



Can I use barbed wire or razor wire on the fence of my residential property?

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Permit

You will require a building permit to erect a structure in the Northern Territory¹, unless your structure is within the specified exemptions.² The exemptions include fences where the fence is:

1. Less than 1 metre high; or
2. Does not offer wind resistance (e.g. chain mesh fences).

Although a permit to erect a fence using barbed wire or razor wire may not be directly required, there are other considerations.

Your particular building development approval may restrict the materials that can be used for fencing your residential property.

Also, a council may make an order (a regulatory order) requiring the owner or occupier of land to remove or mitigate a visual pollution, hazard or nuisance, or potential hazard or nuisance.³

Other considerations

Perhaps the more important consideration is the consequence of erecting a fence which might injure others.

Civil liability

As an occupier of land, you may be liable for an injury that occurs on your land even if the individual was not an invitee.

Section 9 of the *Personal Injuries (Liabilities and Damages) Act 2003* (the Act) provides that the owner or occupier of premises does not incur civil liability for a personal injury to a person who is entering

or has entered the premises and has the intention of committing, is committing or has committed an offence punishable by imprisonment on those premises and at s10, in summary, that a person does not incur civil liability if the court is satisfied that, on the balance of probabilities the injury occurred as a result of conduct constituting an offence punishable by imprisonment and that their conduct contributed to the risk. Sections 9 and 10 are likely to constitute a good defence against a claim for damages by a criminal trespasser.

However, if the injured person can show there was a duty of care, the occupier breached the duty and such breach caused injury to the individual, they could bring a claim in negligence for the injuries sustained⁴, even if they are a trespasser.

In *Southern Portland Cement v Cooper*⁵ the court considered that an occupier owed a trespasser only a duty of common humanity, in *Hackshaw v Shawvi*, the High Court of Australia recognised a limited duty of reasonable care when there was a real risk that a trespasser might be present and injured. There, a farmer whose petrol was being stolen at night ambushed a thief stealing petrol, firing two warning shots at the thief's car. The passenger in the vehicle was injured and sued the farmer seeking compensation for her injuries. It is now clear that an occupier of property may owe a duty of care to a trespasser if he or she actively creates a present

danger which he or she should reasonably have foreseen would be likely to result in injury to persons in the vicinity.

Further, consider the circumstances where a person, although not invited onto your property, is entering for a purpose other than to commit an offence: a child who climbs the fence to retrieve their ball, or a neighbour chasing their runaway pet that has wandered onto your premises.

In *Australian Safeway Stores v Zaluzna*⁷, the High Court rejected the traditional approach to occupiers' liability (which distinguished between classes of visitor (for example invitee or trespasser) and considered the relationship between the occupier and the visitor, and decided that from now on the general duty of care formula⁸ should be applied to all cases.

There are numerous considerations such as whether the injured person assumed the risk, the possibility of a reduction of damages for contributory negligence where the injured person contributed to their own downfall or if the risk was obvious to a reasonable person, and the obligation of a person to take reasonable care for their own safety.

Further, your public liability insurance may not cover you where death or serious injury is caused to a trespasser because of you erecting a dangerous fence which causes such injury.

Criminal liability

There is also potential for criminal liability where a device intended to cause death or serious harm is set intending to kill or cause serious harm (even to a trespasser).⁹ If found guilty, such offence is punishable by up to 3 years' imprisonment.

It is the public policy of the Territory that occupants of dwelling-houses and commercial premises, and persons invited into those premises, may enjoy absolute safety in the premises from attack by intruders.¹⁰

Further, defensive conduct may be justified where the person believes it necessary to defend themselves or their property. The conduct must however be reasonable in response to the circumstances and using force intended to cause death or serious harm to protect property or prevent or remove a trespasser, is not considered defensive conduct.¹¹ There must be something more, such as an imminent threat to person, for such force to be reasonable.

At common law, the leading case on self-defence is *Zecevic v DPP*¹², where the accused killed his neighbour after an argument. The accused argued he believed that the deceased had a knife and a shotgun in his possession, which compelled the accused to go into his unit to retrieve his gun, and as a consequence, shooting his neighbour dead.¹³

During the trial the presiding judge withdrew self-defence, resulting in a conviction. On a successful appeal to the High Court, a retrial was ordered with

Dawson and Toohey JJ setting out the requirements for self-defence:

"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. Stated in this form, the question is one of general application and is not limited to cases of homicide."

Self-defence as a principle is available for acts in defence of property. However, using lethal force is probably not justified under the test set out in *Zecevic*, with the High Court noting that the only justification for lethal force is where the threat was such, that the person held a reasonable apprehension that death or serious harm may result from the attack.

The bottom line is this: if a home owner erects a razor wire fence and someone is injured by the fence, the home owner runs the risk of being charged with a criminal offence.

Homeowners might be wise to consider alternative options to improve the security of their premises, such as security systems, security doors or contact an organisation such as Victims of Crime NT to request a free home security assessment by contacting 1800 672 242. ■

Disclaimer

The advice provided in this article is general only and should not be substituted for obtaining your own independent legal advice. If you require assistance on a fencing issue, please contact Ward Keller on (08) 8946 2999 or wardkeller@wardkeller.com.au for further advice.

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1. *Building Regulations* 2016 (NT)
2. *Ibid* 3(c)
3. *Local Government Act* 2017 (NT) Part 13.2 Division 1 at 193 or 194
4. The principles of negligence in: *Donoghue v Stevenson* [1932] UHL 100
5. *Cooper v Southern Portland Cement Ltd* [1972] HCA 28
6. *Hackshaw v Shaw* [1984] HCA 84
7. *Australian Safeway Stores Pty Ltd v Zaluzna* [1987] HCA 7
8. Established in: *Donoghue v Stevenson* [1932] UHL 100
9. *Criminal Code Act* 2018 (NT) s185
10. *Criminal Code Act* 2018 (NT) s149A
11. *Criminal Code Act* 2018 (NT) s29
12. *Zecevic v DPP* (1987) 162 CLR 645
13. Thomson Reuters *Self-defence law in Australia*