SUPREME COURT OF QUEENSLAND

CITATION:	*Graham & Ors v Welch* [2012] QCA 282
PARTIES:	**TIM GRAHAM** (first applicant) **JANE GRAHAM** (second applicant) **NRMA INSURANCE AUSTRALIA LIMITED** ABN 11 000 016 722 (third applicant) **v** **FLORENCE AGNES WELCH** (respondent)
FILE NO/S:	Appeal No 5119 of 2012 DC No 3948 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2012
JUDGES:	Muir JA and Atkinson and Applegarth JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be allowed.** **3. The order made on 16 May 2012 be set aside.** **4. Enter judgment for the defendants.** **5. The respondent pay the applicants' costs of the proceeding in the District Court and of the appeal to be assessed on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – OCCUPIERS – where respondent was injured after slipping on a gumnut on the stairs of her niece's house – where evidence showed that first and second applicants regularly swept the stairs – whether the risk was not insignificant – whether a reasonable person in the position of the first and second applicants would have removed the gum tree from which the gumnut fell – whether a substantial injustice was occasioned – whether leave to appeal should be granted

Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010 (Qld), s 98
Civil Liability Act 2003 (Qld), s 9
Courts Reform Amendment Act 1997 (Qld), s 118(3)
District Court of Queensland Act 1967 (Qld), s 118
Magistrates Courts Act 1921 (Qld), s 2

ACI Operations Pty Ltd v Bawden [2002] QCA 286, considered
Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; [1987] HCA 7, cited
Hackshaw v Shaw (1984) 155 CLR 614; [1984] HCA 84, cited
Neindorf v Junkovic (2005) 222 ALR 631; [2005] HCA 75, considered
Pickering v McArthur [2005] QCA 294, considered
Smith v Ash [2011] 2 Qd R 175; [2010] QCA 112, considered
Woodward v The Proprietors of Lauretta Lodge [1997] QCA 183, followed
Wyong Shire Council v Shirt (1980) 146 CLR 40; [1980] HCA 12, followed

COUNSEL: G W Diehm SC for the applicant
S J Given for the respondent

SOLICITORS: Moray & Agnew for the applicant
Sinnamon Lawyers for the respondent

[1] **MUIR JA**: I agree with the reasons of Atkinson J and with the orders she proposes, but wish to make some additional observations. Trees on suburban residential allotments contribute significantly to their amenity and that of the surrounding neighbourhood. Their value is not merely aesthetic in nature, although that is obviously important in itself. As well as providing shade and shelter, they can act as wind breaks, help retain soil, provide or improve privacy and attract birds and other wildlife.

[2] Their manifold benefits do not come without disadvantages, as many neighbourhood disputes over trees will testify. A householder who may not object to the shade provided by a neighbour's tree in summer may be less enamoured of its shade in winter, its leaves on lawns, pathways and in guttering and its roots in pipes and foundations. Nevertheless trees, often too large for, and otherwise unsuited to their position if measured by the standards of landscape architects, are part and parcel of Queensland suburbia. Residents of Queensland are generally aware of their benefits and disadvantages and of the hazards which they pose.

[3] The planting or maintaining of a tree which drops large gumnuts over stairs on a pathway introduces a risk that a person may lose his or her footing if a gumnut is stood on inadvertently. But that is a risk of which the appellant was, or ought reasonably to have been, aware. The respondent was familiar with the subject stairs and well aware of the possible presence of large gumnuts[1] on them. It was not disputed that any gumnuts on the stairs were highly visible. It was accepted that

[1] The length of a nut not including its stem was said to be just under 5 cm.

neither the applicants nor the previous owners, who had acquired the property in 1994, were aware of gumnuts causing anyone to slip or fall on the stairs. It is arguable that the presence of the large gumnuts on the stairs presented less of a danger than the presence of leaves, it being less obvious that the latter should be treated with caution than the former. It is against this background that the reasonableness of the appellants' conduct in not removing the tree must be judged.

[4] In the circumstances, the appellants were not required, in order to avoid breaching their duty of care to the respondent, to remove the tree. Pruning would not have satisfied the primary judge's requirements, as it was not shown that this would have prevented gumnuts from being blown on the stairs.

[5] **ATKINSON J:** This is an application for leave to appeal brought pursuant to s 118 of the *District Court of Queensland Act* 1967 against a judgment given for the respondent after a trial in the sum of $55,000.

Leave to Appeal

[6] Section 118 of the *District Court of Queensland Act* 1967 (Qld) provides that if the award of damages in a matter is within the jurisdictional limit of the Magistrates Court, an appeal to the Court of Appeal lies only with leave of the Court. The section provides in relevant part:

> "(2) A party who is dissatisfied with a final or interlocutory judgment of the District Court in its original jurisdiction may appeal to the Court of Appeal if the judgment—
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> (a) is given for an amount equal to or more than the Magistrates Courts jurisdictional limit; or
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> (b) relates to a claim for, or relating to, property that has a value equal to or more than the Magistrates Courts jurisdictional limit.
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> (3) Subject to sections 118A and 118B, a party who is dissatisfied with any other judgment of the District Court, whether in the court's original or appellate jurisdiction, may appeal to the Court of Appeal with the leave of that court."

[7] The monetary jurisdiction of the Magistrates Court is $150,000.[2] The award of damages in this case was less than that. Leave is therefore required to appeal.

[8] In determining whether to grant leave, the relevant considerations are whether the case involves an important question of law that requires consideration, and whether an appeal is necessary to correct a substantial injustice and the decision is attended with sufficient doubt to warrant the appeal being heard.

[9] Since amendments to the Act in 1997 removing express reference to the requirement for an important question of law, that consideration has assumed less

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[2] *Magistrates Courts Act* 1921 (Qld), s 2 as amended by *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld), s 98. The amendment to that section came into force on 1 November 2010: *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act* 2010 (Qld), s 2; Proclamation of 26 August 2010, Schedule, cl 2.

significance, although it has not become irrelevant. Before the passage of the *Courts Reform Amendment Act* 1997 (Qld), s 118(3) provided:

> "Such leave may be granted upon such terms as the Court of Appeal or a Judge of Appeal may impose but such leave shall not be granted unless some important question of law or justice is involved."

[10] In *ACI Operations v Bawden*,[3] McPherson JA with whom Williams JA and Holmes J (as her Honour then was) said:

> "Until some time ago, the discretion under s 118 was exercisable only if the applicant established that the appeal involved an important point of law or some question of general or public importance. The need to satisfy that requirement was deliberately omitted by an amendment to s 118(3) that was effected to the Act in mid-1997. It had the consequence of conferring a general discretion on this Court to grant or refuse leave to appeal, which is exercisable according to the nature of the case. I would, however, tend to agree with what Mr Boulton, for the respondent plaintiff in this matter, has said, namely that the mere fact that there has been an error, or that an error can be detected in the judgment below, is not ordinarily by itself sufficient to justify the granting of leave to appeal.
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> It also, to my mind, does not mean that the former criterion in s 118 of an important point of law or question of general or public importance is entirely irrelevant to applications of this kind. It may be expressed by saying that the existence of such a consideration remains a sufficient, but not a necessary, prerequisite to a grant of leave to appeal.[4]"

[11] Hence, as Keane JA said in *Pickering v McArthur*,[5]

> "Leave to appeal is necessary by reason of s 118(3) of the *District Court of Queensland Act* 1967 (Qld). Leave will usually be granted only where an appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected."

[12] In the end, the discretion to allow leave to appeal is of a general nature which, while guided by such tests, may be exercised by the court on the considerations specific to each case. In *Smith v Ash*, Fraser JA observed that:

> "It is to be emphasised though that, whilst the Court exercises the discretion on a principled basis and those tests provide very useful guidance, s 118(3) confers a general discretion on this Court to grant or refuse leave to appeal which is exercisable according to the nature of the case."[6]

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3 [2002] QCA 286.
4 Cited with approval in *Smith v Ash* [2010] QCA 112 at [50].
5 [2005] QCA 294 at [3].
6 [2010] QCA 112 at [50].

The decision in the District Court

[13] The learned primary judge found the defendants liable for an injury suffered by the plaintiff at their residence in the Brisbane suburb of Alexandra Hills. Photographs of the premises show the dwelling to be a brick home with a bushland-type garden with access from the footpath to the front garden being by well-made paved steps with walls made of timber sleepers. The plaintiff, who was the 76 year old aunt of the female defendant, slipped and fell on those steps after apparently stepping on a gumnut which had fallen from a gum tree in the garden which had a branch arching over the steps. The incident occurred on 27 November 2006.

[14] The statement of claim pleaded that the defendants were negligent in that they failed to warn the plaintiff of a risk of injury of which they knew or ought to have known; failed to ensure that gumnuts did not provide an obstacle to safe access from the premises; allowed, permitted or failed to prevent gumnuts from collecting on the access ways and thereby creating a danger to users, particularly the elderly plaintiff; well knowing that the elderly plaintiff and her sister would be attending the defendants' premises on that day, failed to ensure that the access ways were safe; and failed to implement an adequate system of inspection and cleaning. It was accepted that the pleaded case involved a failure to warn and a failure to clean. These pleaded particulars of negligence were not the basis of his Honour's findings of negligence against the defendants. Rather, his Honour found that the defendants "breached their duty in failing to provide safe access to the house by adequately pruning or removing the gum tree."[7]

[15] The evidence at trial was that the defendants had lived in the house for about two months. The evidence accepted by the trial judge was that the plaintiff, who was the female defendant's aunt, had helped the defendants move into the house and was a regular visitor to the house. The steps were regularly swept as part of the routine maintenance of the property. Gumnuts frequently fell from the flowering gum tree in the garden, often moments after the steps had been swept. No one had ever experienced a problem traversing the steps, neither during the brief period when the defendants had owned the property, nor during the 12 years of occupation by its previous owners.

[16] The uncontradicted evidence was that at the time of the incident the female defendant had not quite two weeks earlier given birth to their youngest child, who was subsequently diagnosed with cystic fibrosis and was very ill in hospital. The defendants' parents were at the defendants' home looking after their three and a half year old twins while the defendants attended the hospital with their baby. The plaintiff visited her sister, the female defendant's mother, at the defendants' house.

[17] The trial judge accepted evidence that the plaintiff was a regular visitor to the house assisting the defendants with the care of their young twins and that the house was obviously in a bushland setting. The trees and bushes made the residential setting visually pleasing, provided shade and attracted birds. The plaintiff slipped as she was leaving the property on steps which she had walked up some two hours earlier when she entered the property.

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[7] The evidence did not substantiate any of the particulars so the focus shifted, without objection, during addresses to whether the tree should have been removed or pruned.

[18] It was conceded that the risk was foreseeable. However, as Mason J (as his Honour then was) emphasised in *Wyong Shire Council v Shirt*,[8] the fact that a risk is foreseeable does not dispose of the issue of breach of duty. His Honour outlined the factors for consideration:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is seen for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

[19] There can be no doubt that an occupier owes a duty of care to entrants to the occupier's land and that duty is consistent and coincident with the usual duty to take reasonable care to avoid foreseeable risk of injury to another.[9] The question in this case concerned whether there was a breach of that duty.

[20] The content of the duty in these circumstances must relate to the circumstances in which the parties find themselves. The defendants obviously lived in a home in a bushland setting. As Gleeson CJ said in *Neindorf v Junkovic*:[10]

> "Not all people live, or can afford to live, in premises that are completely free of hazards. In fact, nobody lives in premises that are risk-free. Concrete pathways crack. Unpaved surfaces become slippery, or uneven, many objects in dwelling houses could be a cause of injury. People enter dwelling houses for a variety of purposes, and in many different circumstances. Entrants may have differing capacities to observe and appreciate risks, and to take care for their own safety. … The response of most people to many hazards in and around their premises is to do nothing. The legislature has recognised, and has reminded courts, that, often, that may be a reasonable response."

[21] An example of a case which is very similar to this case on the facts is found in this court's decision in *Woodward v The Proprietors of Lauretta Lodge*.[11] The court considered the risk posed by mango leaves on a set of stairs not dissimilar to those involved in this case. Helman J cited with approval the observations of the trial judge that:

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8 (1981) 146 CLR 40 at 47.

9 *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 at 488; *Hackshaw v Shaw* (1984) 155 CLR 614 at 655. It was not suggested that s 9 of the *Civil Liability Act* 2003 made any relevant difference to the common law applicable to this case.

10 (2005) 222 ALR 631; [2005] HCA 75 at [14].

11 [1997] QCA 183.

> "…the risk presented by the presence of the mango leaves was such that any danger of a fall was far fetched or fanciful. In daylight, the leaves could easily be seen and avoided by users of the steps. There were only a few leaves at the time. Their presence was a familiar feature of these steps. Indeed, the presence of the mango tree and its leaves can have caused no surprise to anyone used to living in south east Queensland, as was [the plaintiff].
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> Even if it were a foreseeable risk, it is my opinion that no further steps were required to eliminate it. The body corporate acted reasonably in tolerating the situation that in fact existed. The small level of risk, balanced against the benefits of a handsome tree which provided shelter from sun and glare, meant that no further steps had to be taken."

[22] The trial judge distinguished the present case on the basis that "gumnuts themselves being small, cylindrical and hard, are unlike mango leaves and clearly a significant hazard on the stairs."[12] However, there is no basis for making such a distinction. Like mango leaves, the gumnuts could be easily seen and avoided, and the evidence suggested there were only a few of them present at a time as the steps were regularly cleaned. The plaintiff's evidence was that she was aware of the presence of gumnuts on the steps. Like leaves, it is common to find gumnuts or similarly shaped objects such as stones, seed pods or twigs on external steps in suburban residences, particularly those in a bushland setting. There is no basis for distinguishing between the two examples of the same principle: that an occupier need not take action to remove all risks, no matter how obvious, from residential premises.

[23] The evidence shows that the plaintiff was familiar with the steps having been there often and presumably had either experienced no danger in respect of the gumnuts or ought to have been aware of any danger that existed. Accordingly the risk that she would suffer an injury of the type that eventuated was remote. Gumnuts are no less common in bushland gardens in south east Queensland than leaves from the once ubiquitous mango trees.[13]

[24] The finding that the tree should have been trimmed or removed to avoid the possibility of gumnuts falling on steps is in my view contrary to principle. Trees and bushes are common place and desirable attributes of homes in residential areas. It is not possible to have the Australian gumtree without the possibility of gumnuts falling or a Casuarina without the possibility of seed pods, or many common native or exotic trees or shrubs which flower and then produce nuts, berries, seeds, or seed pods. I agree with Muir JA as to the aesthetic and ecological desirability of trees in suburban gardens. It is not reasonable for court decisions to require the removal of such trees if an entrant to residential premises slips on a natural hazard which is readily apparent. This is a case in which there is an error to be corrected and unless corrected, may set a most undesirable precedent. Accordingly I would grant leave to appeal, allow the appeal, order that the order made on 16 May 2012 be set aside,

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12 [2012] QDC 103 at [15].

13 Indeed gumnuts have been an everyday part of the consciousness of Australian children since May Gibbs wrote her tales of Snugglepot and Cuddlepie in *Gumnut Babies* first published by Angus & Robertson in 1916.

enter judgment for the defendants and order that the respondent pay the applicants' costs of the proceeding in the District Court and of the appeal to be assessed on the standard basis.

[25] **APPLEGARTH J:** I have had the advantage of reading the reasons of Atkinson J. I agree with those reasons and with the orders that her Honour proposes. I also have had the advantage of reading the reasons of Muir JA and agree with them.