Flinders University Law School
Bachelor of Laws and Legal Practice

LLAW1211 LEGAL RESEARCH AND WRITING

Semester 1, 2015

ASSIGNMENT 1: Memo (Case Summary)

This is worth **20%** of the assessment in LLAW1211 Legal Research and Writing

PLEASE NOTE:

- The word limit for this piece of work is **900** words. This includes any words that explain that the assignment is to be presented as a memo. In addition, please see the SAM (page 69 of the Topic Guide) for an indication of what is and what is not included in this word limit.
- The **due date** for this piece of work is **4pm 13 April 2015.**
- Assignments must be submitted by the deadline into the Assignment 1 Dropbox on FLO.
- Any applications for an extension must be submitted **prior to the due date**. Please see the FLO site for LLAW1211 for information.
- The University's policy on **academic integrity** applies to this work and will be strictly enforced.
- **Penalties** will be applied to work which is **over-length. Penalties** will also be applied to work that is submitted **late** without an extension. See the SAM for details.
- When working on your assignment you should have regard to the marking criteria provided below. They will be used to mark your paper and provide **feedback** to you about your work when it is marked and returned to you.

pto…

Assignment Task:

THE SCENARIO:

You have been lucky to obtain a position as a Law Clerk at a small but busy law firm in Adelaide's southern suburbs called Flinders Legal. You work a few afternoons doing odd jobs: filing, photocopying, and doing the so-called rounds which means delivering and filing documents at court. You have also begun to do some legal research for members of the firm.

The senior partner at the firm, Bridget Laws, knows that you have recently started a topic called Legal Research and Writing at Flinders Law School and thinks you have a lot of promise.

One day, as she is heading off to court, she rushes to your desk, gives you the attached memo and a case from the South Australian District Court (*Matthews v Christie* [2001] SADC 9) which she's printed out from Austlii.

THE TASK:

Your task is to do what Bridget has requested in the attached memo.

MEMO

TO: The new Law Clerk

FROM: Bridget Laws

DATE: 13 March 2015

RE: *Matthews v Christie* [2001] SADC 9 and client Barbara: **File 2015/ABCXYZ**

I have a meeting with Barbara, a really important client later this afternoon! The meeting is about her commercial lease matter, but she has also told me that she has some new problem with her neighbour and the common boundary fence between them at her house at Glenelg. It seems that it has arisen due to the renovation construction works at her house. Her builders have apparently demolished the fence and her neighbour's chook house as well! Barbara has hated those chickens for years because they're so noisy in the morning. I am not surprised it has come to this. It sounds nasty and it sounds like a trespass issue.

I will need to interview Barbara to get a full understanding of the material facts, but for the moment I want to get an understanding of the law. I have identified the attached case as potentially applicable to this situation as it deals with trespass and damages for trespass.

I need to sound knowledgeable when I interview Barbara, but I don't have time to read the case in full. I need to know something about the law in this area so that I can ask the right questions and elicit the necessary facts I need you to prepare a memo that:

1. Summarises the case for me; and
2. Provides a preliminary indication of whether or not the case is relevant to this issue for Barbara and why you think so.

I will not have time to read a lengthy memo, so keep it to **900 words**.

It needs to be as readable as possible so that I can quickly understand what you are communicating.

Thanks,
Bridget

LEGAL RESEARCH AND WRITING:
Assignment 1 Marking Criteria and Feedback Sheet

CRITERIA THAT WE LOOK FOR AND REWARD WHEN MARKING ASSIGNMENT 1:	Unsatisfactory	Satisfactory	Good	Excellent	COMMENTS WHERE APPROPRIATE:
Memo Structure:					
The way in which you separate each issue is clear and logical to the reader.	☐	☐	☐	☐	
Your ideas flow and you deal with the issues in a logical sequence.	☐	☐	☐	☐	
Memo content:					
You identify the relevant facts, you refer to them well and incorporate them effectively into your memo.	☐	☐	☐	☐	
You deal with the trespass issue accurately.	☐	☐	☐	☐	
You deal with the damages issue accurately.	☐	☐	☐	☐	
Explains clearly how the case may be relevant to Barbara.	☐	☐	☐	☐	
You propose a realistic plan for further legal research	☐	☐	☐	☐	

Writing style:					
You have adopted a memo format, as requested.	☐	☐	☐	☐	
Your writing style is lively, clear and efficient.	☐	☐	☐	☐	
Your punctuation, grammar and spelling are impeccable.	☐	☐	☐	☐	
Overall, the memo communicates effectively and efficiently.	☐	☐	☐	☐	
Your writing shows a professional attention to detail.	☐	☐	☐	☐	
Academic Integrity:					
You acknowledge the source of all words and ideas that are not your own.	☐	☐	☐	☐	
Compliance with Referencing Conventions:					
You substantiate references to legal principles by using the most authoritative source/reference.	☐	☐	☐	☐	
You have made a genuine attempt to comply with the AGLC referencing conventions.	☐	☐	☐	☐	
You provide pinpoints references where necessary.	☐	☐	☐	☐	
General Comments:					

MATTHEWS V CHRISTIE

[2001] SADC 9

1 .... **JUDGE BURLEY…....** The plaintiffs claim damages for trespass to land. The damages sought include a claim for the diminution in value of their property, damages for loss of enjoyment of amenities, damages for mental and emotional anguish and distress, damages for psychological injury to the second plaintiff, and exemplary or aggravated damages.

2 The claim arises from the events of 18, 19 and 20 November 1998. The pleadings refer to the relevant days as 16, 17 and 18 November 1998, but it is common ground that these dates are wrong and no point has been taken by the defendants in that regard.

3 The plaintiffs were, and remain, the registered proprietors of a residential property at 65 Alexandra Avenue, Toorak Gardens. Part of the northern boundary of their land had a common boundary with land then registered in the name of the defendants, being 104 Watson Avenue, Toorak Gardens. It is common ground that the defendants held the Watson Avenue property on trust for the mother of the second defendant, Mrs Ruth Hall. Since the commencement of these proceedings the property has now been transferred into the name of Mrs Hall. I shall refer to the two properties respectively as the plaintiffs' property and the defendants' property.

4 There is a great deal of common ground between the parties and I do not intend to traverse the evidence except where there are material disputes of either fact or opinion. The following narrative consists of my findings.

5 The plaintiffs' property has a frontage of 30.48 metres and a depth of 61.26 metres. In November 1998 the plaintiffs' property consisted of a large, well-maintained house set in an attractive garden with a north-south lawn tennis court at the north-eastern corner of the allotment. The rear of the house, which faced north, contained a sunroom which looked over the tennis court. The northern wall of the sunroom was two-thirds glass divided into four segments. The room was shaded by four roman blinds installed on the inside of the northern wall. The tennis court was enclosed by wire netting about three metres in height along the eastern, western and southern perimeters of the court area. The northern end of the tennis court had what has been described as an ivy screen extending the width of the tennis court. Photographs 1 to 5 of Exhibit P2 show the ivy screen prior to the relevant date, which was 20 November 1998. It was on that day that about three-quarters of the ivy screen was pulled down by workmen employed by a contractor retained by the defendants without the permission of the plaintiffs.

6 The photographs depict an attractive ivy screen along the northern boundary of the plaintiffs' property. At its western end the growth of the ivy was particularly thick and it was connected to a large tree on the defendants' property. The ivy had taken over that tree for many years. The southern side of the tree and the ivy screen at the western side of the screen became almost indistinguishable. The combined effect of the ivy screen was to present, to a person within the tennis court, an attractive backdrop to the tennis court.

7 The ivy forming the screen is the variety known as *hedera helix var* "*Cristata*". It is an old slow-growing variety. It was planted in about 1966 (by the previous owners of the defendants'

property) on the northern side of the common boundary between the two properties. In making this finding I accept the evidence of Mr Adams called by the defendants.

8 When ivy is planted, after a time, the roots migrate. By November 1998, the ivy forming the screen had established roots on both sides of the common boundary. This conclusion follows from the evidence of Mr Turner, which I accept.

9 Ivy needs support to climb. In the case of the ivy screen, that support was provided by a paling fence about 1.5 metres high and a structure which surmounted the fence.

10 The fence was surmounted by a wire screen supported by a post at the eastern and western ends of the screen and two posts, which were about two metres apart, located a short distance to the east of the middle of the screen. A steel pipe, located about three metres from ground level, ran horizontally from the eastern end of the screen to the western end of the screen. It was attached to the posts referred to. The wire screen, in turn, was attached to the steel pipe.

11 The evidence of Mr Abbott, a surveyor, revealed that the palings of the paling fence were on the common boundary and that the posts and rails to which the palings were attached were immediately to the north of the boundary. The two posts supporting the screen, located in approximately the middle of the screen, abutted the palings and were therefore on the southern side of the northern boundary. The ivy screen had a depth of anything from 150 to 300 millimetres, apart from the western end of the screen where ivy spread between the screen and the tree on the defendants' property. Accordingly, at that western end a considerable amount of the screen was over the defendants' property. For the remainder of the screen, it obtruded into the defendants' property to an extent ranging between about 75 to 150 millimetres.

12 It was accepted by the plaintiffs that the defendants had the right to trim the ivy on their side of the boundary back to the boundary. That is undoubtedly so.

13 The defendants wished to redevelop 102 and 104 Watson Avenue, Toorak Gardens. When it was acquired by them it consisted of two titles which they subsequently realigned so that they had most of the frontage to Watson Avenue and Mrs Hall had a block of "flagpole" dimensions, the flagpole having a frontage to Watson Avenue and providing a driveway to the rear of the block of land on which was to be constructed a house for Mrs Hall. As part of the development it was necessary to remove the tree which had been infested with ivy. In order to remove the tree without pulling down the fence it was necessary to sever the ivy stems going from the ivy screen located approximately on the common boundary to the infested tree.

14 On 3 November 1998 Mr Rudduck, an architect employed by the defendants, went to the plaintiffs' property with a view to speaking to the owners and informing them of the proposed development and the effects that the development might have on the fencing on the common boundary. On that occasion he spoke to a person who identified himself as a son of the plaintiffs, and who informed Mr Rudduck that he would get back to him. It is apparent that the person to whom Mr Rudduck spoke failed to mention to the plaintiffs Mr Rudduck's visit and the purpose thereof. On Wednesday, 18 November 1998, Mr Rudduck again went to the plaintiffs' house and there spoke to the second plaintiff, Mrs Matthews. Both Mrs Matthews and Mr Rudduck gave evidence in relation to this conversation. She said that after Mr Rudduck introduced himself, he informed her that he was an architect and that he had come round to tell her that the tree behind

the fence on the common boundary was going to be removed She invited Mr Rudduck inside and took him to the sunroom at the rear of the house. From there they looked out over the tennis court. She said (T186.13):

> "... I told him how I loved the look of it and how it was just a feature of my garden and, you know, we just liked it very much and I pointed out - that is right, I said to him 'The ivy is up in the tree' I said to him - yes."

15 She said that Mr Rudduck said that he thought that the ivy screen looked very good. She said that Mr Rudduck said (T187.14):

> "I doubt whether that ivy will remain."

16 Mrs Matthews then telephoned her husband, who, at the time, was in Mount Gambier on business.

17 Nothing further happened on the Wednesday. On the Thursday morning Mrs Matthews noticed heavy machinery operating in the defendants' property close to the infested tree. It is not clear what type of machinery was in operation but it has been described as having a "grab bucket" mounted on a hydraulic arm. She telephoned her husband, who told her to photograph the activity at the northern boundary. Mr Matthews was still in Mount Gambier but he returned to Adelaide on the Thursday.

18 Mrs Matthews said that she saw the machine take hold of the tree and she then saw the eastern end of the ivy screen being pulled out of its vertical alignment such that a gap in the screen occurred. What she observed is shown in photographs 5 and 6 of Exhibit P2. In photograph 6 the tree behind the fence appears to be pulled over to the east and there is a gap at the eastern end of the ivy screen, part of which has been pulled over onto the defendants' property.

19 Photographs 7 and 8 show the gap at the eastern end of the screen and were taken at a time by which a lattice gate had been put sideways across the gap. It is apparent that once the gap in the ivy screen appeared as a result of the machine pulling on the infested tree, the workmen ceased work and did not that day proceed further.

20 Mr Matthews said that he telephoned Mr Rudduck but he cannot remember whether the call was made on the Wednesday or Thursday. An arrangement was made to meet on the Friday morning at about 8.30 am.

21 Mr Matthews said that on the Friday morning he met Mr Rudduck at the boundary common to the two properties. He went through the gap in the ivy screen on to the defendants' property and walked with Mr Rudduck west along the defendants' side of the boundary to a point where they were approximately at the south-western corner of the defendants' property. Mr Matthews said that Mr Rudduck had a surveyor's plan of the defendants' property which was shown to Mr Matthews. There was a discussion about the position of the boundary by reference to the survey plan and also to pins set into the soil.

22 Mr Matthews told Mr Rudduck that the plaintiffs wanted the ivy fence to remain. He said that Mr Rudduck was non-committal in relation to that request.

23 Mr Matthews offered to come on to the defendants' property and cut the vine between the fence and the tree. He said that a decision could not be made at that stage and suggested that they meet later in the day. The meeting lasted about twenty minutes. After it was over, Mr Matthews rang his solicitor, Mr Maidment. Mr Maidment came round to the plaintiffs' property at about 11 o'clock. Mr Maidment then made a telephone call to Mr Rudduck and arranged to meet him later that day. Mr Maidment said that all further communications with the plaintiffs were to be through him and that only he would attend the meeting arranged for later in the day. Mr Maidment then left the plaintiffs' property and subsequently Mr Matthews went to work.

24 After Mr Rudduck had spoken by telephone to Mr Maidment, Mr Rudduck reported to the first defendant that the plaintiffs had appointed a solicitor to act for them and that the solicitor, rather than the first plaintiff, would attend the meeting with Mr Rudduck scheduled for later that day.

25 The first defendant, who did not give evidence, but whose instructions form part of the evidence given by Mr Rudduck, instructed Mr Rudduck not to have any further dealings with the plaintiffs and that he should arrange with the builder for the removal of the fence along the common boundary as soon as possible. Those instructions were given in writing to the builder, who proceeded to carry them out. At about 2 o'clock in the afternoon of the Friday, workmen, without warning to the plaintiffs, removed from the common boundary the paling fence, the surmounting structure supporting the ivy and the ivy. The removal of the supporting structure included the removal of the two vertical wooden supports located on the plaintiffs' property immediately south of the common boundary which was located slightly to the east of the midway point of the ivy screen.

26 The removal of the fence and ivy screen was achieved with the use of the machinery described earlier and was witnessed by Mrs Matthews. She was deeply shocked and distressed by the event.

27 For the purposes of ascertaining the nature of the trespass committed by the defendants, it is necessary to consider the ivy screen as having two basic components: the paling fence and the structure surmounting the paling fence. Contrary to the submission of the defendants' counsel, I do not consider that the surmounting structure formed part of the fence. It was a separate, but attached, structure, and it was, for practical purposes, located on the plaintiffs' side of the boundary, although it must be said that the ivy intertwined within the wire forming part of that structure was over both the defendants' property and the plaintiffs' property. Nevertheless, in my view, the structure was essentially on a vertical plane immediately to the south of the common boundary and as such it belonged to the plaintiffs. To the extent that the structure had bent or deformed out of that plane and into the property of the defendants, such distortion did not then make the screen the property of the defendants either solely or jointly with the plaintiffs.

28 The paling fence is in a different position. The law relating to boundary fences is to be found in the Fences Act 1975. It is clear from the provisions of that Act that a boundary fence is the joint property of the adjoining owners. This must follow from the provisions in the Act which require an equal financial contribution from the adjoining owners to the construction of the fence.

29 Because the ivy vine had roots on both sides of the common boundary, part of the ivy belonged to the defendants and part of it belonged to the plaintiffs. I am unable to say quantitatively what the proportions were, but it is probably not necessary for me to do so for the purposes of this case.

30 The law relating to trespass to land has been dealt with by the High Court in *Plenty v Dillon and Ors* (1990-1991) 171 CLR 635. In their joint judgment, Mason CJ, Brennan and Toohey JJ said (at 639):

> "The starting point is the judgment of Lord Camden L.C.J. in *Entick v. Carrington* (1765) 19 St. Tr. 1029, at p. 1066:
>
> 'By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.'"

31 The question of justification is referred to by Gaudron and McHugh JJ when they said (at 647):

> "... A person who enters the property of another must justify that entry by showing that he or she either entered with the consent of the occupier or otherwise had lawful authority to enter the premises ..."

32 The defendants, who did not give evidence at the trial, have not disputed that the ivy screen was removed from the common boundary at the instigation of the defendants by workmen employed by the building contractor. Nor have they sought to justify their action by maintaining some right to have done what they did. Nor did they rely upon any waiver or permission afforded by the plaintiffs.

33 My findings as to the trespass are directed to the defendants. The evidence reveals that the first defendant gave the relevant instructions to Mr Rudduck. It has not been suggested by the defendants' counsel that the second defendant was other than jointly responsible with the first defendant for what took place.

34 In light of the uncontested evidence and in the absence of reliance by the defendants on some form of justification for their actions, it must inevitably follow that the defendants, through the workmen of the contractor employed by them, committed a trespass to the plaintiffs' land by the removal of the jointly owned paling fence from the common boundary, by the removal of the ivy belonging to the plaintiffs and by the removal of the structure surmounting the fence. I have used the term "removal" but it is perhaps more appropriate to use the word "destruction".

35 The actions of the defendants in destroying the ivy screen in the manner referred to above, were, to say the least, high-handed. To the extent that it was suggested, in explanation (but not justification) of the defendants' behaviour that the plaintiffs had retained a solicitor which, in turn, in the view of the defendants, would interfere with their building schedule, does nothing to ameliorate the gravity of the conduct of the defendants. I have no hesitation in describing their behaviour as outrageous.

Damages

36 In assessing damages and in making my findings as to the nature of the trespass committed by the defendants, I have borne in mind that the common boundary between the two properties did not extend for the entire length of the back of the tennis court. In approximate terms, the common boundary amounted to about three-quarters of the width of the tennis court and it follows that the actions of the defendants destroyed three-quarters of the ivy screen.

37 The ability of the plaintiffs to recover damages for the loss of the ivy screen is tied up with the question of whether or not the screen could have, in any event, been preserved had the parties co-operated to that effect. Mr Turner, the horticulturalist called by the plaintiffs, was of the view that the screen could have been preserved by detaching the wire superstructure from the fence and laying the screen down on the tennis court. In forming the opinion that the ivy screen could have been preserved, he took into account the right of the defendants to cut the ivy back to the boundary. He was of the view that even if that had been done, the ivy screen, although it would have been considerably depleted, would have regrown over a period of five to ten years.

38 Mr Stevens, the horticultural consultant called by the defendants, had a different view. Having reviewed the evidence of each of the two experts, I prefer the evidence of Mr Turner. He was measured and balanced in his approach whereas Mr Stevens often assumed the role of advocate rather than independent expert witness. I particularly found his explanations unconvincing when he resorted to factual hypotheses not within his brief.

39 In addition, it was apparent that Mr Stevens was unaware of the wire netting superstructure previously referred to. He thought, based on photographs taken before the ivy screen was destroyed by the defendants, that the screen above the level of the fence was self-supporting and consequently it was not possible both to cut back the screen on the defendants' side of the boundary and lay the remainder on the tennis court belonging to the plaintiffs. It is difficult to see how a trained horticulturalist could arrive at the view that the ivy could have been self-supporting. It is perhaps an example of the lengths to which Mr Stevens was prepared to go in his role of advocate rather than an independent expert witness. Be that as it may, it is clear that the ivy screen, above the level of the paling fence, was supported by the wire screen previously described. As such it was capable of being dismantled in the manner referred to by Mr Turner.

40 In accepting the evidence of Mr Turner, I find that had the parties co-operated in the preservation of the ivy screen, it could have been substantially preserved for the use and enjoyment of the plaintiffs without detriment to the defendants.

41 The plaintiffs claimed damages commensurate with diminution in value of their property as a result of a loss of most of the ivy screen. They called Mr Waterhouse, a licensed valuer, who expressed the opinion that the loss of the screen diminished the value of the plaintiffs' premises but he was unable to say to what extent. He also failed to articulate any relevant principles of valuation which led him to the conclusion that the value of the property had been diminished. His opinion might be properly characterized as a subjective impression. In essence, Mr Waterhouse made a comparison between the property having the ivy screen prior to its destruction along the common boundary and the property with a replacement brush fence of the same height as a tennis court backstop. Whilst I accept Mr Waterhouse's evidence that many a prospective purchaser would be attracted by the ivy screen because it had been well maintained

over many years, it also must be accepted that not all prospective purchasers would regard ivy as being a suitable garden plant.

42 The comparison referred to was one which arose in respect of other aspects of the assessment of damages and, in my view, is an appropriate comparison. However, when such a comparison is made, it does not seem to me that any amount of valuation expertise can detect a difference in value to the plaintiffs' property overall with the ivy screen being replaced by a three metre high brush fence.

43 In any event, although there is some suggestion by Mrs Matthews that she would wish to move to other accommodation, I think the combined evidence of Mrs Matthews and her husband is that they will remain in that property for the rest of their lives. That being the case, there can be no claim for diminution in value unless the diminution is permanent. I do not think there can be a permanent diminution in value, even if one has occurred at all, because, since the destruction of the ivy screen, it has been (and it remains) open to the plaintiffs to re-grow the ivy screen on the backstop of the tennis court which has been constructed since the original ivy screen was destroyed. For these reasons I do not think that the plaintiffs have made out a case for damages based on diminution in value. In arriving at that conclusion, I have not had to rely upon the evidence of Mr Harrington, a valuer called by the defendants.

44 The plaintiffs must be compensated for the physical destruction of their property. This consisted of the paling fence, the structure surmounting it and the ivy. The paling fence was jointly owned, as I have said, and probably did not have much value because it was very old. The same may be said of the structure surmounting the paling fence. However, the virtue of those two structures was that they provided a support for the ivy screen which was very attractive to the plaintiffs, in particular to Mrs Matthews. In those circumstances, I consider that the proper measure of damage for a loss of the ivy and the structures themselves is the cost of replacement of the nearest equivalent, less some discount for the fact that old is being replaced with new.

45 As I have previously indicated, if the parties had co-operated in order to preserve the ivy screen, it is clear from the evidence of Mr Turner that the screen attached both to the fence and to the superstructure above the fence could have been laid on the tennis court belonging to the plaintiffs. That would have exposed the fence. The question arises as to whether or not the plaintiffs are entitled to be compensated for loss of that jointly owned fence. If, when the screen was separated from the fence, the fence were found to have been in such poor condition that it had to be renewed, I do not think that the plaintiffs could thereby be compensated for the loss of the fence because, had events taken the course contended for by the plaintiffs, the paling fence would have had to have been replaced as part of that process. The need to replace the fence is based on the conclusion that the fence could not be salvaged and I find, based on Mr Rudduck's evidence of what he observed of the fence, that the fence could not have been salvaged if the screen had been removed as suggested by Mr Turner.

46 Immediately after the destruction of the ivy screen on the common boundary, the defendants arranged for a temporary fence to be constructed between the two properties to maintain the integrity of each. This was later replaced with a permanent fence consisting of two types of fencing: a brush fence and a steel panelled fence. The nature of the fencing across the common boundary is shown in photographs which were tendered (Exhibit D19). The plaintiffs did not co-operate in the construction of this new fencing. It is unusual in that it consists of two

types of fencing along the one boundary and, from the plaintiffs' perspective, it looks odd. I do not consider that that fencing is a proper substitute for the ivy screen destroyed by the defendants. The brush fence three metres in height is, as I have said, a more appropriate alternative because it has a thickness and density similar to the ivy screen and it would blend in much more readily with the remaining part of the ivy screen which was not destroyed by the defendants' actions.

47 I have had the advantage of a view of the plaintiffs' and the defendants' properties and it can be seen that the remainder of the ivy screen, if allowed to, would gradually grow over the brush fence at least in part.

48 As to the replacement cost, the plaintiffs called evidence from Mr Nichols from All Type Fencing Co, who has had many years' experience in the construction of all types of fencing. A copy of a quotation dated 7 December 2000 was provided and that shows a cost of $9,380.00. There are other costs referred to in the quotation relating to removal of the existing fence and the existing chain-wire tennis court backstop. I do not consider that this aspect of the assessment of damages should include those amounts because some form of fence between the two properties and backstop to the tennis court had to be provided pending the outcome of these proceedings.

49 The quotation of 7 December 2000 provides for a brush fence of varying height running from 3.6 metres to 4.5 metres. Apparently this is to replicate the height variation that existed in the original ivy screen. Contrary to the plaintiffs' case, I do not think that the assessment of damages in relation to the cost of a new brush fence should allow for this design because the varying nature of the height of the original ivy screen principally arose from the fact that much of the ivy had infested the tree on the defendants' property, thereby increasing the apparent height of the ivy screen. Had the original ivy screen been preserved in the manner suggested by Mr Turner in his evidence, the ivy on the defendants' property would have been cut right back and the height differential would have been lost. Consequently, some deduction should be made from the quotation price to account for this variation in the design of the fence. In addition, a deduction should be made to account for the fact that the old screen has been replaced by a new fence because, in due course, the wire support would have had to be replaced: *Hoad and Another v Scone Motors Pty Ltd and Another* [1977] 1 NSWLR 88.

50 Mr Nichols' quote was criticized as being too expensive. Mr Rudduck was of the view that the appropriate fence could be constructed for less. That is not the test to be applied. The plaintiffs may recover the reasonable cost of construction. In my view, based on Mr Nichols' experience, the rates of charge contained in the quotation are reasonable.

51 It is not possible to be mathematically precise in relation to this aspect of the damages. Some estimate must be made by me bearing in mind the various factors referred to above. In all the circumstances I think that damages should be awarded in the sum of $7,000.00.

52 The plaintiffs' claim for damages includes a claim by the second plaintiff that she sustained psychological injury as a result of the actions of the defendants. It is clear from the evidence that she gave and from her demeanour in the witness box that she has been markedly affected by the destruction of the ivy screen. Through her solicitor she consulted Dr JE Burvill, a psychiatrist. His reports were tendered at the commencement of the evidence given by him at the trial. The history taken by him is largely consistent with the evidence given by Mrs Matthews at the trial. In his report of 19 November 1999 (page 5) he said:

"Psychologically, she reacted by developing emotional distress and continued to experience emotional distress due to the frequent reminder of the destruction which had occurred as the fence and hedge in question and the effects of the destruction of the same, were clearly in view on an everyday, practically all day basis, from the main living area of her home. This state of emotional distress could be classified as a period of adjustment disorder with features of anxiety, which died down to a non-clinical level, but with her emotional distress reactivated frequently as described above."

53 In his report of 30 November 2000, Dr Burvill said:

"In her presentation today, Mrs Matthews appeared decidedly fragile and strained and lost her composure and wept and commented that she obviously needed to do a lot more talking about how it had affected her. She impressed as having been hiding a considerable degree of depression over the events that transpired and very much in need of trying to deal with her feelings.

Therefore, in summary, Mrs Matthews presents now as person [sic] severely affected by the events of two years ago whereby the rear property of her fence was destroyed, and affected now to the extent that despite trying hard to blank out the memories and hide her feelings, she is in fact feeling quite desperate, has lost affection for her home, wants to move out of her home and her marriage, and needs treatment for depression."

54 Having reviewed the evidence of Mrs Matthews, I think that Dr Burvill has accurately described Mrs Matthews' reaction to the trespass and the continuing effect that it has had upon her.

55 The question of whether or not Mrs Matthews is able to recover damages for personal injury in the form of a psychological injury is a difficult question. If she had been physically injured by a falling supporting post, she would be able to recover damages but not necessarily from the defendants and not necessarily based on the cause of action of trespass to land. It could be said that such an injury was caused by the negligence of the contractor employed by the defendants to carry out the removal of the ivy screen. If that person were a truly independent contractor the defendants may not be liable for the actions of the contractor whether those actions be characterised as a trespass or negligence. The situation is touched upon in Professor Fleming's "The Law of Torts", 9th Edition, at page 47. The question of accidental injury is dealt with. The learned author stated:

"Accidental trespassory *harm*, at any rate, must today meet the modern conditions of liability for unintended injury stemming from the competing action on the case.

All vestiges of the older strict liability were progressively discarded as it became established that claims for unintended injury, whether formulated in trespass or case, had to conform to the conditions of liability postulated by the latter form of action. Proof of negligence became essential: first, in cases of highway accidents causing damage to adjacent property (such as a car veering off the road or a bull disporting himself into a china shop); and eventually, as the development in the analogous cases of personal injury and damage to chattels bears out, in all residuary situations which would formerly have fallen within the purview of trespass to land."

[Reference to footnotes and cases cited have been omitted.]

56 It seems to me that the above analysis requires the conclusion that where, in an action for trespass to land, damages for personal injury are sought, the principles applicable to the recovery of damages for such an injury to be found in the law of negligence are to be applied. Both counsel put submissions respectively for and against the recovery of damages based on that assumption.

57 The only point of opposition advanced by Mr Ross-Smith, counsel for the defendants, was that it could not reasonably have been foreseen by the defendants that their conduct in having the ivy screen removed would result in psychological injury to Mrs Matthews. It is not in dispute that reasonable foreseeability must be demonstrated by the plaintiffs. This is in the context that the cause of injury was the destruction of the ivy screen and the fact that Mrs Matthews continually observed (and felt) its absence on a daily basis since the destruction of the ivy screen.

58 It was submitted by Mr Ross-Smith that there was no evidence that the occurrence of such an injury was reasonably foreseeable. In *Maloney v Commissioner for Railways (NSW)* (1978) 52 ALJR 292, it was held that evidence must be given as to the degree of the particular risk except where the foreseeability could be judged by reference to ordinary common experience. In my view, this is not a matter where common experience enables a judgment to be made as to whether or not the psychological injury was reasonably foreseeable. There has been no expert evidence called to this effect. In its absence it is not possible to make a finding one way or the other. To that extent the plaintiffs have failed to make out an essential element of their claim for damages giving rise to the psychological injury sustained by Mrs Matthews and her claim must therefore fail.

59 Aggravated damages may be awarded in an action for trespass to land: *Williams and Others v Hursey* (1959) 103 CLR at 30; *Greig v Greig* [1966] VR 376. Mr Hoile referred me to a number of cases on aggravated damages which he said were awarded as compensation for injury to the plaintiff's feelings caused by the defendant's insulting or humiliating conduct: *Lamb v Cotogno* (1987) 164 CLR 1; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

60 There is a distinction between aggravated and exemplary damages. In broad terms aggravated damages are compensatory in nature whereas exemplary damages have a punitive element. In *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559, McHugh JA (as he then was) referred to the need to retain the concept of exemplary damages. He said:

> "An award of exemplary damages acts as an example to all those in the community who might engage in wrongdoing involving a conscious and contumelious disregard of another person's rights."

61 An award of exemplary damages in respect of a case involving a trespass to land was dealt with by the High Court in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1984-1985) 155 CLR 448. In that case Gibbs CJ referred (at 461) to "... the action of Caltex as showing a high-handed and outrageous disregard for XL's rights ...". In addition, Brennan J said (at 471):

> "... an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights ..."

62 It is possible for an award of damages to be made under both headings if the circumstances justify it. In *Johnstone v Stewart* (1968) SASR 142, Bray CJ dealt with a case which involved both a trespass and an assault. He came to the view that the actions of the defendant justified an award of both aggravated and exemplary damages. He made an award allowing one lump sum to cover both types of damage.

63 I think that such an approach should be taken by me in this case. I have described the actions of the defendants as both outrageous and high-handed. Putting to one side the psychological injury sustained by Mrs Matthews, her feelings have been injured to a pronounced degree. Although Mr Matthews did not, in his evidence, dwell upon his personal reaction to the conduct of the defendants, it is clear that he has been emotionally affected by the trespass and the affect that it had upon his wife. They should be compensated by way of aggravated damages for what has occurred. In addition, in my view, the defendants by their actions displayed a "conscious and contumelious disregard of " the plaintiffs' rights. The extent of the damages to be awarded should include the element of deterrence of both the defendants and others from like conduct. In all the circumstances I consider that an award of $10,000 is appropriate.

64 There will be judgment for the plaintiffs against the defendants in the sum of $17,000.00.