SUPREME COURT OF QUEENSLAND

CITATION:	*Challen v The McLeod Country Golf Club* [2004] QCA 358
PARTIES:	**JILLIAN MARGARET CHALLEN** (plaintiff/appellant) **v** **THE McLEOD COUNTRY GOLF CLUB** ACN 009 773 273 (defendant/respondent)
FILE NO/S:	Appeal No 2735 of 2004 DC No 5348 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	15 July 2004
JUDGES:	McPherson and Davies JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Orders made by the learned trial judge on 27 February 2004 be set aside** **3. Judgment for the appellant against the respondent for damages in the sum of $12,067 and interest of six percent per annum on the sum of $12,000 from 8 November 1994 until the date of judgment** **4. The respondent pay the appellant's cost of the proceeding in the District Court to be assessed, as if the proceeding had been started in the Magistrates Court** **5. The respondent pay the appellant's costs of the appeal to be assessed**
CATCHWORDS:	TORTS – NUISANCE – WHAT CONSTITUTES – PRIVATE NUISANCE – PARTICULAR CASES – claim for damages as a result of golf balls being hit from adjoining golf course – whether nature and extent of interference caused by intrusion of golf balls constituted material or substantial interference with enjoyment of premises –when golf club management became aware of material or substantial interference – whether golf club took reasonable

steps to abate the nuisance

Campbelltown Golf Club Limited v Winton [1998] NSWSC 257, unreported, NSWCA, CA No 40056 of 1996, 23 June 1998, cited
Lester-Travers v City of Frankston [1970] VR 2, cited
Lamond v Glasgow Corporation [1968] SLT 291, cited
R v Shorrock [1994] QB 279, cited
Sedleigh–Denfield v O'Callaghan [1940] AC 880, cited
Wilkinson v Joyceman [1985] 1 Qd R 567, cited

COUNSEL: A M Daubney SC, with C J O'Neill, for the appellant
S S W Couper QC for the respondent

SOLICITORS: Hawthorn Cuppaidge & Badgery for the appellant
Toogoods for the respondent

[1] **McPHERSON JA:** I agree with the reasons of Mullins J for allowing this appeal and with her Honour's assessment of the damages to be awarded. The orders should be in the form proposed in those reasons.

[2] The incorporated defendant Golf Club appears at one stage to have adopted the stance that it was only the individual player who struck the errant golf ball who incurred liability for the nuisance to the plaintiff. If the Club took that view, it was mistaken. If an occupier of land permits a nuisance to be conducted on its land of which it knows or ought to know, it becomes liable for that nuisance and its potentially harmful consequences to others from the time at which it acquired that knowledge or ought to have done so. A local example is *Wilkinson v Joyceman* [1985] 1 Qd R 567, where the owner of the land permitted stock car racing to be conducted on it knowing that insufficient precautions had been taken to protect spectators from the serious risk of injury it presented. Another and more recent English example is *R v Shorrock* [1994] QB 279, in which the landowner and occupier was held liable for a public noise nuisance, of which he knew or ought to have known, created on his land by his licensees. See also *Lamond v Glasgow Corporation* [1968] SLT 291, which enjoys added authority by coming from the home of golf itself. I did not understand Mr Couper QC for the defendant Club in this appeal to be disputing this proposition of liability on the part of the defendant.

[3] From that point, the issue in the present case becomes one simply of what the defendant knew, and from what time or date, about the damage being caused to the plaintiff's property by stray golf balls, and the potential risk of injury it presented to persons and property on her land. Mullins J has analysed the Club committee's state of knowledge or notice of the nuisance, which can be dated back to at least 8 November 1994. The proceedings issued on 6 November 2001. The statement of claim in para 6(a) claimed $50,000 by way of general damages for nuisance in the past and, in para 6(e), $20,000 for future special damages if the nuisance continues. On appeal, Mr Daubney SC said his client was claiming general damages of $20,000 to the date of judgment. It follows that the plaintiff is no longer claiming damages for possible future intrusions of golf balls into her property. The matter is of some importance because, if we were to award damages for the future in lieu of an injunction, the plaintiff may not be free to sue again in respect of future intrusions. The damages of $12,067 assessed by this Court are therefore to be

understood as awarded in relation to the period before the judgment that is now being given in favour of the plaintiff.

[4] **DAVIES JA:** I agree with the orders proposed by Mullins J for her reasons, and for the further reasons of McPherson JA.

[5] **MULLINS J:** Since November 1988 the appellant has owned and lived with her family at the house she built at Middle Park adjoining the golf course owned and operated by the respondent. By a proceeding commenced in the District Court in November 2001, the appellant sued the respondent for damages for nuisance occasioned by golf balls being hit from the respondent's golf course onto the appellant's property which the appellant alleged caused damage to the appellant's house, garage and other fixtures and chattels on the appellant's land. After a trial on 2 and 3 February 2004, the appellant's claim was dismissed on 27 February 2004 and the appellant was ordered to pay the respondent's costs of the proceeding to be assessed on the indemnity basis.

Summary of the relevant evidence

[6] In the appellant's case, evidence was given by the appellant herself, her husband Mr Challen and Mr Priddle who had "housesat" the appellant's property over the Christmas New Year period for 3 years commencing 2000/2001. The respondent called Mrs Chesterman and Mr Vallis. Mrs Chesterman became vice-president of the respondent in November 1997 following which she became president of the respondent for two years in November 1999. After being off the board for 12 months, she took on the position of a director of the respondent with particular responsibility for the golf course. Women are eligible to be full members of the respondent. Men are eligible to be fellow members. Women comprise 55 percent of the total membership. Mr Vallis has been a fellow member of the respondent since 1980 and was president of the fellow members' committee between 1986 and 1988. He played golf twice per week between 1980 and 1995 and four times per week since 1995 at the respondent's course.

[7] After purchasing her land in 1987, the appellant became aware that golf balls from the golf course came onto the land. The house was designed so that the swimming pool and tennis court were between the house and the golf course. The appellant's property is adjacent to the fairway of the 12th hole of the golf course.

[8] The appellant described that in the early 90's the golf balls coming onto her land seemed to get worse and at one stage it became like "living in Beirut". The appellant gave evidence of the incidents that were described in the letters sent by her and on her behalf to the respondent. In evidence, the appellant also described how she had seen golf balls strike the roof, how golf balls cracked the plastic table around the pool and that she found a golf ball in the yard at the same time as she found that the ornamental bird had been knocked off the concrete birdbath in the yard. The appellant stated that on another occasion she found a golf ball near a fountain in the yard, at the same time that she found the plaque at the base of the fountain had been cracked.

[9] The first letter dated 15 October 1991 from Mr Challen to the respondent which enclosed an account for $38 stated:

> "Enclosed is a copy of an account which relates to replacing a roof tile over our garage which was broken by a golf ball.

> I would be pleased if the Club would meet this cost and look forward to receiving from you any necessary paperwork in respect to the claim.
>
> Because of the steep slope of the roof and the position of the tile it was too dangerous for me to try to replace the tile myself on this occasion. I have previously replaced two other tiles which have been broken by golf balls but for which I do not seek to make claim upon the club however in this case as we have had to incur the expenditure it is reasonable I believe to request the Club to compensate us for it."

[10] The letter sent by Mr Challen to the respondent on 11 July 1992 enclosed two accounts for the replacement of two windows in the appellant's garage which were broken by golf balls, one several weeks prior to the sending of the letter and the other about four weeks prior to the sending of the letter. The letter recorded that "on the second occasion glass shattered over one of my sons who was inside the garage as the golf ball narrowly missed him". The letter also referred to a previous request made by Mr Challen in about November 1991 concerning the replacement of the garage door which had been holed by a golf ball. The attitude of the respondent expressed in its letter of 28 August 1992 to Mr Challen was that the respondent would pay for the broken windows, but would pay only the $50 excess for the appellant's claim upon her insurance company for the damage to the garage door.

[11] The appellant's letter to the respondent dated 8 November 1994 stated:

> "I am **enclosing** a copy of an invoice number 3942 from Barrier Roofing dated 27 April 1994 in the sum of $50.00 which covers replacement of nine tiles which were broken on our roof by golf balls.
>
> I am also **enclosing** a further invoice number _ from Barrier Roofing for a broken tile which recently occurred. I was in the yard at the time when this last tile was broken and actually heard the crash of the tile.
>
> I continue to get between twelve and twenty golf balls in the yard of my house each week, most of them coming on the weekend."

[12] On 5 November 1996 the appellant forwarded to the respondent a receipt for the repair of a broken window caused by a golf ball requesting "re-imbursement for the amount as you have so kindly done in the past". The same request was made by the appellant by letter dated 18 August 1997 in respect of a broken window on the lounge room French doors.

[13] The appellant's letter to the respondent dated 1 December 1998 sought reimbursement for repairs to the roof of the appellant's house which the appellant claimed was caused by golf balls. The appellant explained that the damage was drawn to her attention after suffering water damage inside the house after a severe storm on 24 November 1998. The account that was enclosed with that letter was a quotation dated 30 November 1998 for replacing 45 broken tiles "due to damage from golf balls" at $5 per tile plus further amounts for re-bedding and pointing four

metres of ridge capping and labour. This was for a total of $340.50. The letter also stated:

> "The golf ball menace appears to be increasing and we also have damage to the eaves of our verandah from the numerous golf balls which bounce on the verandah."

[14] The respondent forwarded a cheque for $100 in response to this request that was described as being in payment of the appellant's insurance excess, stating in the accompanying letter dated 15 January 1999:

> "The Golf Club is not liable for damage caused by golf balls. The legal stance on this is that the person who hits the golf ball is liable for the damage it causes. McLeod Golf Club's policy is to pay the insurance excess up to a value of $100.00 when damage has been caused. This is not a legal requirement but The Board reimburses the insurance excess as a matter of goodwill with its neighbours."

[15] By letter dated 12 July 2000 the appellant requested the respondent to reimburse her for the sum of $67.10 paid for the repair of a window which was "smashed" by a golf ball the previous Thursday afternoon. A cheque was sent by the respondent on 28 July 2000.

[16] The appellant's solicitors sent the respondent a lengthy letter dated 13 March 2001 setting out the history of the problems encountered by the appellant from golf balls coming onto her property. The letter describes approximately 20 golf balls per week coming onto the appellant's property and referred to one occasion when a golf ball hit the appellant in the back causing severe bruising. (The appellant stated in evidence that it was in 1998 or 1999 that she was struck by the golf ball.) The letter enclosed the invoice dated 15 February 2001 received by the appellant for the cost of repairs to 45 roof tiles damaged by golf balls striking the roof. The request was made in the letter that the respondent redesign the 12th hole of the golf course, in order to eliminate the nuisance being suffered of golf balls intruding onto the appellant's property.

[17] For 12 months from the end of January 2001, Mr Challen collected the golf balls which he found in the appellant's yard. He collected a minimum of 526 balls.

[18] Eventually the respondent changed the 12th hole. After receiving the letter of 13 March 2001, the respondent immediately investigated obtaining approval for and building a golf ball barrier net on the boundary. As that would have had a detrimental effect on the view of the golf course, the respondent decided to redesign the 12th hole. The work commenced in about November 2001 and was completed and opened in about March 2002. The cost was approximately $26,000. The work comprised moving the tee for men and social players, so that the 12th hole became for them a par 3 hole rather than a par 4 hole, and putting in new mounds and planting more trees to act as a barrier between the fairway and the appellant's property.

[19] As a result of these changes, the numbers of balls coming onto the appellant's property reduced. The appellant described it in terms "we still get the odd ball". Mr Challen estimated it as "between two to three balls a week". Their main concern is for the safety of those at the house.

[20] Mr Priddle's evidence of his observations about the numbers of golf balls which he found in the appellant's yard when he stayed there each Christmas New Year period from 2000/2001 confirmed the observations of the appellant and Mr Challen.

[21] Although the respondent is an incorporated body, the only witness called for the respondent with management experience was Mrs Chesterman, and her involvement commenced only in November 1997. Mrs Chesterman was able to confirm that her understanding was that the policy of the respondent in respect of damage caused by golf balls was that which was conveyed by the respondent from time to time to the appellant that the respondent would pay for a neighbour's excess payment under the neighbour's insurance policy, when damage was caused by a golf ball. Because Mrs Chesterman was not aware of the contents of letters from the appellant prior to the appellant's letter dated 1 December 1998, she did not treat the reference in that letter to "golf ball menace" as alerting the respondent to a real problem. Mrs Chesterman conceded that her response to the letter dated 1 December 1998 may have been different, if she had been aware of the complaint made in the letter of 8 November 1994 that the appellant was getting between 12 and 20 golf balls in her yard each week. The magnitude of the problem was realised by Mrs Chesterman upon the receipt by the respondent of the appellant's solicitors' letter dated 13 March 2001.

[22] Mrs Chesterman gave evidence that she mostly played in the women's competition and had never witnessed a ball entering the appellant's premises after having been struck by a woman player.

[23] Mr Vallis gave evidence that during the 20 years or so that he had been playing, prior to the 12th hole being changed in 2002, he observed a ball being hit into the appellant's property about 10 times. Since the 12th hole had become a par 3 hole for men, he had not seen anyone hit a ball into the appellant's property.

[24] The evidence of each of Mrs Chesterman and Mr Vallis as to their observations of players on the 12th hole was limited to those occasions when they played and the persons who played at the same time. Their evidence did not contradict that of the appellant and Mr Challen.

[25] Apart from the challenge by the respondent of the appellant's claim for repairs of tiles to the roof of the appellant's house, the respondent did not attack the credit of the appellant's witnesses at the trial. Although the learned trial judge observed in paragraph [32] of his reasons for judgment ("the reasons for judgment") that he was satisfied that it was the more recent years about which the recollections of the appellant and Mr Challen were more accurate and reliable, the learned trial judge did not reject the evidence given by the appellant and Mr Challen of the events prior to the late 1990's and their evidence was supported by the letters that were sent from time to time by or on behalf of the appellant to the respondent.

Findings of the learned trial judge

[26] If from the early 1990's until the late 1990's the interference with the appellant's enjoyment of her premises was material or substantial, the learned trial judge would have expected the letters from her to the respondent to be more regular in frequency and to seek more than reimbursement for damage caused to her premises. The learned trial judge therefore concluded that the interference with the appellant's

enjoyment of her premises was not material or substantial from about the early 1990's until about the late 1990's (paragraph [31] of the reasons for judgment).

[27] The learned trial judge was satisfied that interference with the appellant's enjoyment of her premises was material or substantial in the late 1990's and in the early 2000's, but was satisfied that the interference with her enjoyment of her premises was not now material or substantial (paragraph [33] of the reasons for judgment).

[28] The trial was conducted on the basis that the liability of the respondent depended upon whether it knew or ought reasonably to have known of the alleged nuisance. Notwithstanding the learned trial judge's finding that there was a material or substantial interference from the late 1990's until the early 2000's, the learned trial judge concluded that the respondent did not know nor ought to have known until the letter from the appellant's solicitors dated 13 March 2001 that the interference with the appellant's enjoyment of her premises had been material or substantial (paragraph [48] of the reasons for judgment). The learned trial judge was satisfied that the respondent did all that it could reasonably be expected of it to do in the circumstances in response to the letter dated 13 March 2001 (paragraph [51] of the reasons for judgment).

Grounds of appeal

[29] Apart from the finding that there was a nuisance from the late 1990's until the early 2000's, each of the above findings of the learned trial judge is challenged on the appeal.

[30] During the hearing of the appeal, it was made clear by Mr Daubney of senior counsel who appeared with Mr C J O'Neill of counsel for the appellant that the appellant sought general damages only in respect of the nuisance to the date of trial and was not seeking an award of equitable damages in lieu of an injunction for any continuing nuisance.

[31] There was no limitation defence relied on by the respondent in respect of the claim for nuisance from the early 1990's.

Knowledge of the respondent

[32] In respect of the period from the early 1990's to the late 1990's, the learned trial judge determined the issue of the nature of the interference with the right of the appellant to enjoy her property by reference to the frequency of the letters that were sent to the respondent. Although the frequency of the letters is itself of evidentiary value, what is more significant is the nature of the interference and the lack of abatement of that interference that is disclosed in those letters.

[33] Apart from the letters of 15 October 1991 and 11 July 1992 which gave information to the respondent of specific instances of damage sustained to the appellant's property from golf balls, the letter of 8 November 1994 alerted the respondent to the continuing situation of between 12 and 20 golf balls each week intruding onto the appellant's property. It must have been obvious to the respondent from the claims for reimbursement that preceded, were included in and followed the letter of 8 November 1994, that some of the golf balls that intruded onto the appellant's property did so in such a way as to cause damage.

[34] The learned trial judge erred in deciding the issue of whether the interference with the appellant's enjoyment of her property was material or substantial between the early 1990's and the 1990's by reference to the frequency of the letters from the appellant to the respondent during that period. The unchallenged evidence before the learned trial judge of the nature and extent of the interference during that period was such that the only conclusion that could be reached was that the intrusion of golf balls from the respondents' golf course onto the appellant's property constituted a private nuisance.

[35] The respondent is liable for such nuisance only from that point in time that it knew or ought to have known of the nuisance: *Sedleigh–Denfield v O'Callaghan* [1940] AC 880, 904. By the time the respondent received the appellant's letter of 8 November 1994, it was on notice that some golfers which it permitted to play on its golf course were substantially and materially interfering with the appellant's enjoyment of her property. In this period until the late 1990's, that situation did not change to the knowledge of the respondent. It is not suggested that the respondent took any steps after the receipt of the letter of 8 November 1994 to reduce the number of golf balls that were intruding onto the appellant's property and the appellant's letters that were sent in 1996, 1997 and 1998 only served to confirm for the respondent that the problem was continuing.

[36] It follows from this conclusion that the respondent was or ought to have been on notice of the nuisance from the receipt of the letter of 8 November 1994, that the learned trial judge's finding that the respondent did not know nor ought to have known of the nuisance that the learned trial judge found did exist from the late 1990's to the early 2000's until the receipt of the letter from the appellant's solicitors dated 13 March 2001 cannot stand.

Whether the respondent took reasonable steps to abate the nuisance

[37] The finding of the learned trial judge that the respondent did all that could reasonably be expected of it to abate the nuisance on receipt of the appellant's solicitors' letter of 13 March 2001 was made in the context of the finding that the receipt of the appellant's solicitors' letter dated 13 March 2001 was the notice of the nuisance.

[38] In light of the conclusion that the respondent was on notice of the nuisance from the receipt of the letter of 8 November 1994, the steps taken by the respondent to address the problem in late 2001 and early 2002 could not amount to a reasonable response in all the circumstances to abate the nuisance.

[39] In any case, the steps that have been taken by the respondent have not removed the problem of golf balls intruding onto the appellant's property. Even two or three balls per week regularly coming onto the appellant's property with the risk of physical harm or damage to persons or property on the appellant's premises is a material interference with the enjoyment of the appellant of her property. It is common ground, however, that there should be continuing abatement of the problem, as the changes that have been effected by the respondent to the 12th hole become more effectual over time in providing a barrier between the fairway and the appellant's property.

[40] Even allowing for the abatement of the problem from early 2002, the appellant is entitled to a finding that the nuisance (although of much less significance) continued to the date of trial.

Damages

[41] At the hearing of the appeal, the only special damages which were pursued by the appellant were:

30 November 1998	Re bed and point 4m of ridge capping and replace 45 tiles	$297.00
15 February 2001	Supply and replace 45 slate shingles	$247.50
31 July 2001	Replace broken glass in window	$61.00
		$605.50

[42] The claim for replacing the broken glass was supported by an invoice for a total amount of $67 (including GST) and is not disputed. The two claims for replacing tiles are in issue. The evidence given in respect of the cause of the damage to the tiles and the repair was that of the appellant who was confused about the various claims that were made by her for reimbursement in respect of the tiles, another two of which were abandoned during the course of the trial. Although each of the invoices refers to the damage being caused by golf balls, the tilers were not called to give evidence. The cross examination of the appellant on this matter did not continue when counsel for the appellant announced that the evidence would be given on this aspect by Mr Challen. That did not occur. Although there is no doubt that the appellant observed golf balls strike the roof of her house, the invoice dated 30 November 1998 was obtained after repair work undertaken after a severe storm. The appellant did not discharge the onus of proving that the repairs for tiles that were claimed were due to golf ball damage.

[43] With respect to an award of general damages, the period for assessment is from 8 November 1994 until 3 February 2004. At the hearing of the appeal the appellant did not seek an award greater than the sum of $20,000 for general damages. It was submitted by Mr Couper of Queen's Counsel on behalf of the respondent that general damages should be in the range of $8,000 to $10,000. Damages for such a nuisance cannot be calculated with any precision. Other awards for general damages for similar nuisances have been nominal or modest amounts: *Lester-Travers v City of Frankston* [1970] VR 2; *Campbelltown Golf Club Limited v Winton* [1998] NSWSC 257 unreported, NSWCA CA No 40056 of 1996, 23 June 1998.

[44] In all the circumstances of this matter, an award of general damages of $12,000 is appropriate.

[45] As the assessment of special damages is for such a small amount, an order for interest under s 47(1) of the *Supreme Court Act* 1995 need only apply to general damages.

Orders

[46] It was properly conceded on behalf of the appellant at the hearing of the appeal that as the proceeding was always a claim for damages only, any order for costs should be limited to the appropriate Magistrates Court scale.

[47] The orders which should be made are:

1. Appeal allowed.
2. Orders made by the learned trial judge on 27 February 2004 be set aside.
3. Judgment for the appellant against the respondent for damages in the sum of $12,067 and interest of six percent per annum on the sum of $12,000 from 8 November 1994 until the date of judgment.
4. The respondent pay the appellant's cost of the proceeding in the District Court to be assessed, as if the proceeding had been started in the Magistrates Court.
5. The respondent pay the appellant's costs of the appeal to be assessed.