

**LAWS1017 Torts & Contracts II Scaffolds - Do not copy and paste into assessments**

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## **TOPIC 1: THE TORT OF TRESPASS TO LAND & TOPIC 2: PRIVATE NUISANCE; STATUTORY LIABILITY FOR DAMAGE BY AIRCRAFT**

### **Scaffold for trespass to land**

- ☐ Has there been direct, intentional (or negligent), unauthorised or unlawful interference with land in the possession of another?
- ☐ Does P have title to sue? (what is their interest in the land?)
- ☐ What is land?
- ☐ Defences?
  - ☐ Consent by occupier
  - ☐ Statutory authority (but limits)
  - ☐ Necessity (when situation of urgent peril)
  - ☐ Where overflight of aircraft, consider CLA (NSW) s 72
- ☐ Remedies? Actionable per se (ie no need to show actual damage)
  - ☐ Damages - general, aggravated, exemplary
  - ☐ Injunction (and equitable damages in lieu)
- ☐ If aerial trespass, does the damage by aircraft legislation apply?

### Elements of the Action

#### *A. Prima facie, a trespass to land*

The XX on prima facie is a trespass to land as there is a direct interference (*Eso Petroleum v Southport Corp 1956*) when XX with a clear intention of XX through the voluntary intrusion of XX (*Public Transport Commission of NSW v Perry (1977) 137 CLR 107*) [although negligent]

**CONCLUSION:** Overall, it is likely that P would be able to prove on the balance of probabilities that a trespass to the land occurred.

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**[OR]**

*A. Has there been direct, intentional (or negligent), unauthorised or unlawful interference with land in the possession of another?*

### **A direct interference occurs when:**

- There must be a “**physical act done by [the defendant] on to the plaintiffs land**” (Denning LJ in *Southport Corporation v Esso Petroleum Company Ltd* [1954] 2 QB 182)
- [Compare to Facts] *Southport Corporation v Esso Petroleum Company Ltd*:
  - Distinguished from Denning LJ: whereby the discharge of oil was not done directly on to their foreshore, but outside in the estuary, and it was carried by the tide on to their land which was only consequential not direct. Therefore no trespass.
  - They had a remedy but no trespass
- [But note **continuing trespass** if relevant]
  - Although there must be direct interference, a continuing trespass will arise in circumstances where, having committed the initial trespass without consent, the person or object giving rise to the trespass continues to remain on the land (*Konskier v B Goodman*). Pursuant to *Konskier*, P is able to sue in trespass to land if D’s licence to undertake a trespassory act expires and s/he continues to undertake such conduct

### **The trespass is intentional or negligent when:**

- **Intentional**: “**A person who is lawfully upon premises, and is using the premises in an ordinary and reasonable way, becomes a trespasser only if [the defendant] goes voluntarily on to a part of the premises which the invitation does not extend**” (Gibbs J [8] *Public Transport Commission of NSW v Perry* (1977) 137 CLR 107)
- [Compare to Facts] *Public Transport Commission of NSW v Perry* (1977):
  - Majority of the HCA held that Ms Perry was not a trespasser on the railway track as she had gone onto them involuntarily.
  - Gibbs J [8]: “Since [D] had got on to the [railway] line involuntarily her presence there gave [P] no right of action. **It has been established for centuries that a [person] does not commit trespass by going on to ... land involuntarily...**”
- Note: Mistake is not a defence

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- It is clear on the facts that D acted intentionally or negligently in interfering with P's land.

**The interference was unauthorised or unlawful as [this needs to be referred to during defence]:**

- Entry without lawful authority/consent of occupier but there may be implied authority
  - Entry without lawful authority due to limits of statutory authority (was evidence obtained legally?)
  - Entry without lawful authority when consent that was initially granted is later revoked (which also applies to limits of statutory authority)
  - Entry without lawful authority due to limits to implied authority (entry beyond implied authority)
  - Lawful entry but followed by unauthorised conduct
- The entry is **without** lawful authority when D has entered onto P's land **without** his/her consent:
    - P can have consented to D's entering onto his/her land either **expressly (such as written or spoken) or impliedly and this is essentially a question of fact** (Gibbs CJ, Mason, Wilson and Deane JJ in [7] of *Halliday v Nevill* (1984) 155 CLR 1).
      - [Compare to Facts]: The law will imply a licence in favour of any member of the public to go upon the part of land where there is **implied licence/consent** which can be in the form of [7]:
        - the means of access
        - whether the path or driveway was open and unobstructed
        - entrance gate unlocked
        - no notice or other indication which prohibits entry
      - But this must be for **lawful purpose** [7] and "reinforced by considerations of public policy" [8]:
        - "... either unintentionally or to avoid an obstruction such as a vehicle parked across the footpath"
        - "... to recover some item of his or her property which has fallen or blow upon it"
        - "... to lead away and errant child"
      - Or for the **purpose of lawful communication** [7]
        - See *TCN v Anning* for purpose of lawful communication

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- However, **such an implied licence can be precluded or revoked at any time by express or implied refusal or withdrawal of it** [7]
    - However, P **cannot argue that he or she did not imply the consent/licence** when they had neither done nor said anything to negate or revoke any such licence because subjectively he or she had not intended to give it [7]
  - However, [see below on **page 4** for limits on implied authority]
  - It is clear on the facts that P had/had not consented to D interfering with P's land
- b. The entry is **without** lawful authority when there are limits of statutory authority (was evidence obtained legally):
- This is because any legislation which **limits fundamental rights and freedoms of a citizen will be strictly construed in "unmistakable and unambiguous language"** and the statutory authority would not extend to otherwise tortious conduct unless clearly authorised in **unambiguous language so that even general words will "rarely be sufficient"** (Mason CJ, Brennan, Gaudron and McHugh JJ in [435-7] of *Coco v The Queen* (1994) 179 CLR 427; *Kuru v New South Wales* (2008) 236 CLR 1)
  - [Compare to Facts]: Similar to *Coco v The Queen* (1994), where Mason CJ, Brennan, Gaudron and McHugh JJ in [438] held that the s 43 of the *Invasion of Privacy Act* "**does not contain express words**" conferring power upon a Supreme Court judge to authorise conduct which would otherwise be tortious and involve **interference with a fundamental common law right to exclude others from his or her property**.
    - Therefore, evidence of the listening device "was inadmissible" [445]
  - It is clear on the facts that P had/had not consented to D interfering with P's land and [therefore the evidence is admissible/inadmissible].

**OR**

- c. The entry is **without** lawful authority when the consent that was initially given is later revoked:
- For the revocation to be effective, pursuant to Gleeson CJ, Gummow, Kirby and Hayne JJ in [54] of *Kuru v New South Wales* (2008) 236 CLR 1, it must be brought to the **D's attention** and D must have **a reasonable amount of time to leave** P's land once consent or invitation has been revoked.

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- [Compare to Facts]: At first the plaintiff gave the police officers permission to look around but later he told them repeatedly to leave but the police officers stayed until they had completed their search and had made sure that the P's girlfriend was no longer in the flat.
  - Although the police officers have power at common law to enter private premises to prevent a breach of the peace, they have no power to enter or remain on premises for the purposes of investigating whether there had been a breach of peace [47]
  - HCA also held that the police officers were not authorised by the *Crimes Act 1900 (NSW)* s 357F to enter and remain on the premises and when the plaintiff revoked his invitation to the police officers, their right to be there under s 357F ceased immediately [20]
- d. The entry is **without** lawful authority as there are limits to implied authority (entry beyond implied authority):
  - Implied licence to enter ≠ Implied invitation to film
  - “Persons conducting business on private property are entitled to do so without others intruding for purposes unrelated to the business activities they are conducting... includ[ing] those who wish to enter with a view to publicly exposing aspects of the business” (Spigelman CJ in [346] of *TCN Channel v Anning* (2002) 54 NSWLR 333; cited with approval in *Roy v O'Neill* [2020] HCA 45 in [67], [71], [79])
  - There is no issue with D's physical entry onto the P's possession through \_\_\_\_\_ an opened, unlocked or unobstructed entrance, the **main issue is whether the acts of the D were authorised by the P, either implied or expressly** [339]
  - [Compare to Facts]: The entry would be lawful when there is an implied licence if the D “**relied on permission to enter in order to ask the occupier for permission to film**” but no evidence of such in the case [348]
    - The purposes of filming the raid, record the P's use of land and conducting interviews were found to be “wholly outside of any implied licence” [349]
  - However, even if there is express or implied authority, it may be revoked but needs to be manifested.

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- If revoked, the entrant must then leave within a reasonable time or they will become a trespasser who can be ejected with reasonable force [67]

### e. Lawful entry but followed by **unauthorised conduct**:

- “[A] person who is not a trespasser upon entry to land can become a trespasser if the purpose of their licence is exhausted, if the licence is revoked, or if the person performs acts that are beyond the scope of their licence.” (Keane and Edelman JJ in [72] of *Roy v O’Neill* [2020] HCA 45)
- [Compare to facts although there is no clear ratio if a person who enters for a mixed purpose becomes a trespasser before they act inconsistently with the licence to enter]: The initial purpose was to carry out proactive compliance check on Ms Roy who previously stabbed Mr Johnson while intoxicated but later saw her intoxicated through a fly screen door and did a breath test when Ms Ray came to the door
- Keane and Edelman JJ. in majority [74] **MIXED PURPOSE**:
  - “At any point in time a person is either a **trespasser or not a trespasser...**” and “a person’s entry to a premises for an unauthorised purpose “is not made unlawful because he enters with another an alien purpose in mind” (*Barker v The Queen* (1983) CLR at [347]).
  - Although an implied licence to enter is limited to **a particular purpose** and if the sole purpose of entry is entirely outside that particular purpose [318], then entrant will be a trespasser [319] **BUT** “a person who **enters for one or more of the purposes within an implied licence** will not usually be a trespasser even if they have some other purpose that falls outside the scope of the licence”
  - Referred to Barwick CJ and Menzies J in *Healing (Sales) Pty v Inglis Electrix* (1968) CLR which held that the implication in law of a licence in instances of mixed purposes “reflects the realities and incidents of social life” and this does not require the distinction of whether “a purpose within a licence is or is not accompanied by other subjective motivations or purposes that might lie outside the licence” especially if the subjective motivations might be conditional, subservient or uncertain or might never be acted upon. If distinctions were drawn, the operation of an implied licence would be practically unworkable. [319]

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- **Exception to mixed purposes:**
  - “...where the occupier, expressly or impliedly, makes clear that the licence is for an exclusive purpose and does not extend to entry for a mixed purpose ...” [320] such as notice saying “Police keep out” [321]
  - “If a person’s licence to be present on land concludes, is exceeded, or is revoked then the person will be a trespasser unless the person has some independent legal authority to be present on the land” [320]
- No trespass on entry here
- Kiefel CJ **DUAL APPROACH:**
  - Considered all purposes of D were lawful so did not consider mixed purpose
  - “Either of the two lawful purposes referred to above was sufficient for the law to imply a licence for Constable Elliott to enter the dwelling unit in question. He was not a trespasser. The evidence of the results of the breath test was admissible...” [307] - [308]
  - **The Dual Approach:** “The two purposes – to observe and enquire the appellant and Mr Johnson – go hand in hand”
- CF Gageler and Bell JJ, in dissent **UNLAWFUL COERCIVE PURPOSE** [40]:
  - If an entrant has any **intention** of exceeding the licence, he/she is a trespasser on entry and “depends on what the visitor is seeking to achieve [at P’s possession]” [308]
    - “If the purpose is just to talk to me, and in talking simply to ask for permission to come inside or to go elsewhere on my land or simply to ask for my voluntary cooperation in pursuing some inquiry the totality of the conduct is within the scope of the licence. If the purpose is to coerce me, the **totality of the conduct is outside the scope of the licence; it is a trespass**” [308]
    - [Compare to Facts]: “However **politely** Constable Elliot might have intended to couch the direction he gave to Ms Roy, he knew that Ms Roy would have no option but to **comply** had the direction been lawful. She would be criminally liable if she did not” [310]
  - That **coercive purpose** took Constable Elliott and his colleagues **beyond the scope of the implied licence; it made them trespassers.** [310]

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- The fact that Constable Elliott and his colleagues had the more general “dual purpose” of checking on Ms Roy’s compliance with the DVO and [311] checking on the well-being of Mr Johnson makes no difference.

**CONCLUSION:** Overall, it is likely that P would be able/unable to prove on the balance of probabilities that D would be liable for trespass to land.

### Title to Sue

**INTRO:** Although the elements of trespass to land are made out, there needs to be a title to sue by the plaintiff.

#### *A. Does the plaintiff have title to sue? What is their interest in the land?*

A plaintiff may bring an action for trespass if she or he has exclusive possession of the land at that time of the trespassory act. (McHugh JA with whom Hope JA and Kirby P agreed at [563-4] of *Newington v Windeyer* (1985) 3 NSWLR 222)

#### **Exclusive possession:**

- An individual ‘adverse to the true owner has a legal interest...as long as a person does not abandon possession, possession for less than 12 years enables him to exclude from the land any person who does not have a better title’ [563]
  - does not need to have a legal or equitable interest to sue in trespass [563]
- “... that possession is prima facie evidence of seisin in fee and that an estate gained by wrong is nevertheless an estate in fee simple” [563]
- Evidence of actual possession:
  - mowing the lawn, maintenance of trees, garden, cutting down trees, entertainment, paying rates, informing others it was trespass, actual possession was found, hosting parties [564]
- “An action for trespass is an action for the disturbance of possession, and ... the persons who can maintain it are those whose possession is disturbed” (Hodges J at [544] of *Rodrigues v Ufton* (1894) 20 VLR 539)



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### **Parties that do not have title to sue for trespass:**

- A lessor/reversioner/landlord
  - “... no doubt that the reversioner cannot bring an action of trespass” (Hodges J at [546] of *Rodrigues v Ufton* (1894) 20 VLR 539)
  - BUT he can “bring an action, and can recover damages, if a trespass will injure his reversion” [546] - A landlord during the subsistence of a lease does not have title to sue in trespass but he may recover for injury to his **reversionary interest on proof of permanent injury to the land**
- It does not apply if exclusivity cannot be demonstrated such as for a mere licensee
  - A patient in a hospital room (*Kaye v Robertson*)
  - A guest in a hotel room or function (*Douglas v Hello! Ltd* [2003] 3 All ER 996)
  - A squatter
- It does not apply against an individual not in occupation if they are a legal co-tenant who have a contractual right to enter the premise – *BA v The King* (2023) [43]
  - This was given the ‘*right of occupation...was not in the nature of a mere possession to occupy...a right of exclusive possession which would not have been lost even if it had been found that he ceased to occupy the premises*’

### Where did the trespass occur?

#### **Trespass to Land**

- It includes **anything fixed to the land** ‘fixtures’ (Gibbs CJ in *XL Petroleum v Caltex Oil* (1985))
  - Underground oil tanks (*XL v Caltex*)
  - Moveable things that are part of the land (e.g. flowers/sandstone)
- Does not include
  - Movable things (e.g. caravan) (Brereton JA in [107] *McIntosh v Morris* [2021] NSWCA 225)
  - This is unless they are a part of land (e.g. crops), which will become goods once separated from the land

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### **Trespass to airspace**

- The test is “whether the incursion is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake” (Hodgson J at [495] of *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1898) 24 NSWLR 490)
- But a literal application of the *usque ad coelum maxim* was rejected by Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479)
  - No authority for “... landowner’s rights in the airspace above his property extend to an unlimited height” [487-8] for public policy reason to “balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space”
  - Only to the “height as is necessary for the ordinary use and enjoyment of his land and the structure upon it, ... he has no greater rights in the air space than any other member of the public”
- **Structures:**
  - [Compare to Facts]: The D rejected the terms of P and built the scaffolding anyway at a height of about 4.5 metres above ground level and 1.5 metres into the airspace above plaintiff’s property
  - Benefit for test: so that the owners know that “they have no right to erect structures overhanging or passing over their neighbours’ land and there is no room for argument whether they are thereby causing damage or annoyance to their neighbours” (Griffith J at p 486 in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479)
  - [Compare to Facts of *Graham v KD Morris & Sons Pty Ltd* [1974] Qd R1 referred by Hodgson J in *LJP Investments v Howard Chia Investments* (1989)]:
    - The Court found that the incursions of crane jibs that were not in used but at heights of the order of 50 feet (15.24m) above the plaintiffs roof were treated as trespass [495]
  - Yes → trespass to land
  - No → no trespass to land
  - Note: The law places a high value on the rights of free hold landowners to control the use of that land (*Bendal v Mirvac Project*)
- **Overflight by aircraft:**

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- Did the trespass encroach upon the actual or potential use or enjoyment of the land and the structures on it? (*Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479)
- [Compare to Facts] Griffith J:
  - Was it a single flight? - if multiple continuous flights, could be nuisance
  - Did the occupier know about the overflight?
  - Whether the occupier was being kept under surveillance?
- **Defence under s72 of CLA**
  - “No action lies in respect of trespass or nuisance if only one aircraft fly over the property at a reasonable height” but subject to compliance with the Air Navigation Regulations

### Trespass to Underground

- Yes → the occupier have an interest in the land to the specified depth
  - A person has substantial control over land beneath his or her soil for a considerable depth (*Di Napoli v New Beach Apartments* [2004] NSWSC 52 at [18]-[19] by Young CJ in Eq)
  - Although it has been often said that prima facie “the owner of the surface is entitled to the surface itself and everything below it down to the centre of the earth” Lord Hope [984] (*Bocardo v Star Energy UK Onshore* [2011] AC 380) but need to consider below:
  - [Compare to Facts]:
    - *Di Napoli*: D argued that the rock anchors are “too distant or the depth too great to be available to the P for ordinary use and enjoyment of her land [65,399] but it must be consented by the owner of the surface land [20]
      - Otherwise the court will grant an injunction [65,401]
    - *Bocardo*: Lord Hope of Craighead DPSC said at [15] that the pipe that were deep down at 800-2800 feet (850 metres) “do not get anywhere near approaching the point of absurdity”

### Defences

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**INTRO:** Although the elements of trespass to land have likely been established, if D can prove on the balance of probabilities that a defence existed in relation to the conduct in question, then she or he may not be liable for the commission of the tort.

### *A. Did the P give consent for the D to encroach upon their land?*

- *Halliday v Neville (1984) 155 CLR 1*
  - Yes → No unauthorised or unlawful entry
  - No → No defence to trespass

### *B. Is the trespass permitted by a statutory or common law authority?*

- E.g. police powers, but note limits of police powers to enter (*Plenty v Dillon; Kuru v R; Coco v R; Halliday v Neville*)
- Yes → Is the statutory ambiguous?
  - Yes → Can be relied upon by a defendant entering without lawful consent
  - No → Cannot be relied upon to excuse trespass to land (*Coco v R; Kuru v NSW*)

### *C. Was the trespass necessary to prevent a greater evil in a situation of urgent peril?*

- *London Borough Southwark v Williams (1971)*
  - Yes → Necessity will provide a defence
  - No → Necessity will provide no defence
- *Proudman v Allen [1954] SASR 336*
  - [Compare to Facts]: D managed to catch up with a car that had lost control and turn its steering wheel to prevent a collision. The car then ran into sea. P (the owner) made a claim against D for interference with goods.
  - Necessity may be used as a defence against liability caused by interference with goods/person/property when:
    - There has been real and imminent danger to life or property
    - The D's conduct was reasonably necessary in the circumstances to save the goods/person/property from real and imminent danger

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### *D. Where overflight of aircraft, consider s 72 of CLA (NSW)*

See above

### *D. Was the defendant exercising a self-help remedy?*

- Abatement of a nuisance, retaking of stolen goods
- Yes → possibly a lawful defence but exercise with extreme caution and on very strong and reasonable grounds
  - Was prior notice given?
    - Usually required

### Remedies (Actionable per se)

- Trespass to land is **actionable per se** (*Plenty v Dillon*) and thus do not need to prove actual damage to **receive an award of damages** and also means the lack of damage is no defence.
- The first test is whether the damages can be claimed which relies upon the **remoteness of the damages**. (*Plenty v Dillon*)
  - ‘**Damages can be recovered for harm that is intended or that is the natural and probable consequence of the tortious act**’ (Spigelman CJ agreed by Mason P and Grove J, *TCN Channel Nine v Anning* [352], relying upon *Palmer Bruyn & Parker v Parsons (2001)*)
    - Natural probable cause:
      - This is given it is within their ‘presumed intent’ of the actor [100], citing *Palmer Bruyn & Parker v Parsons (2001) HCA* [73] and [80] per Gummow J
      - AND must depend on all the circumstances of a case and essentially a question of fact [353]
        - E.g., ‘a cobra snake in a bedroom’ may demonstrate personal intent – however, psychiatric does not extend to a ‘video camera’

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which may drive aggravated damages, but from which psychological trauma does not flow naturally [107]

- There are three considerations when applying this test
  - This does not rely upon ‘reasonable foreseeability’ – *Palmer (2001)*
  - This is a question of fact [104]
  - There are no limitations upon the types of damages that may be claimed – [104]; indeed, psychiatric damages may be the natural and probable consequence – [105]

### *A. Damages?*

#### **Nominal Damages**

Trespass, uniquely, **does not require demonstration of actual damages** – Mason CJ, Brennan and Toohey JJ [655] *Plenty v Dillon (1991)*

1. ‘Entry was wrongful, and the plaintiff is entitled to judgement and an award of some damages...in vindication of his right to exclude defendants from the farm’ – [645], relying upon *Halliday v Nevil (1984)*, *Great Central Railway Co v Bates (1921)*
  - a. There is no separate type of vindictory damages, but there may be a vindictory purpose – Gordon J [119]-[120], *Lewis v Act (2020)*
  - b. [Compare to Fact]: The award of damages themselves appears to be impacted by the consequences of the trespass, with the **sense of injustice felt by Plenty, and the distress and humiliation contributing** – *Edelman J at [161]*, *Lewis v Act (2020)*
    - and similar remark by Gaudron and McHugh JJ: “sense of injustice which is apt to be generated by the unlawful invasion of a person’s right, particularly when the invader is a governmental official” [655]
  - c. This was affirmed by *Gageler J at [120]* in *Smethurst (2020)* – ‘**vindicate her interest in ‘maintaining the right to exclusive possession...free from uninvited physical intrusion by strangers’**, drawing from *NSW v Ibbett (2006)* at [29]

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### General Damages

Generally, however, damages are based on the **principle of restoration** – *Kirby J, Parramatta City Council v Lutz (1988)*. For buildings, the following principles apply.

1. There exists the ‘restitutio in integrum’ principle – *‘the object is to restore the plaintiff to the position in which he would have been placed if the wrongful act had not been committed’* – *Kirby J at [311]*, quoting *State of South Australia v Johnson (1982) [169]-[170]*
  1. They are entitled *‘to recover the reasonable cost of reinstatement’* for a building – **[312]** – this means entitlement to e.g. a home, not a sum of money equivalent to it
  2. This principle, however, applies only if it is reasonable to have the property reinstated and restored – *Samuels JA, Evans v Balog (1976) [39]-[40]*

The award of damages, if related to land, however, may be reliant upon the intentions of the plaintiff – *Williams J, Hansen v Gloucester Developments (1992)*, relying upon *Dodd Properties v Canterbury City Council (1980)*

1. *‘The first is to take the capital value of the property in an undamaged state and to compare it with its value in a damaged state...if he reasonably intends to sell the property in its damaged state, clearly the diminution in capital value is the true measure of damage’*
2. *‘The second is to take the cost of repair or reinstatement...if he reasonably intends to continue to occupy it and to repair the damage, clearly the cost of repairs is the true damage’*
  - a. There are, however, in-between measures

This is unless, as relied upon by Kirby from *Evans v Balog (1976)*, if *‘the cost of replacing the land is disproportionate to the diminution in the value of the land, unless there is a reason personal to the owner for restoring the original condition’*, **diminution** is relied upon.

1. Kirby, however, observed that ‘replacing the land’ must be read liberally, given it is often not possible to restore to the exact pre-existing condition – thus, judges should consider competing alternatives against the diminution of value

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If the building in question, however, is effectively 'redundant', it is unreasonable to seek the costs of rebuilding; the claim is restricted to diminution of value – *C R Taylor v Hepwroths (1977)*.

### **Aggravated Damages**

Aggravated damages may be awarded – *Spiegelman J, TCN Channel Nine v Anning (2002)*.

1. The difference is for aggravated damages, '*that focus is directed at compensating the plaintiff for the circumstances and manner of the defendant's wrongdoing*' – [157]
  - a. E.g. if '*hurt to feelings, humiliation and affront to dignity...was aggravated by the way in which the Appellant acted...filming for the purpose of broadcast to the public at large...justifies an award of aggravated*' – [179]
2. The injury '*may be intangible*' – Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ – *NSW v Ibbett (2006)* [31]

### **Exemplary Damages**

Exemplary damages may be awarded – *XL Petroleum v Caltex Oil (1985)*.

1. They are 'intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again' – Brennan J (dissenting), [471], from *Whitfield v De Lauret (1920)*
2. They are 'not compensatory, but designed to punish and deter' – Spiegelman J, *TCN Channel Nine v Anning* [157]

However, exemplary damages may only be awarded in very specific instances:

1. Spiegelman J at [167] in *TCN Channel Nine v Anning* rejected the trial judge's rationale of the plaintiff's outrage, and a continuing trespass as inadequate
2. Indeed, they are described as 'awarded rarely and require something more than finding of fault' – [185], affirmed by *Gray v Motor Accident Commission*



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- a. This is a question of fact – Spiegelman considered that the intrusion being not personal, but for business; considered public interest in allowing investigations; the tone was forceful, but not insulting; and they left promptly when confronted – [186]-[187]
3. It was not contested, however, in XL Petroleum, given the consensus view that Caltex had abused their position of relative wealth to under a competitor for financial gain, seen as ‘contumelious disregard’ – **Brennan J, [472]**

The observed position is that Courts may intervene if they believe it is excessive.

1. Gibbs CJ suggested that ‘*the nature of those rights and the ability of the plaintiff to benefit from their exercise are matters properly to be considered*’ when awarding exemplary damages – **Gibbs CJ (in majority), [463]**
  - a. Gibbs CJ affirmed *Precision Plastics v Demir (1975)* that there is ‘*the risk that exemplary damages might amount to a punishment greater than would likely to be imposed if the conduct were criminal...juries should display restraint*’ – [463]
2. There were some considerations made (albeit, not of ‘major consequence’)
  - a. First, the conduct was of short duration – Gibbs suggested that ‘*much evil can be done in a moment*’, but agreed that the damage was repaired at not significant cost, and there was no repetition – [461]
  - b. Second, XL had not been given consent to utilise the tanks – agreed that this reduced the extent to which their rights were infringed – [462]

**NOTE:** although Spiegelman J recognises at [156] in *TCN Channel Nine v Anning (2002)* why distinction of exemplary and aggravated is difficult, they should be awarded separately – [166].

### ***B. Injunctions?***

Injunctions are an equitable remedy sought where damages at common law would be an inadequate remedy. They are relatively rare, as there are several bases from which they may be rejected:

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1. If the common law damages are adequate – *Lincoln Hunt Australia Pty Ltd v Willesee (1986)*
  - a. It is insufficient if there exists some support for an injunction – they are only granted ‘*if it can be seen that irreparable damage will be suffered by the plaintiff...such may occur when the damages are virtually impossible of quantification*’ – **Young J**
    - i. **OLD VIEW**: specifically, ‘*if it would be unconscionable for the defendant to publish the material obtained by trespass*’ – if taken from private property, and impacting goodwill
    - ii. **NEW VIEW**: in *Lenah (2001)*, **Gleeson CJ** at [55], affirmed by *Smethurst (2020)*, **Kiefel CJ, Bell and Keane JJ** at [82] disagreed with Young and noted that unconscionability through ‘tortiously obtaining information’ was insufficient to make it unconscientious to use/publish it; and that further requirements were necessary
2. If there is a public interest – *Lincoln Hunt Australia Pty Ltd v Willesee (1986)*
  - a. Although not considered, there further exists a consideration of ‘*public interest in having full dissemination of news of matters of general importance*’ against individual rights – **Young J**
3. If there is no legal right – *ABC v Lenah Game Meats (2001)*
  - a. ‘*the necessary quality of privacy to warrant the application of the law of breach of confidence...[met by] the gratuitously humiliating nature of the film...permit the information to be regarded as confidential. If that condition is not fulfilled, the circumstance that it is tortiously obtained is not sufficient*’ – **Gleeson CJ, [54-55]**
  - b. ‘*Injunction is a curial remedy...it can only issue to protect an equitable or legal right...there is no statutory provision specifically authorising the grant of an order restraining publication of material obtained*’ – **Gaudron J, [60]-[61], Gummow and Hayne JJ [132]** (noting, however, the question of the right to privacy)

## **Scaffold for statutory action for damage by Aircraft**

This tort is restricted to damage caused by the aircraft, or its contents, but does not apply to passenger injury, which is covered within the *Civil Aviation (Carriers Liability) Act 1959*.

1. **Aircraft** – ‘any machine or craft that can derive support in the atmosphere. From the reactions of the air, other than the reactions of the air against the earth’s surface’ – **s3, Civil Aviation Act**

It should initially be considered whether it falls within Commonwealth legislation. This is given inconsistencies between State and Federal legislation are settled by the Federal Legislation – **s109 Constitution**.

1. The application of Commonwealth Legislation (**s10 Damage by Aircraft Act (2002)**) requires:-
  - a. It requires some ‘impact’ from the aircraft, or part of the aircraft – **s10(1) DAA, ACQ v Cook (2008), Southgate v Cth of Australia (1987)**
    - i. **s10(1)(a)** an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened
    - ii. **s10(1)(b)** an impact with part of an aircraft that was destroyed or damaged in flight
    - iii. **s10(1)(c)** an impact with a person, animal or thing that dropped or fell from an aircraft in flight
  - b. It requires the aircraft to fall within the criteria identified in **s9 DAA**
    - i. If the aircraft is owned by a trading/commercial corporation within the bounds of s51(xx) of Constitution – **s9(b) DAA**
    - ii. It, however, does not capture defence aircraft – **s9(2) DAA**
    - iii. Aircraft (including foreign) engaged in:-
      1. International navigation – **s9(c)(i) DAA**
      2. Air navigation related to trade and commerce – **s9(c)(ii) DAA**
      3. Air navigation conducted by a foreign corporation – **s9(c)(iii) DAA**
      4. Air navigation to or from territories – **s9(c)(iv) DAA**
      5. Landing at, or taking off from, a place acquired by the Cth for public purposes – **s9(c)(v) DAA**

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- c. It does not capture mental injury caused unless the person suffers other personal injury, material loss, damage or destruction – **s10(1A) DAA**
- d. It is a strict liability offence – **s11 DAA**

If failing, **s73 CLA (NSW) 2002** will apply.

1. Where material **loss or damage** is caused to any person or property on land or water by, or by a person in, or an **article** or person falling from, an aircraft while in flight, taking off or landing, then unless the **loss or damage** was caused or contributed to by the **negligence** of the person by whom it was suffered, damages in respect of the **loss or damage** are recoverable without proof of **negligence** or intention or other cause of action, as if the **loss or damage** had been caused by the wilful act, neglect, or default of the owner of the aircraft.
2. However, where the material **loss or damage** is caused in circumstances in which—
  - a. (a) damages are recoverable in respect of that **loss or damage** by virtue only of subsection (1), and
  - b. (b) a legal liability is created in some person other than the owner to pay damages in respect of that **loss or damage**,the owner is entitled to be indemnified by that **other person** against any claim in respect of that **loss or damage**.
3. Where the aircraft concerned has been bona fide demised, let or hired out for a period exceeding 14 days to any **other person** by the owner of the aircraft, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, references in this section to the owner are to be read as references to the person to whom the aircraft has been so demised, let or hired out.
4. In this section--
  - "article" includes mail or animal.
  - "loss or damage" includes, in relation to persons, loss of life and **personal injury**.