ipsa loquitor* merely from the fact that defendant’s shot hooked sharply); *Baker v. Thibodeaux*, 470 So. 2d 245, 250 (La. Ct. App. 1985) (rejecting plaintiff’s attempt to prove negligence by utilizing doctrine of *res ipsa loquitor*); *Hampson v. Simon*, 104 N.E.2d 112, 113 (Ill. App. Ct. 1952) (“No presumption of negligence arises from the mere fact that a player on a golf course is hit by a ball driven by another player”).

337. See *supra* note 34-39 and accompanying text for a discussion of the point that the negligence standard does not expect perfect shots; it merely expects reasonable care.

338. Other commentators have suggested a negligence per se standard for violations of safety rules in recreational sports. See Rosenthal, *supra* note 274 at 2672.

339. Lazaroff, *supra* note 246, at 333.

340. Research on this topic has not indicated that this argument has been made yet. This Comment merely anticipates that this argument could be made. For a case where a golfer did not have time to react to a warning of “fore,” see, e.g., *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990). This paper offers no empirical findings on the effectiveness of the warning of “fore”—instances where the warning was effective do not proceed to litigation. But common experience suggests that this warning—a custom that has existed for centuries—is often effective.

341. See *supra* Part II.A.1 for a discussion of the point that negligence standard imposes a duty on golfers to warn all those within the foreseeable zone of danger before hitting. See *supra* Part II.C.2. for a discussion of the point that the recklessness standard seems to impose liability only when the defendant fails to give warning before hitting when there are other individuals within the intended line of flight.

negligence standard's exception that there is no duty to warn if such a warning would be futile.³⁴²

3. *The Negligence Standard is the Appropriate Approach Even Though Some Cases Would Have Resulted in the Same Disposition Under Either Standard*

A third potential objection to the negligence standard is that there is nothing wrong with the recklessness standard because many cases result in the same disposition under either standard.³⁴³ Indeed, *Thompson*,³⁴⁴ *Hathaway*,³⁴⁵ and *Anand*³⁴⁶ would have all been disposed of on summary judgment under either standard because the plaintiffs were not within the foreseeable zone of danger.³⁴⁷ And *Schick*³⁴⁸ and *Shin*³⁴⁹ were cases that would have gone to the jury under either standard.³⁵⁰ Although this argument is meritorious, there are at least three responses as to why it fails.³⁵¹

342. See *supra* Part II.A.2.ii for a discussion of the exception to give warning if a warning would be futile under the negligence standard.

343. Indeed, many recklessness cases within the scope of this paper would have resulted in summary judgment under either standard, including: *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990), *Hathaway v. Tascosa Country Club, Inc.*, 846 S.W.2d 614 (Tex. Ct. App. 1993), and *Anand v. Kapoor*, 877 N.Y.S.2d 425 (App. Div. 2009), *aff'd*, 942 N.E.2d 295 (N.Y. 2010). See *infra* Appendix, figures 1 and 5 for diagrams of *Thompson* and *Anand*, respectively. See *supra* notes 148-52 and accompanying text for a discussion of the facts of *Hathaway*. Similarly, *Schick v. Ferolito*, 767 A.2d 969, 970 (N.J. 2001) and *Shin v. Ahn*, 165 P. 3d 581 (Cal. 2007) went to the jury under the recklessness standard and, therefore, would have also gone to the jury under the negligence standard. See *supra* notes 155-59 and accompanying text for the facts of *Schick*. See *supra* notes 179-82 and accompanying text for a discussion of the facts of *Shin*. See *infra* Appendix, figures 3 and 4 for diagrams of *Schick* and *Shin*, respectively.

344. *Thompson*, 559 N.E.2d 705 (Ohio 1990).

345. *Hathaway*, 846 S.W.2d 614 (Tex. Ct. App. 1993).

346. *Anand*, 877 N.Y.S.2d 425 (App. Div. 2009), *aff'd*, 942 N.E.2d 295 (N.Y. 2010).

347. See *supra* note 343 and accompanying text for a discussion of the point that all three of these cases would have been disposed of on summary judgment under both the recklessness and negligence standard. Furthermore, the duty to warn after the ball became errant was either satisfied as in the case of *Hathaway* or did not exist because a warning would be futile, as in the cases of *Thompson* and *Anand*. See *supra* note 152 and accompanying text for a discussion of the point that the duty to warn after the ball was hit was satisfied in *Hathaway*. See *supra* note 147 and accompanying text for a discussion of the point that a warning would have been futile in *Thompson*. See *supra* note 148 and accompanying text for a discussion of the point that a warning would have been futile under in *Anand*.

348. *Schick*, 767 A.2d at 969.

349. *Shin*, 165 P.3d at 581.

350. Because these cases went to the jury to determine recklessness, it logically follows that they would have been sent to the jury under the negligence standard by virtue of the fact that recklessness is a more difficult standard for plaintiffs to satisfy.

351. A fourth argument is that a standard which reaches the right result, but based on the wrong reasoning is not a good rule—especially when it is a standard that encourages unreasonable behavior. See *supra* notes 262-65 for a discussion of the argument that the recklessness standard encourages unreasonable behavior.

The first is that there are borderline cases where the result is not so clear—cases that could go to the jury under the negligence standard, but not under the recklessness standard.³⁵² These cases generally involve a failure to warn when the plaintiff is fifty to 250 yards from the defendant and within the zone of danger.³⁵³ Based on the *Thompson* court's guidance that a golfer's failure to warn even when he knows another individual is in the intended line of flight might not amount to recklessness,³⁵⁴ it is less likely that recklessness jurisdictions will allow cases of this sort to go to the jury despite this conduct being a clear violation of the Rules.³⁵⁵

The second response is that even in cases that could reach the jury under either standard, the negligence standard gives the jury a framework with clearly defined rules and is capable of being applied consistently and sensibly.³⁵⁶ In contrast, the nebulous nature of the recklessness standard can lead to inconsistent jury determinations

352. See, e.g., *Dilger v. Moyles*, 54 Cal. App. 4th 1452, 1456 (Cal. Ct. App. 1997) (noting that defendant's failure to warn was possibly negligent, but not reckless).

353. See, e.g., *McWilliams v. Parham*, 160 S.E.2d 692 (N.C. 1968), *infra* Appendix, Figure 1, (holding that whether defendant breached his duty to use ordinary care when he injured a plaintiff approximately 180 yards ahead, and approximately twenty yard from the intended line of flight, was a jury question); *Carrigan v. Roussell*, 426 A.2d 517 (N.J. App. Ct. 1981) (holding that plaintiff had duty to warn under the negligence standard when the defendant's ball hooked towards the plaintiff, who was 200 to 220 yards away and forty to fifty yards from the intended line of flight). *Cf.* *Gray v. Giroux*, 730 N.E.2d 338 (Mass. App. Ct. 2000) (holding that plaintiff had no cause of action against the defendant under the recklessness standard for a failure to warn when the plaintiff was thirty-five to fifty yards away from the defendant and not within the intended path of the shot).

354. *Thompson v. McNeill*, 559 N.E.2d 705, 707 (Ohio 1990).

355. See *supra* text accompanying 205 for a discussion of the four rules of golf safety. *But see* *Maxwell v. Rowe*, No. 97CA0075, 1998 Ohio App. LEXIS 4396 (Ohio Ct. App. Sept. 23, 1998) (holding that defendant's failure to warn both before and after hitting could have constituted recklessness if he did not look to see whether plaintiff was within the intended line of flight, or alternatively, if he knew that the plaintiff was within the intended line of flight and proceeded to hit anyway). However, the dissent in *Maxwell* argued that "[t]aking a golf shot without looking for others on ahead on the golf course may be negligent, but such action is not reckless." *Id.* at *9 (Cacioppo, J., dissenting). The dissent's argument lends support to the fact that cases of this sort at less likely to go to the jury under the recklessness standard.

356. See *supra* Part II.C.1 for an analysis of the point that golfer's duties under the negligence standard are clearly defined because they are based on the rules of golf safety. Staunch advocates of the recklessness standard will still argue only the most egregious rule violations should give rise to liability. Fortunately, the common sense of jurors should ensure that plaintiffs are not rewarded for minor infractions. See *Burnstein, supra* note 224, at 1021 ("a natural check exists in the sensibilities of jurors. Jurors are less likely to allow recovery for a plaintiff unless they consider the conduct of a defendant severe and a violation of the rule or a blatant disregard for the ordinary care of co-participants").

under nearly identical facts.³⁵⁷ Horizontal inconsistencies across similarly situated plaintiffs offend traditional notions of fairness.³⁵⁸

The third response is that the negligence standard has the potential to allow courts to establish a liability scheme for defining the contours of conduct that is negligent as a matter of law.³⁵⁹ Much like the fifty-degree rule for awarding summary judgment for defendants, negligence courts can demarcate an area in which injury is so highly foreseeable that the defendant was negligent as a matter of law (or rebuttably presumed negligent).³⁶⁰ Although this might be an unusual rule, if implemented just once, it could serve judicial economy and further clarify the law.³⁶¹

D. A Few Additional Suggestions for Future Courts in Applying the Negligence Standard

Although this Comment firmly urges courts to reject the recklessness standard in favor of negligence, it would be unrealistic to suggest that the negligence jurisprudence could not be improved. This Section notes four areas where improvement may be possible and offers some suggestions for how negligence courts should proceed.

357. Matthew G. Cole, Note and Comment, *No Blood No Foul: The Standard of Care in Texas Owed by Participants to One Another in Athletic Contests*, 59 BAYLOR L. REV. 435, 473 (“Recklessness is an ambiguous standard that is impossible to apply accurately and consistently”). See generally Rapp, *The Wreckage of Recklessness*, *supra* note 281 (arguing that the troubled state of the recklessness standard creates inconsistencies).

358. Cf. John L. Diamond, *Eliminating the “Defect” in Design Strict Products Liability Theory*, 34 HASTINGS L.J. 529, 540 (1983) (noting that arbitrary compensation schemes in the context of products liability offend traditional notions of fairness).

359. The fact that recklessness is a more difficult standard for plaintiffs to satisfy makes establishing recklessness as a matter of law more impractical than a scheme that establishes negligence as a matter of law.

360. Although courts would need to consider the totality of the circumstances in establishing the whether foreseeability of injury is so high that there is no reason for the case to proceed to a jury, common sense dictates that there are cases in which the defendant clearly breached a duty of care. Perhaps ten to twenty degrees from the intended line of flight when the plaintiff and defendant are at a close range—say, within twenty yards—could establish negligence as a matter of law. As the distance between the plaintiff and the defendant increases, the deviation from the intended line of flight required to establish negligence as a matter of law would be negatively correlated until the foreseeability of injury is sufficiently low so as to require the question of breach to be reserved for a jury.

361. One issue with establishing negligence as a matter of law is that these sorts of cases may never proceed to trial—liability is clear and parties are likely to settle. Still, even if a defendant is found to be negligent as a matter of law just once, such a ruling would establish a precedent and thereby enhance the state of the law. Indeed, defining rights is one of the functions of tort law. See RESTATEMENT (SECOND) OF TORTS 901, *supra* note 288, at 900. Furthermore, just one precedent would enable future parties to reach more efficient outcomes in settlement negotiations. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that greater information allows parties to reach more efficient outcomes in bargaining).

First, courts that make a distinction between plaintiffs in the same group as the defendant and those in different groups³⁶² should lessen the weight given to this consideration—or forget about it entirely.³⁶³ Instead, the focus should remain on the traditional analysis—that is, whether it was foreseeable that the plaintiff might be injured.³⁶⁴ Whether a golfer is a member of a different foursome is merely one factor that should be considered within the totality of the circumstances to determine whether injury was foreseeable.³⁶⁵

Second, courts should be cautious not to restrict the zone of danger to the intended line of flight.³⁶⁶ As experience shows, it is entirely foreseeable for a golf ball hit by even the most skilled golfer to stray significantly from the line of flight.³⁶⁷ Similarly, courts should not significantly reduce the foreseeable zone of danger merely because the defendant is a highly skilled golfer or because the defendant has not hit an errant shot for some time.³⁶⁸ While errant shots may be more likely to originate from the club head of a poor golfer than a skilled one, errant shots are never entirely unforeseeable—and scores of accurate shots hit in succession do not guarantee that a golfer's next drive will split the middle of the fairway.

Third, courts should be careful not to rely too heavily on prior law at the expense of discounting the specific facts of the case.³⁶⁹ Because foreseeability is the most important factor in determining whether a duty exists,³⁷⁰ prior law should be used as a compliment to the foreseeability analysis, not a substitute.

362. See *supra* notes 89-91 for a discussion of the distinction that some negligence courts make between the duty owed to golfer's in one's own group and golfer's on other holes.

363. See *supra* note 91 for a discussion of the Supreme Court of California's argument that this distinction is irrelevant and arbitrary.

364. *Boozer v. Arizona Country Club*, 434 P.2d 630, 633 (Ariz. 1967) ("Negligence is based on foreseeability").

365. See *supra* Part II.A.1.ii.a. for a discussion of how courts determine the foreseeable zone of danger by a consideration of the totality of the circumstances in the case.

366. See *supra* note 61 and accompanying text for a discussion of the minority rule of equating the zone of danger to the intended line of flight.

367. See *supra* notes 32-36 and accompanying text for a discussion of the point that bad shots are inevitable even by the most highly skilled golfers; see also *Nussbaum*, 27 N.Y.2d at 319 ("Golfers are notorious in the tedious preparation they give to a shot. They know that concentration is the key to the game. Yet even the best professional golfers cannot avoid an occasional 'hook' or 'slice.'").

368. See *supra* notes 61-65 and accompanying text for *Ludwikoski v. Kurotsu*, 875 F. Supp. 727 (D. Kan. 1995), which applied this type of analysis.

369. See *supra* Part II.A.ii.b for a discussion of cases citing prior to law to determine whether the plaintiff was within the foreseeable zone of danger.

370. *Boozer v. Arizona Country Club*, 434 P.2d 630, 633 (Ariz. 1967) ("Negligence is based on foreseeability."); see also *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 342

Courts should, however, use the fifty-degree line as a tool of exclusion;³⁷¹ cases in which the plaintiff was not within fifty degrees from the intended line of flight should result in awarding summary judgment to the defendant.³⁷² In extreme cases, such as when the defendant has a severe propensity to shank,³⁷³ courts can be more flexible. While not dispositive in all cases, the fifty-degree line is certainly a useful tool and serves judicial economy.

Fourth, courts should reconsider holding minor golfers to the adult standard of care under the adult-activities rule.³⁷⁴ On one hand, it is indeed true that a golf ball is equally as dangerous whether it is hit by an adult or a minor,³⁷⁵ and it is likewise true that holding minors to the adult standard of care will encourage golfers to learn golf etiquette at an early age.³⁷⁶ But on the other hand, holding minors to the adult standard of care might discourage minors from participating in the sport altogether. And unlike driving a car without a license—a dangerous activity that the minor should not be doing in the first place³⁷⁷—our society wants to encourage youths to play golf.³⁷⁸

Moreover, when a minor is behind the wheel of an enclosed motor vehicle, the adult is unable to detect that he is encountering a minor,

(Cal. 1976) (noting that foreseeability of harm is the most important consideration in determining the existence of a duty).

371. See *supra* notes 70 and accompanying text for a discussion of the fifty-degree line. See *infra* Appendix for a visual representation of the fifty degree line.

372. See *supra* Part II.A.ii.b. for a discussion of how prior law—especially the fifty-degree line—can be used to award summary judgment for defendants.

373. One such case was *Cook v. Johnston*, 688 P.2d 215 (Ariz. Ct. App. 1984). See *supra* note 64 and accompanying text for a discussion of the extreme facts of *Cook*.

374. See *supra* notes 83-88 and accompanying text for a discussion of the adult-activities rule.

375. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 632-33 (N.Y. Cnty. Ct. 1968), *aff'd*, 312 N.Y.S.2d 951 (N.Y. App. Term 1970), *aff'd*, 318 N.Y.S.2d 925 (N.Y. App. Div. 1971). Of course, this assumes that the ball is traveling at the same speed regardless of whether it was hit by the adult or the minor.

376. *Cf. Lazaroff*, *supra* note 246, at 331-32 (arguing that a negligence standard “would encourage proper instruction in the rules and etiquette of golf from the inception of a player’s participation in the sport”); Note, *supra* note 274, at 2672-73 (arguing that a negligence per se rule based on safety-based rule violations in recreational sports would “return the focus . . . of recreational league sports to education and fun, without excessive violence”); Ray Yasser, *Perceptive*, *supra* note 261, at 262 (arguing that the negligence standard is the appropriate approach because at all levels of sports, participants need to be “restrained not emboldened”).

377. See, e.g., *Daniels v. Evans*, 224 A.2d 63, 65 (N.H. 1966) (noting that it would be unsound public policy to allow a hold a minor to a lower standard of care than an adult when operating a motor vehicle).

378. See generally THE FIRST TEE, <http://www.thefirsttee.org/Club/Scripts/Home/home.asp> (Last visited March 19, 2011) (“The First Tee Provides young people of all backgrounds an opportunity to develop life-enhancing values such as confidence, perseverance and judgment through golf and character education”).

and therefore cannot take necessary precautions.³⁷⁹ On the golf course, however, the adult can easily detect the minor and proceed accordingly.³⁸⁰ On balance, there might be valid reasons for applying the adult-activities rule to golfing minors, but the weight of authority suggests that they should be held to the standard of care of a reasonable minor of like age, intelligence, and experience.³⁸¹

E. A Few Suggestions for Courts that insist on Applying the Recklessness Standard

Undoubtedly, many courts will continue to insist on applying the recklessness standard in light of the strength of the current trend.³⁸² But the next time a severely injured plaintiff seeks compensation in one of these jurisdictions, their courts should take the opportunity to improve their jurisprudence in at least two ways.

First, recklessness courts should take a closer reading of *Thompson*.³⁸³ The *Thompson* court recognized that golf is a relatively safe sport in which physical contact is rare.³⁸⁴ The court noted the inverse relationship between dangerousness and duty to point out that golfers have a heightened duty to use ordinary care compared to participants in inherently dangerous sports, such as football.³⁸⁵ The logical corollary of these observations is that a lesser deviation from the standard of reasonable care is required to hold a golfer reckless than to hold a football player reckless. This principle should guide future courts when they determine whether to allow plaintiffs to move past the pleading or summary judgment stage under the recklessness standard.

379. RESTATEMENT (THIRD) OF TORTS § 10 cmt. f

380. For example, the adult can move farther away from the minor's intended line of flight or take cover behind a tree. A creative argument (never suggested in the case law) could be made for a bifurcated approach: when the adult can observe the minor (such as when the adult and minor are playing together), the minor should be held to the standard of care of a minor; when the adult cannot observe the minor (such as when the minor is on another hole), the minor should be held to the standard of care of an adult. If this were the only rationale for the standard, perhaps such an approach could work. Moreover, this approach would be problematic because it would require probing into what the adult subjectively knew.

381. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 632-33 (N.Y. Cnty. Ct. 1968), *aff'd*, 312 N.Y.S.2d 951 (N.Y. App. Term 1970), *aff'd*, 318 N.Y.S.2d 925 (N.Y. App. Div. 1971). It could be argued that it is inconsistent to suggest that adults should be held to the adult standard—which makes no account for intelligence or experience—while children should be given a break. However, refusing to hold children to the adult-activities rule would not give children a break: it would restore their standard of care to the standard they are held to in all other aspects of their lives.

382. See *supra* Part II.B.2 for a discussion of the current trend of adopting the recklessness standard to golf.

383. *Thompson v. McNeill*, 559 N.E.2d 705 (Ohio 1990).

384. *Id.* at 708-09.

385. *Id.* at 708.

Second, recklessness courts should provide the Second Restatement's definition of recklessness with the proper burial it deserves.³⁸⁶ The Third Restatement approach, which considers the cost of avoidance in relation to the magnitude of the risk,³⁸⁷ is more in line with overall trends in tort law.³⁸⁸ While not a panacea for an ailing standard,³⁸⁹ if applied, this approach would likely allow more cases to proceed to the jury,³⁹⁰ thus softening the harsh effects of the current recklessness jurisprudence. Such a result could perhaps appease advocates of the negligence standard—if only slightly.

IV. CONCLUSION

Courts should reject the current trend and reaffirm the negligence standard as the appropriate standard for golf. The rationales for the recklessness standard—a standard that has its roots in sports where physical contact is the norm³⁹¹—simply do not hold up when applied to golf.³⁹² Occupying an uncertain penumbra between negligence and intent, recklessness is a nebulous standard incapable of being consistently applied.³⁹³ In stark contrast, the negligence standard largely conforms to the well-established Rules of Golf.³⁹⁴ As a result, the negligence standard provides courts and golfers with a clearly defined standard of care,³⁹⁵ is in keeping with the spirit of the game,³⁹⁶ is con-

386. See *supra* note 281-87 and accompanying text for a discussion of the confusion surrounding the Second Restatement's definition of recklessness.

387. See *supra* note 123 and accompanying text for a discussion of the Third Restatement's definition of recklessness.

388. See RAHDERT, *supra* note 293, at 12 (noting that the trend in tort law has been to move away from a moral perspective towards a pragmatic one); Note, *supra* note 274, at 2633-34 (noting that the trend in tort law has been to move away from a fault-based "writ system" towards one where courts balance the social benefit of an activity with the risk of harm).

389. See, e.g., Rapp, *supra* note 281, at 178 (noting that the authors of the Third Restatement acknowledge the deficiencies with their definition) (citing Restatement (Third) of Torts § 2, cmt. b ("[Defining recklessness requires] acknowledging and balancing several factors")).

390. Because the costs of warning on the golf course are minimal relative to the magnitude of potential injury, it is more likely that, on average, a reasonable juror could find that a golfer was reckless.

391. See *supra* note 235 and accompanying text for a discussion of the fact that the recklessness standard has its roots in contact sports.

392. See *supra* Part III.A.1 for an analysis of the rationales for the recklessness standard in recreational sports and the argument that they do not hold up when applied to the more genteel game of golf.

393. See *supra* Part III.A.2 for a discussion of the nebulous nature of the recklessness standard and the resulting difficulties in its application.

394. See *supra* Part II.C.1 for an analysis of the conformity between the Rules of Golf and the negligence standard.

395. See *infra* Part III.B.1.i for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, provides courts and golfers with a clearly defined standard of care.

sistent with golfers' reasonable expectations,³⁹⁷ and is consistent with the Restatement (Second) of Torts.³⁹⁸ Moreover, this standard merely asks golfers to act reasonably³⁹⁹—a flexible and commonsense approach that courts and juries have great experience in applying—so that severely injured plaintiffs are not forced to bear the costs of preventable injuries caused by negligent conduct.⁴⁰⁰

Concerns about the negligence standard are well-intentioned, but misguided. Specifically, the negligence standard is not too harsh on defendants or bad golfers, and liability will not result merely for poor shots.⁴⁰¹ Undoubtedly, there are a few areas where the negligence jurisprudence can be improved.⁴⁰² Yet the standard is still a much more appropriate approach than recklessness.

Because of the strength of the current trend, many courts are likely to insist on applying the recklessness standard.⁴⁰³ The next time a plaintiff with severe or fatal injuries, like Hiroshi, seeks compensation in one of these jurisdictions, these courts should use the opportunity to refine their jurisprudence⁴⁰⁴ or reject the recklessness standard outright. Only then will the law once again become more aligned with the customs and long-standing traditions of golf—a game defined by “honesty, integrity, and courtesy,”⁴⁰⁵ in which players routinely call penalties on themselves and reasonably expect, and rely on, other players to follow the safety rules of the sport. The current trend is indeed alarming and needs to be seriously reconsidered. It is time for

396. See *infra* Part III.B.1.ii for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, is consistent with the long-standing traditions of golf and the Spirit of The Game.

397. See *infra* Part III.B.1.iv for a discussion of the argument that the negligence standard, because it conforms to the Rules of Golf, is consistent with the Restatement (Second) of Torts.

398. See *supra* Part III.B.2 for an analysis of the argument that the negligence standard is the appropriate approach because it merely asks golfers to act reasonably—a flexible and commonsense standard that courts and juries have great experience in applying.

399. See *supra* notes 292-94 and accompanying text for a discussion of the argument that the negligence standard, unlike the recklessness standard, does not force negligently injured plaintiffs to bear the costs of preventable injuries.

400. See *supra* Part III.C.1 for a discussion of the argument that the negligence standard is not too harsh on defendants or bad golfers.

401. See *supra* Part III.D.1 for the argument that the negligence standard is not too harsh on defendants or bad golfers.

402. See *supra* Part III.D for a discussion of a few areas where the negligence jurisprudence can be improved.

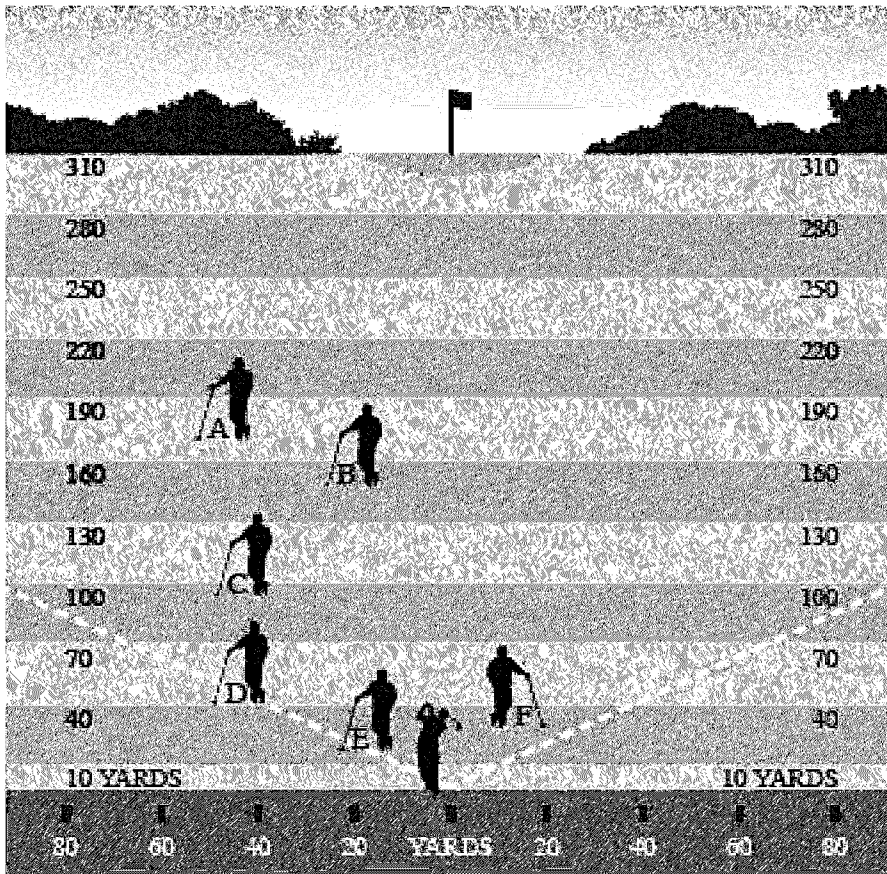
403. See *supra* Part II.B.2 for a discussion of the current trend of applying the recklessness standard to golf.

404. See *supra* part III.E for a discussion of some ways in which the recklessness jurisprudence can be improved.

405. See THE R&A, *supra* notes 199-205 and accompanying text for a discussion of golf etiquette.

courts to reject the recklessness standard and respect the Rules of Golf.

FIGURE 1
SELECTED CASES FROM THE NEGLIGENCE
JURISPRUDENCE



- 50 Degree Line
- A, C Court: Not Negligent as a Matter of Law
- B, F Jury Question
- E Jury: Negligent
- D Jury: Negligent; Court: J.N.O.V.

NEGLIGENCE CASES EXPLAINED

A. *Carrigan v. Roussell*, 426 A. 2d 517 (N.J. Super. Ct. App. Div. 1981).

Commentary: Plaintiff was taking a lesson on the driving range when defendant hit a hooked shot from the first tee. Because the defendant gave a timely and adequate warning of "fore" once it became apparent that the shot was errant, the court held that the defendant was not negligent as a matter of law. This case was decided before New Jersey adopted the recklessness standard in 2001 in Schick v. Ferolito

B. *McWilliams v. Parham*, 160 S.E.2d 692 (N.C. 1968).

Commentary: Plaintiff-caddie was hurrying from the thirteenth green to the fourteenth tee when he was struck by defendant's shot from the thirteenth tee. Defendant satisfied his duty to warn after the ball was hit, but the Supreme Court of North Carolina reversed the trial court's grant of a nonsuit because defendant could have been negligent in failing to warn before hitting.

C. *Rose v. Morris*, 104 S.E.2d 485 (Ga. Ct. App. 1954).

Commentary: Although the court held that defendant was not negligent as a matter of law, plaintiff was playing on another fairway.

D. *Benjamin v. Nernberg*, 157 A.10 (Pa. Super. Ct. 1931).

Commentary: This case represents the farthest plaintiff from the intended line of flight to ever receive a jury verdict in his favor. The court, however, entered a J.N.O.V. The fifty degree line on each figure in this Appendix is derived from this case. The fifty degree line generally demarks the foreseeable zone of danger. The limits of the zone of danger are more likely somewhere within fifty degrees—although it is impossible to say precisely where—and turn on the specific facts of the case. The fifty degree line has been used by courts as a tool of exclusion whereby a finding that plaintiff was outside its contours results in a finding that defendant was not negligent as a matter of law. A finding that the plaintiff was within fifty degrees of the intended line of flight, however, does not necessary mean that plaintiff was within the zone of danger.

E. *Alexander v. Wrenn*, 164 S.E. 715 (Va. 1932).

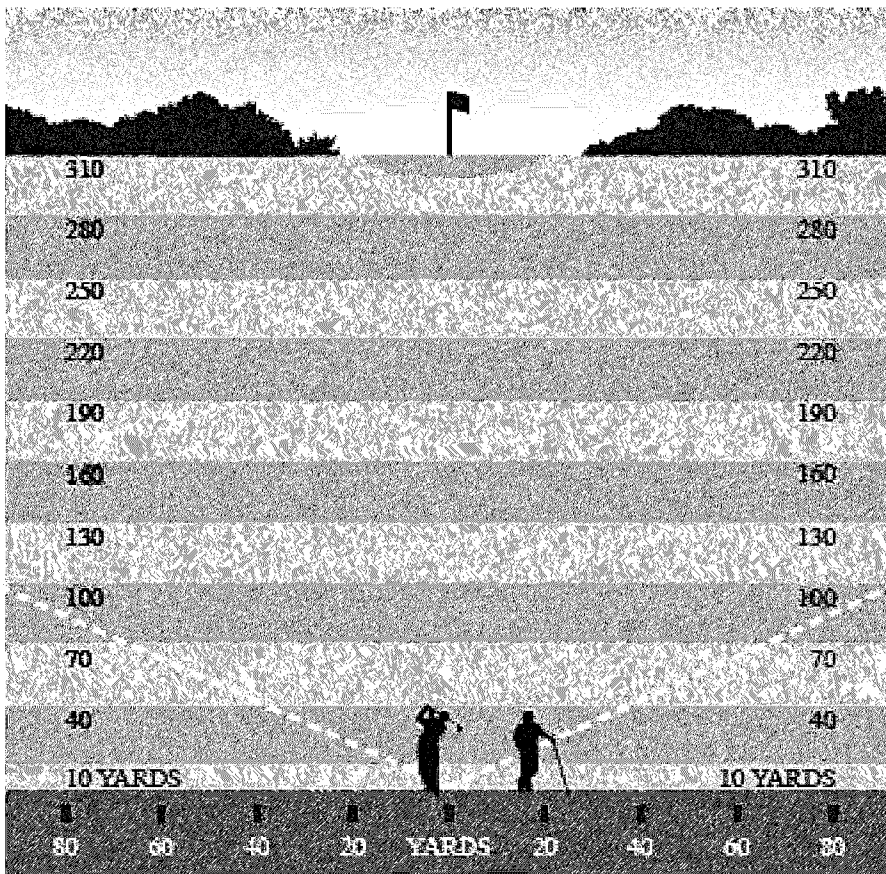
Commentary: Jury found defendant negligent, and the Supreme Court of Virginia affirmed.

F. *Allen v. Pinewood Country Club*, 292 So.2d 786 (La. Ct. App. 1974).

Commentary: Plaintiff was on a different fairway and had his back turned to defendants. Defendant gave warning buy immediately pro-

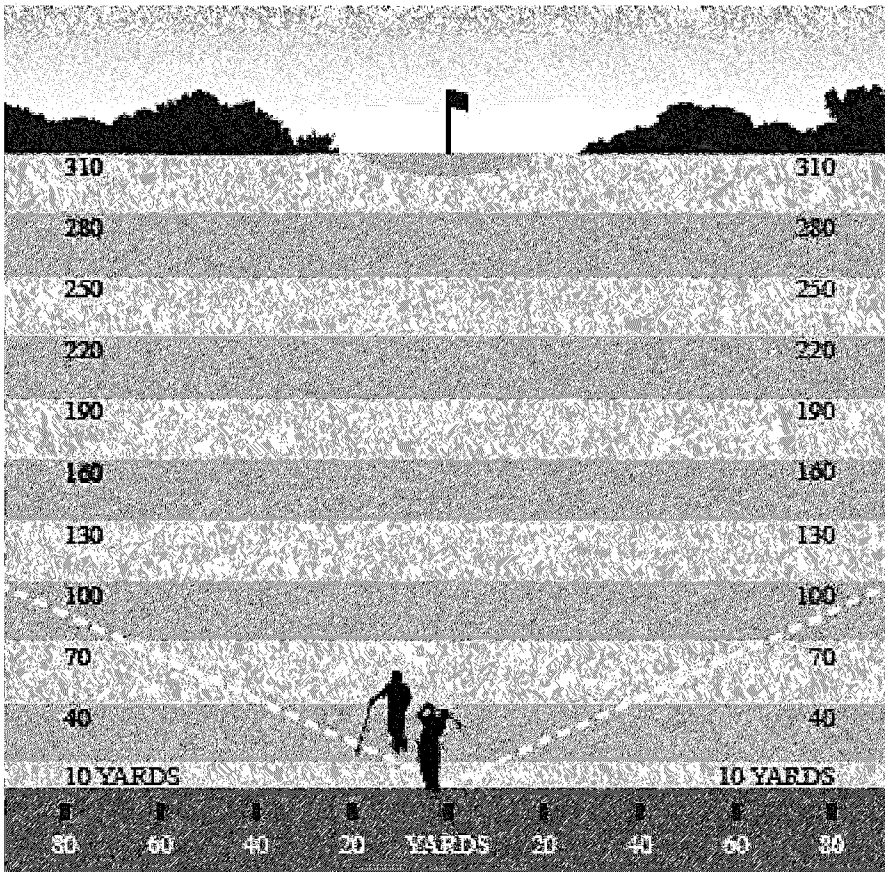
ceeded to hit before ascertaining whether plaintiff had a chance to heed the warning.

FIGURE 2
THOMPSON V. McNEIL, 559 N.E.2D 705 (OHIO 1990)



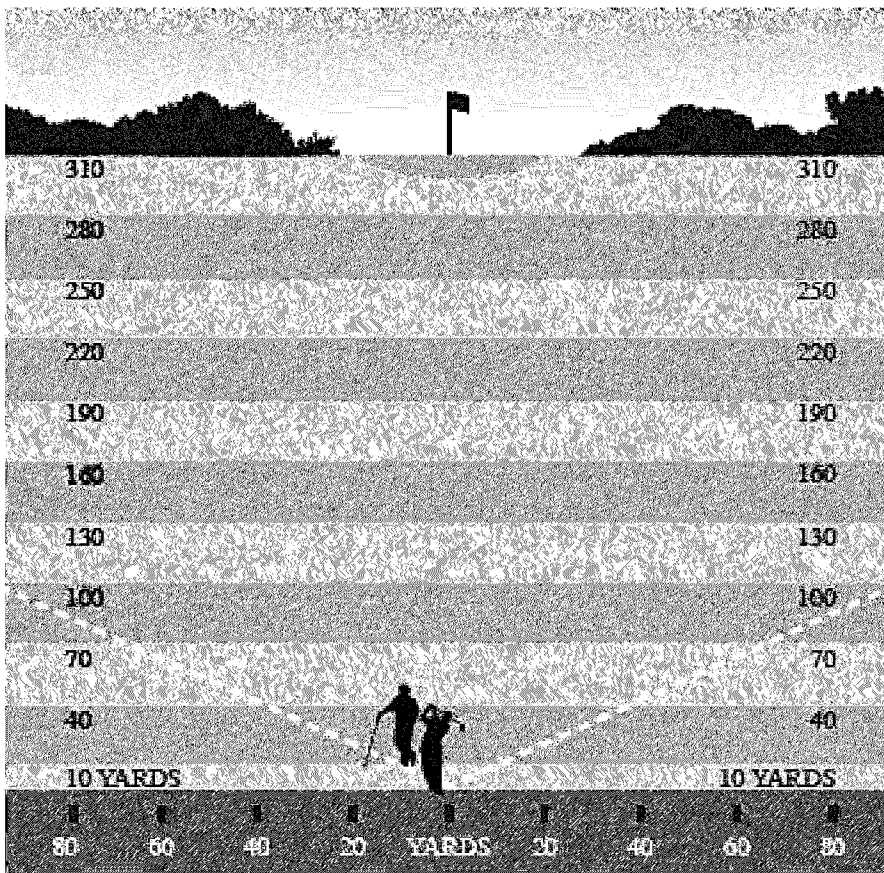
----- 50 Degree Line
Thompson v McNeil
(Not Reckless as a Matter of Law)

FIGURE 3
SCHICK V. FEROLITO, 767 A.2D 962 (N.J. 2001)



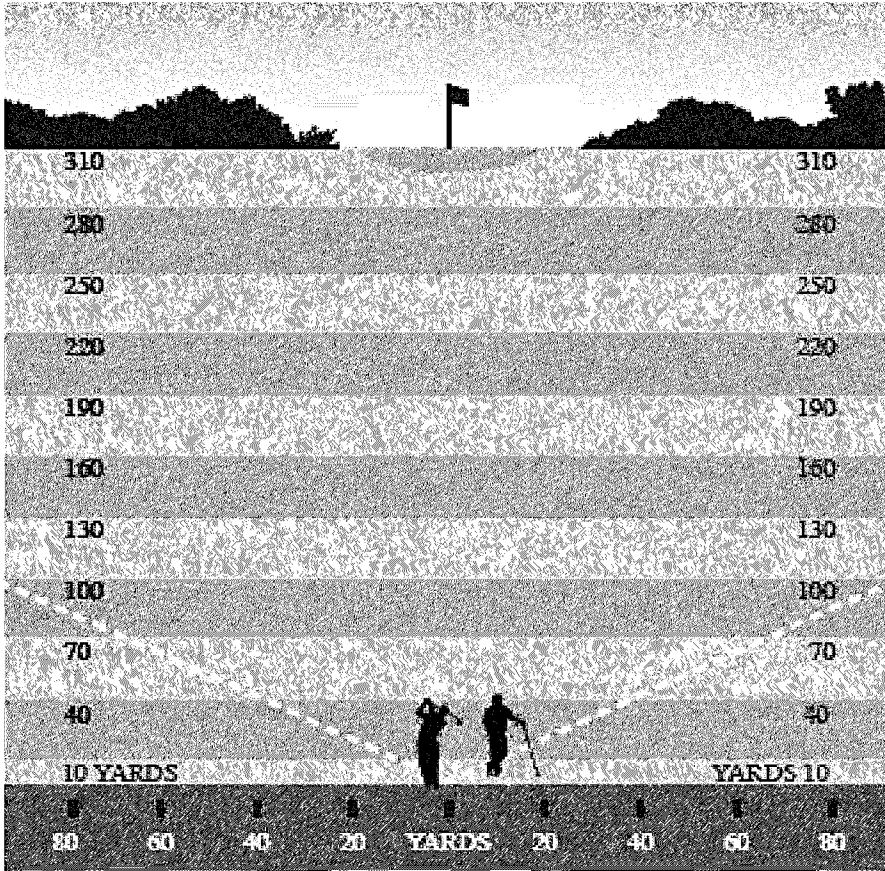
----- 50 Degree Line
Schick v. Ferolito
(Jury Question to Determine Reckless)

FIGURE 4
 SHIN V. AHN, 165 P.3D 581 (CAL. 2008)



----- 50 Degree Line
 Shin v. Ahn
 (Jury Question to Determine Whether
 Plaintiff Assumed the Risk)

FIGURE 5
ANAND V. KAPOOR, 2009 NY SLIP OP. 3110 (N.Y. APP.
DIV. APRIL 29, 2009), AFF'D, 2010 N.Y. SLIP OP.
9380 (N.Y. DEC. 21, 2010)



----- 50 Degree Line
Anand v. Kapoor
(Not Reckless/Plaintiff Assumed
the Risk)