CITATION:	*Carina James v North Star Pastoral Pty Ltd* [2019] NTSC 72
PARTIES:	JAMES, Carina v North Star Pastoral Pty Ltd ACN 117 235 480
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction.
FILE NO:	93 of 2018 (21838827)
DELIVERED:	18 September 2019
HEARING DATE:	26 August 2019
JUDGMENT OF:	Barr J

CATCHWORDS:

TORT – TRESPASS TO LAND – Fence constructed by defendant encroached two metres inside plaintiff's boundary – initial trespass unintentional – no damage alleged to plaintiff's land – minuscule area of land affected – trespass continued after defendant made aware of encroachment – encroaching two metres of fence removed prior to trial – plaintiff entitled to general damages for vindication of right to exclusive use and occupation – no element of restitutionary damages – plaintiff suffered distress on account of defendant's delay in removing the encroachment – plaintiff entitled to aggravated damages – plaintiff not entitled to exemplary damages – defendant's actions not sufficiently reprehensible, 'wanton or malicious', or 'gross and outrageous' to justify award of exemplary damages

Lamb v Cotogno (1987) 164 CLR 1; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; *Plenty v Dillon* (1991) 171 CLR 635; *Gazzard and anor v Hutchesson and anor* (1995) Aust Torts Reports 81-337 (SA SC), referred to

John G Fleming, The Law of Torts, 9th edition (1998), p. 53, cited

REPRESENTATION:

Counsel:

Plaintiff:	T Tzovaros
Defendant:	M Spazzapan

Solicitors:

Plaintiff:	De Silva Hebron/Salerno Law Pty Ltd
Defendant:	Ward Keller
Judgment category classification:	B
Judgment ID Number:	Bar1912
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Carina James v North Star Pastoral Pty Ltd [2019] NTSC 72
No. 93 of 2018 (21838827)

BETWEEN:

CARINA JAMES
Plaintiff

AND:

NORTH STAR PASTORAL PTY LTD
ACN 117 235 480
Defendant

CORAM: Barr J

REASONS FOR JUDGMENT

(Delivered 18 September 2019)

Introduction

[1] The plaintiff claims damages, aggravated damages and exemplary damages for the defendant's admitted trespass.

[2] The fact that a trespass may be of an apparently trifling nature is no defence. A plaintiff in an action for trespass is entitled to recover damages, even though he or she has sustained no actual loss.

[3] Over a period of several years prior to 2016, the plaintiff built a fence some 20 km in length which traced part of the boundary between her land (Cow Creek Station, Larrimah, NT Portion 4966) and land

belonging to the Wubalawun Aboriginal Land Trust (NT Portion 2016). The boundary runs approximately north-south.

[4] For reasons which might be characterised as 'a matter of principle' in the context of the plaintiff's relationship with the Wubalawun Aboriginal Land Trust and/or the Northern Land Council, the plaintiff built her fence entirely within her own land, two metres inside the boundary with the Land Trust land.[1]

[5] In 2016, the Land Trust land came to be occupied by the defendant under licence from the Wubalawun Aboriginal Land Trust.[2] Under the terms of the licence agreement, the defendant was required to make specified improvements to the land by specified dates. One such "approved improvement" was the construction of 24.6 km of fencing shown as 'Fence Line B' on a plan annexed to the agreement. In general compliance with that obligation, sometime in 2017, the defendant built a fence on the Land Trust land which tracked approximately east-west.

[6] The most westerly two metres of that fence crossed into the plaintiff's land and joined the plaintiff's fence at a right angle, forming a T-intersection of the fences.

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1 In successive attempts to plead the plaintiff's claim, the plaintiff's lawyers refer to the fence as "Plaintiff's fence infrastructure". It is unclear what the word 'infrastructure' adds to the meaning of 'fence', but it is probably intended to include support structures which, strictly speaking, may not be part of the fence itself. I will call the fence a fence in these reasons.

2 The licence was granted by a 'Pastoral Land Use Agreement' between the defendant, the Northern Land Council and the Wubalawun Aboriginal Land Trust: annexure 'CR-1' to the affidavit of Colon Ross affirmed 3 July 2019.

[7] By the construction of that two-metre section of fence, the defendant was trespassing on the plaintiff's land. The fact of entering the plaintiff's land and erecting the fence was a trespass. In fact, there was actually a dual trespass: (1) the intrusion onto the plaintiff's land to build the westernmost two metres of fence and (2) the "continuing trespass" from the time the fence was built in 2017 to when it was removed on or about 3 May 2019.

[8] By its Defence to the plaintiff's most recent Statement of Claim, the defendant admitted that it wrongfully built the westernmost two metres of fence on the plaintiff's land.[3]

[9] The plaintiff was at all times entitled to request that the defendant remove that part of the fence which was on her land.

[10] Moreover, she was entitled to issue court proceedings, as she did,[4] for a mandatory injunction to compel the defendant to remove that part of fence which was on her land.

[11] The plaintiff alleged trespass but did not plead a specific claim for damages in trespass until 1 May 2019.[5]

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3 Specifically, the defendant admitted that it wrongfully built "a metal pipe rail construction with three posts and two stay posts at the end of the Defendant's constructed fence which trespasses upon the Plaintiff's land by about two metres over the common boundary". See par 5 of the Defence, filed 15 May 2019, to the plaintiff's 'Amended Amended Statement of Claim', filed 1 May 2019.

4 In the writ filed 12 September 2018, the plaintiff referred to the presence of an encroaching fence and sought an order "that the Defendant, by itself, its servants, agents or contractors do all such things necessary to remove any encroachment upon the Plaintiff's land caused by the presence of the encroachment or part thereof on the plaintiff's land without the plaintiff's consent", together with an order that the defendant make good the plaintiff's land.

Damages

[12] As mentioned in [2] above, a plaintiff in an action for trespass is entitled to recover damages, even in the absence of actual loss.

[13] In respect of actual damage to land (or structures), a plaintiff is entitled to compensation on the same principles as for negligence.[6] Otherwise, according to Professor Fleming, "the basic measure of damages is the use value of the land, regardless of whether and how the owner would otherwise have exploited it". It is not compensatory like a typical tort action, but rather restitutionary, preventing the defendant's unjust enrichment.[7]

[14] In *Plenty v Dillon*[8], Gaudron and McHugh JJ characterised an award of general damages, for a serious trespass to land, as also fulfilling vindicatory purposes:

> True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. The appellant is entitled to have his right of property vindicated by a substantial award of damages ... If the occupier of property has a right not to be unlawfully invaded, then … the 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric'.

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5 In her third pleading, described as 'Amended Amended Statement of Claim'.

6 *Hansen v Gloucester Developments* [1992] 1 Qd R 14.

7 John G Fleming, The Law of Torts, 9th edition 1998, p 53.

8 *Plenty v Dillon* (1991) 171 CLR 635 at 654-655.

[15] The plaintiff does not allege damage to her land. Her claim for general damages appears to be for vindication of her proprietary right.

[16] The plaintiff contends that the defendant committed an intentional trespass; that is, it built the fence or had the fence built with knowledge that it would constitute a trespass to the plaintiff's land. Counsel for the plaintiff submitted that an intentional trespass should attract an award of aggravated damages or even exemplary damages.

[17] I am not satisfied on the balance of probabilities that the defendant committed an intentional trespass. Rather, I am satisfied that the defendant built the fence on the understanding that it was doing so lawfully, for legitimate purposes and to satisfy a contractual obligation.

[18] Counsel for the plaintiff submitted that the defendant would have been alerted by the presence of survey pegs marking the legal boundary. The relevant evidence was contained in par 6.b. of the plaintiff's affidavit:[9]

> The common boundary was at some time surveyed. I understand this to be true because the common boundary survey pegs used in the survey still remain in situ. The common boundary survey pegs were on the common boundary before I purchased the Plaintiff's land.

[19] There was no evidence at trial that survey pegs were present in the immediate location where the defendant's fence met the plaintiff's fence. Mr Ross, the sole director the defendant, denied any knowledge

9 Affidavit of Carina James, sworn 19 June 2019.

on his part, prior to the construction of the offending fence, that the plaintiff's fence was two metres in from the actual boundary.[10] Mr Ross was not aware of any survey pegs relevantly situated.[11] I accept that evidence.

[20] Counsel for the plaintiff pursued the submission that I should find that the defendant's trespass was intentional and infer that Mr Ross would have travelled around and carefully assessed the boundaries of the land prior to the defendant entering into the license agreement. Mr Ross, denied that he carefully checked the boundaries in the way suggested.[12] I accept his evidence that he would not have been overly concerned with the boundaries or the boundary fencing, and that the focus of his attention would have been watering points for stock, and infrastructure. I also accept the evidence of Mr Ross that he probably did not visit the western part (or "back part") for quite some time after the defendant acquired the property because there were no plans to use that part of the property initially.[13]

[21] It was my impression that the defendant was to some extent an innocent party, and that there was no reason for the defendant or Mr Ross to believe that the plaintiff's fence was not the actual boundary

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10 Evidence of Mr Ross at T 56.6, 57.4. See also T 56.8, where Mr Ross denied that he was aware, prior to signing the licence agreement, that there was any issue between the plaintiff and the Northern Land Council about contributing towards the cost of her fence.

11 Evidence of Mr Ross at T 57.5, 58.4.

12 Evidence of Mr Ross at T52.2.

13 Evidence of Mr Ross at T52.6.

fence. There is no evidence that he had been informed of this fact by the Northern Land Council, which negotiated and drafted the licence agreement on behalf of the Land Trust. Moreover, the map of the grazing area, annexure 'B' to the licence agreement, showed what the legend describes as a "Community fence" on what appears to be the western boundary of the Land Trust land. There was no apparent separation or distinction made or shown between the so-called Community fence and the legal boundary.

[22] Finally, I note that in her email to Mr Ross sent 24 May 2018, the plaintiff wrote as follows:

> Just to clarify, NLC have pushed the situation upon us BOTH and I have to stand up for my legal rights – personally I have no gripe with NSP [the defendant] – but perhaps now you can consider yourself more informed about the issue and your part in it – (in the fence that has been constructed by NSP over the cadastral boundary onto Cow Creek).
>
> I do however feel they – (NLC) have been somewhat less than honest with you, as this matter has been known for years …

[23] It would appear that, at the relevant time, the plaintiff herself did not believe that the defendant's trespass was intentional.

[24] In all the circumstances, I am not prepared to infer that the trespass was intentional, as contended by counsel for the plaintiff. However, I turn to consider the situation after the plaintiff made the defendant aware of the trespass, on 24 May 2018.

[25] Going back a day in time, on 23 May 2018, the plaintiff had sent an email to Mr Ross, as follows:

> It is a busy time of the year for us all but I really do need to catch up with you about this matter of the boundary.
>
> I did speak with Gavin when he was in your employ but I don't think he got back to you about it and it may have slipped Brodie's mind also.
>
> The lack of transparency over the fence does not surprise me if your dealings with the Wabulawan lease involved [male person's name redacted]. …

[26] If the plaintiff was intending by that email to raise the issue of the two-metre fence encroachment, she raised the issue very obliquely, if at all.[14] Not surprisingly, Mr Ross probably thought that the issue was the boundary fence; hence his reply:

> Unfortunately the issue of the fence has nothing to do with NSP, it is a prior issue that obviously was before we leased the place, you need to speak to Mark Ford at the NLC, as he is our contact.

[27] The plaintiff then got to the point, in an email sent at 12:18 pm on 24 May 2018:

> NSP has constructed a fence that must be removed back to the boundary point – it is your issue – please give me a time to discuss. And if you could also give me Mark Ford's contact as he must also be unaware that the fence he thinks is on the boundary is not.

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14 The plaintiff agreed in cross-examination at T 36 that she did not mention the fact that she wanted to talk to Mr Ross about a trespass. She then sought to explain her reason for not doing so in a very lengthy but most unconvincing fashion at T 36-37. I was left with the impression that her principal concern in the early stages was to obtain a financial contribution to ongoing maintenance of her own fence.

[28] I am satisfied that the defendant did not have reason to believe that the construction of the last two metres of his fence was an intrusion onto the plaintiff's land, resulting in trespass to land, until he received the plaintiff's email dated 24 May 2018. From that date on, he was – or ought to have been – aware of the fact that the presence of part of his fence on the plaintiff's land was (said to be) a continuing trespass. He made attempts to have the Northern Land Council deal with the plaintiff in relation to her underlying concern, which was obtaining a contribution to the maintenance costs of her fence. However, for the next 12 months or thereabouts, the offending fence remained in place.

[29] As mentioned above, the plaintiff does not allege damage to her land, and her pastoral operations were not affected. It is difficult to assess the quantum of the plaintiff's damages for vindication of her right to the exclusive use and occupation of a miniscule area of land which she had chosen not to include within her own boundary fence. I note that the plaintiff was prepared to negotiate an agreement to leave the offending fence in place, that is, relieve the defendant of its liability in trespass, in return for a $12,000 contribution to the maintenance of her fence which, she agreed, would then be the boundary fence for practical purposes, presumably indefinitely.[15]

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15 In her email to Mr Ross sent 24 May 2018 at 13:47 (annexure 'D' to the plaintiff's affidavit), the plaintiff wrote: "I have just contacted Mark [NLC]. Explained their problem to him and I have given NLC two weeks to get a solution and get back to me. I have reached the end of my long-suffering patience. 12 thousand (a very fair amount) has to be put in to contribute toward the share of what will then become the boundary fence OR unfortunately the fence constructed by NSP has to be removed back to its

[30] I have considered whether there is any significance in the plaintiff having built a fence two metres inside the legal boundary. The purpose of a fence is to alert and prevent: to alert members of the public to the metes and bounds of one's own property, so that strangers do not trespass; and to create a physical barrier to prevent persons trespassing, and, in the pastoral context, to prevent stock wandering off or a neighbour's stock wandering in. By building a fence within one's own boundary, rather than on the boundary, one is not alerting, or preventing, or even seeking to prevent the public using the strip of land which the owner has elected not to fence. In the present case, the location of the fence meant that the plaintiff was unable, in the practical sense, to utilise the two-metre strip for grazing. Indeed, when asked if she actually grazed cattle on the two-metre strip between her fence and the boundary, she said that she did not do so deliberately.[16]

[31] I have formed the view that the plaintiff had to some extent, by her own conduct, devalued the proprietary right which she has sought to vindicate in this proceeding. She had determined not to use the two metre strip; she had deliberately not enclosed it; and she had not informed the defendant of her proprietary right to any land which lay beyond her fence. However, to the extent that my conclusion may be

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cadastral position and there will be further action in respect of my fence which may or may not affect where NSP cattle wander."

16 Evidence of the plaintiff, T 44. The reference to "deliberately" was in the context that the plaintiff's cattle may at times have got out through a fence being down and wandered unrestrained – see T 43.9.

relevant to the initial trespass, it is not relevant in respect of the period after 24 May 2018.

[32] There is no evidence that the defendant gained an advantage from the continuing trespass to better or more profitably utilise the two large paddocks (or tracts of land) created to the north and south of the fence. In his affidavit evidence, Mr Ross deposed that "in light of allegations/complaints regarding the boundary fence" and the subsequent allegation of trespass, he did not run cattle in either paddock.[17] He was not challenged in cross-examination. Ultimately, the plaintiff's evidence does not establish that the defendant was advantaged by the fence such that the award of general damages should include an award of restitutionary damages.

[33] I assess general damages in the sum of $2,500.

[34] In my opinion, it is appropriate in this case also to award aggravated damages because the offending fence was left in place for 12 months or thereabouts after the defendant, through Mr Ross, became aware of the facts which constituted the trespass. Not only was the fence left in place, but the defendant: (1) did not respond to a reasonable pre-action letter from the plaintiff's solicitors; (2) defended the proceeding brought by the plaintiff in September 2018 for the removal of the encroaching fence; and (3) mounted a counterclaim in damages.

17 Affidavit Colan Ross affirmed 3 July 2019, par 28.

[35] It may be acknowledged that there was some general confusion in May, June and July 2018, arising from: (1) the earlier dispute between the plaintiff and the Northern Land Council over fence maintenance contributions, which was still live; (2) the plaintiff's objectively confusing construction of the 'boundary fence' inside her boundary, referred to in [30] above; and (3) the need for the parties to deal with the Northern Land Council as the representative of the Land Trust. The defendant was not indifferent to the plaintiff's concerns and made some efforts to involve the Land Council in an attempt to resolve those concerns. However, it would have been apparent by 21 June 2018 that any resolution of the plaintiff's concerns would not happen immediately, given that the Land Council needed to consult the traditional Aboriginal owners of the Land Trust land, and did not see the situation as urgent.[18] In that context, the plaintiff's lawyers made it clear to Mr Ross on 3 July 2018 that the plaintiff was not prepared to hold off indefinitely given (what were described as) the procedural inefficiencies of the Northern Land Council and the Wubalawun Land Trust.

[36] In his affidavit, Mr Ross deposed that the plaintiff did not at any stage prior to the commencement of proceedings provide the defendant with documentary material to support her trespass claims. However, that

18 Mark Ford of the Northern Land Council sent an email to Mr Ross on Thursday 21 June, explaining, inter alia, the need to present settlement options to a meeting of the Traditional Aboriginal Owners, and Mr Ross on-sent that letter to the plaintiff's lawyers (annexure 'F' to the plaintiff's affidavit). See also affidavit of Colan Ross affirmed 3 July 2019, pars 23.19 to 23.23.

does not mean that the defendant had good reason to doubt the plaintiff's claim. Moreover, the defendant had been put on notice and could have made its own enquiries or engaged its own surveyor to carry out a boundary survey. While I have some appreciation of the defendant's position, I consider that it was unreasonable to leave the offending fence in position for the whole of the period from 24 May 2018 to 3 May 2019. It is difficult to determine the precise point in time, after commission of the initial trespass, at which the defendant's conduct started to cause insult, hurt and mental distress to the plaintiff, so as to aggravate her damages, but it was probably about a month or so before the plaintiff commenced proceedings on 12 September 2018. From that time (if not before), the plaintiff suffered injured feelings and personal distress as she sought to vindicate her proprietary right. Her level of stress no doubt increased after she commenced court proceedings. She also suffered the inconvenience and expense involved in travelling from her rural home to attend court.[19]

[37] The plaintiff was not challenged in relation to the distress she suffered and I accept her evidence in that respect. However, I do not take into account the fact that she incurred and paid legal costs and disbursements, because any claim for such expenditure would be dealt with post-judgment.

19 Plaintiff's affidavit, par 14. I have ruled that pars 13 and 15 of the plaintiff's affidavit are inadmissible.

[38] I assess aggravated damages in the sum of $20,000.

[39] I do not consider that it is appropriate to award exemplary damages. An award of exemplary damages is intended to punish a defendant for conduct which shows a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again. The observations of Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* explain the purpose of awards of exemplary damages in cases of trespass to land, and the nature of 'injury' which might justify an award of exemplary damages: [20]

> The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v. Cassell & Co.*at 1130, "to teach a wrongdoer that tort does not pay". The purpose of restraint looms large in the present case. The jury were entitled to take into account that Caltex and XL were competitors in an industry in which, notoriously, competition for markets and for outlet sites has been intense. The jury were therefore entitled to form the view that a risk of repetition of Caltex's conduct in spiking a competitor's tanks was quite unacceptable, for the intensity of commercial competition might lead to violence and counter-violence among competitors if legal process proved inadequate to suppress the use of force. And if the jury formed the view that it was desirable to ensure that Caltex did not again spike the tanks of a competitor, the jury were entitled to assess exemplary damages in an amount that would be likely to have a deterrent effect — sufficient to make Caltex smart. In *Uren v. John Fairfax & Sons Pty Ltd* (1966) 117 CLR at 136-137, Taylor J. cited with approval a passage from the judgment of Grier J. delivering the opinion of the Supreme Court of the United States in *Day v. Woodworth* (1851) 13 How. 363; 14 Law. Ed. 181. That passage included the following:
>
> > "In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he

20 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471-472.

> would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'. This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."
>
> Where exemplary damages may properly be awarded to deter a tortfeasor, evidence of his means is material not only to show that he can afford to satisfy a substantial judgment or to show that he has acted in contumelious disregard of the plaintiff's rights by taking advantage of his wealth, but to show what sum will be a sufficient deterrent against repetition of the conduct that attracts the award. No doubt the width of the jury's discretion in assessing exemplary damages has evoked judicial expressions of concern about employing the civil law to inflict punishment. But it is now beyond argument that, by the law of this country, it is proper to award exemplary damages by way of punishment of the tortfeasor ….

[40] The conduct of the respondent in *XL Petroleum Pty Ltd v Caltex Oil* was egregious. The intentional and malicious actions of Caltex caused significant damage to in-ground fixtures. Caltex sabotaged underground petrol tanks to prevent the appellant (a competitor) making use of them. The tanks were rendered unfit for use for almost four weeks. Hardly surprisingly, Brennan J emphasised the punitive aspect of exemplary damages.

[41] In an action for trespass to the person, it has been held that an award of exemplary damages may serve to appease victims, to assuage any urge for revenge they may feel and to discourage any temptation to retaliate or engage in self-help.[21]

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21 *Lamb v Cotogno* (1987) 164 CLR 1 at 9.

[42] The observations of Brennan J extracted in [39] should be read in the context of the facts in *XL Petroleum Pty Ltd v Caltex Oil*. However, not every case where exemplary damages have been awarded for trespass to land has involved the same high level of intent, malice and damage. For example, in *Gazzard v Hutchesson,*[22] Bollen J upheld an award of exemplary damages of $3,000 made by a magistrate in circumstances where the appellants (by their) contractor had trespassed on a neighbouring property and caused "severe and substantial damage" by cutting branches from the neighbours' poplar trees. His Honour agreed with the magistrate that the appellants had acted with "contumelious disrespect for [their neighbours'] rights of enjoyment of the trees" on their property; moreover, had done so at a time when they knew their neighbours were away and there was "no chance of effective complaint". His Honour's reasons disclose that deterrence and punishment were the relevant objects of the award of exemplary damages in that case.

[43] In the present case, I do not consider that the defendant's actions constituted conduct of a sufficiently reprehensible kind to justify an award of exemplary damages. The defendant's conduct was not wanton or malicious; or gross and outrageous. The defendant was not guilty of a "high-handed and outrageous disregard",[23] or a "conscious and

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22 *Gazzard and anor v Hutchesson and anor* (1995) Aust Torts Reports 81-337 (SA SC)

23 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 461, per Gibbs CJ.

contumelious disregard"[24] for the plaintiff's rights. The facts in this case do not trigger the need for punishment or deterrence in respect of which an award of exemplary damages might be made in other circumstances.

Conclusion

[44] There should be judgment for the plaintiff in the sum of $22,500.

[45] I will hear the parties on the issue of costs and any other consequential orders.

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24 Ibid at 471, per Brennan J.