Around the World

Switzerland

HIT BY A GOLF BALL: CRIMINAL LIABILITY

Federal Supreme Court decision 6B_1332/2016 dated 27 July 2017

Architects; Clubs; Criminal liability; Criminal negligence; Golf courses; Health and safety offences; Limitation periods; Switzerland

Facts

On a Swiss golf course in the greater Zurich area, the tee boxes of the holes Nos 7 and 9 are approximately 60 metres apart, and those two holes are designed in a way that makes the players drive off from one tee box past the other tee box (and not away from it).

During a casual round of golf, a player (the playing player) drove off from hole No.9, and his ball hit another player (the injured player) who was getting ready to drive off hole No.7 in the face. The said injured player suffered several injuries to his jaw and teeth. The following details of the situation were established later:

- The tee boxes of holes Nos 7 and 9 were separated by some bushes. Nevertheless, the players were able to see each other through the bushes. There was no net in between the holes and no warning signs at the tee boxes.
  The flight driving off from hole No.9 was just finishing doing so when the other flight prepared to get started at hole No.7. Both flights were aware of the other.
  The ball deviated from the regular trajectory by 20 degrees.
  As soon as the playing player had noticed that his ball was deviating to the side, he yelled out "fore" (which is the warning call known to all golfers).

The injured player filed a criminal complaint against the playing player, the operator of the golf course and the architect of the golf course. However, the local prosecutor declined to indict these three persons, arguing that the accident was only the consequence of the realisation of a risk which is inherent to and typical for the kind of sport in question and therefore accepted by any player setting foot onto a golf course. He found that the playing player did not breach his duties of diligence. He found also that the course operator and the architect could not be held criminally liable as the Swiss Golf Association had approved and homologated the course. This view was supported by the courts of first and second instance to which the injured golfer appealed this declination. However, the Federal Supreme Court (FSC) overruled the previous instances and ordered that the local prosecutor had to indict the three accused persons. It decided that the risk which the injured player accepted by playing on the respective course and the risk which realised in the accident should be defined and compared by a court (FSC Decision 1B_156/2012 dated 7 June 2012).

Accordingly, the local prosecutor indicted the three persons in question for negligent physical injury. Additionally, the injured player filed an associated civil claim, requesting approximately CHF 200,000 in damages and compensation for pain and suffering. The court of first instance acquitted all three accused while the court of second instance acquitted the first two accused and closed the proceedings against the third accused for expiry of the limitation period. Both courts additionally referred the civil claim to the civil courts. However, the injured golfer appealed the second instance judgment to the FSC.

Held

First, the FSC discussed the culpability of the playing player. It analysed the Rules of Golf as approved by R&A Rules Ltd and the United States Golf Association and the golf etiquette and came to the conclusion that the playing player had not broken any rules. Namely, the rule pursuant to which players should not play until the players in front are out of range does not apply to players on other holes, and the rule to shout “fore” as a warning to other players only applies to situations in which a ball is already hit and could possibly endanger others and not before a ball is hit. Further, the absence of any warning signs did not imply the absence of any dangers as warning signs only have to be put up in blind spots.

Taking into account several factors, the FSC concluded that the playing player did not exceed the risks which were typical for golf. These factors were the following: According to statistics, only 4 per cent of the balls deviate from the regular trajectory to the right by more than 15 degrees; the player driving off was the last of his flight to start playing on hole No.9 while the injured player’s flight had not yet started to drive off; the injured player had seen the players at the tee box of hole No.9; the stroke planned by the player driving off was not a difficult stroke; the weather was good and the visibility was fine and the playing player had a handicap of 33.9.

On that basis, the FSC went on to hold that the playing player did not act negligently. The injury suffered by the injured player was no more than the realisation of a risk which is inherent to and typical of golf. The injured player accepted this risk by positioning himself on the tee box of the hole No.7, being aware of the other flight on hole No.9. Consequently, the FSC confirmed that the acquittal of the playing player was in conformity with Federal Penal Law and therefore correct.

Secondly, the FSC analysed whether the golf course operator was to be found guilty for negligent physical injury. It started from the proposition that whoever creates a situation of danger is responsible to control it and to prevent damage to any legal interests being caused by it. In consequence, the operator of a sports ground has to ensure that all reasonable and appropriate protective measures are taken. However, it is not necessary for such operator to guarantee the absence of any risks; rather, it is sufficient for it to take protective measures against those risks which a golf player implicitly accepts based on his self-responsibility when setting foot onto a golf course.

As to the absence of any safety nets, the FSC stated that the planning of the course lay within the responsibility of the course architect who was a specialist in the field of planning of golf courses. The course operator was entitled to trust in the abilities and knowledge of the architect. He was not obliged to put up any nets, to plant more bushes or trees or to install warning signs at a later point in time as, never since the opening of the golf course, had there been an incident which implied that this specific spot might be problematic. Therefore, the FSC assessed the operating of the golf course to be correct and confirmed the acquittal of the course operator.

Thirdly, the FSC confirmed that the criminal proceedings against the golf course architect were correctly closed for lapse of the period of limitation. He had been indicted for negligent physical injury by not planning adequate safety measures when designing the golf course. The FSC confirmed that the applicable limitation period of seven years had already passed since the termination of the involvement of the architect before the court of first instance proceeded to pass its judgment (which would have interruptive effect) and that, therefore, the architect could not as a matter of principle be held criminally liable.

The FSC did not explicitly discuss the civil claim of the injured player. However, by dismissing the entire appeal, it also dismissed the appeal against the referral of this claim to the civil courts.

Discussion

Despite the fact that the injury of the injured player certainly was very unpleasant (and certainly none of the judges would have wanted to step into the shoes of the injured player), the FSC followed its previous practice regarding the criminal liability for occurrences in sports (see namely FSC Decision 134 IV 26 (= 6B_298/2007), which the authors of this contribution discussed in [2008] I.S.L.R. issue 1, pp.11–12: If a harm suffered by an athlete is to be categorised as the consequence of the realisation of a risk which is inherent to and typical for the kind of sport in question, no criminal sanctions may be imposed on the person having caused this harm.

Once again, in the light of the investigation as it presented itself in the several judgments, the authors of this contribution believe that the courts showed common sense by not finding the three indicted persons guilty. Fortunately, golf accidents as the one which led to the discussed case are extremely rare. Nevertheless, the risk of being hit by a ball going astray is a risk every golf player is aware of from the outset. It is a risk that simply cannot be wholly excluded unless nets are built around golf course holes just like baseball batting cages—a scenario which would be of nightmare quality for any golf player and which would not only be the end to enjoyment on the course but would be the end of golf entirely (at least in Switzerland) as this would never be accepted by the Swiss building permission authorities.

This is not to absolve any golf course situations which create clear danger—such situations certainly have to be remedied. However, this is an argument in support of the FSC practice pursuant to which not every realisation of any risk shall lead to criminal sanctions for anyone being involved to some degree.

The decision of all courts at all levels not to pass a judgment on the civil claim certainly is not to be misunderstood as a dismissal of the monetary claim as such. The acquittal of defendants in criminal cases does not automatically lead to the exclusion of any claims on a civil law basis. However, sometimes, the criminal courts simply are not in a position to pass a judgment on civil claims.

In the case at hand, the civil claim was not filed by the injured player in ordinary civil proceedings but as a so-called associated civil claim within the criminal proceedings. Generally, this is a much simpler and more inexpensive way for claimants as they do not need to argue their claims as thoroughly as in civil proceedings, as there is no cost risk at first instance and as the court hearing the case is familiar with all details of the criminal case already. However, claimants of associated civil claims have no guarantee that the court trying the criminal case will indeed make a decision on their claim. Depending on the circumstances, the criminal court may also refer the matter to civil courts. Experience shows that criminal courts frequently have recourse to this option, mostly arguing that they are not yet in a position to make a decision because the claimant has failed to justify or quantify the claim sufficiently. If a court comes to this conclusion, it does not create res judicata or any kind of obligation to file for civil litigation within a specific deadline. As it does not automatically transfer the civil part of the proceedings to the

civil judge for decision-taking either, it remains within the discretion of the claimant whether he indeed wants to file an ordinary civil action at a later point in time.

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