NATIONAL OPEN UNIVERSITY OF NIGERIA

COURSE CODE :LAW 323

COURSE TITLE:LAW OF TORT I

COURSE GUIDE

LAW OF TORT I

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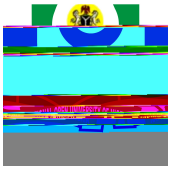

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Introduction

Law of Torts is a two semester course. You would take the first part in the first semester. The code is LAW 323. It is a foundation level course and is available to all students towards fulfilling core requirements for the degree in Law.

The course will discuss basic law principles. The material has been developed to suit students in Nigeria by adapting practical examples from within our jurisdictions.

This course guide tells you briefly what the course is about, what course materials you will be using and how you can work your way through these materials. It suggests some general guidelines for the amount of time you are likely to spend on each unit of the course in order to complete it successfully. It also gives you some guidance on your tutor marked assignment (TMAs). Detailed information on TMAs is found in the separate assignment file, which will be available to you in due course. There are regular tutorial and surgery classes that are linked to the course. You are advised to attend these sessions.

What you will learn in this Course

The over aim of LAW 323 is to introduce the fundamental principles and applications of Law of contract. During this course you will learn about, Nature of contract, formation of Contract, legality and Public Policy, Terms of Contract, condition warrantees and other clause.

Course Aims

The aim of the course can be summarized as follows: this course aims to give you an understanding of general principles of law and how they can be used in relation to other branches of law.

This will be achieved by aiming to:

1.0 Introduce you to the basic sources of law of Torts
2.0 History of the Law of Torts
3.0 Principle of liability in Torts
4.0 Trespass to a person.

Course Objectives

To achieve the aims set out above, the course sets overall objectives. In addition, each unit also has specific objectives. The objectives are always included at the beginning pf a unit; you should read them before you start working through the unit. You may want to refer to them during your study of the unit to check on your progress. You should always look that you have done what was required of you by the unit.

Set out below is the wider objectives of the course as a whole. By meeting these objectives you should have achieved the aims of the course as a whole.

On successful completion of this course, you should be able to:

(a) Explain the term Law of Torts
(b) Differentiate the difference between
(c) Nature of the Law of Trots
(d) What constitute Law of Torts
(e) Building blocks of the Law of Torts
(f) Negligence
(g) Assault
(h) Occupiers Liability..

Working Through this Course

To complete this course you are required to read the study units, read set books and other materials: Each unit contains self-assessment exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end o \f the course is a final examination. The course should take you about 12 weeks or more in total to complete. Below you will find listed all the components of the course, what you have to do and how you should allocate your time to each unit in order to complete the course successfully on time.

Course Materials

Major components of the course are:

(a) Course guide;
(b) Study units;
(c) Textbooks;
(d) Assignment file and
(e) Presentation schedule.

In addition, you obtain the set book; these are not provided by NOUN, obtaining them is you own responsibility. You may purchase you own copies. You may contact your tutor if you have problems in obtaining these textbooks.

Study Units

These are 21 study units in this course, as follows:

Unit 1 **Historical background and general principles of tortuous liability**
Unit 2 **Trespass**
Unit 3 **Negligence**
Unit 4 **Defences in relation to torts**
Unit 5 **Damages**

Each unit contains a number of self-tests. In general, these self-tests question you on the materials you have just covered or required you to apply it in some way and, thereby, help you to gauge your progress and to reinforce your understanding of material. Together with TMAs, these exercises will assist you in achieving the stated learning objectives of the individual units of the course.

References

There are some books you should purchase for yourself:

The Nigeria Law of Torts ; Kodilinye and Aluko
Fleming; G. John: The Law of Torts, Sweet & Maxwell, Street on Torts.

Assignment File

In this file you will find all the details of the work you must submit to your tutor for making. The marks you obtain for these assignments will count towards the final mark you obtain for this course. Further information on assignments will be found in the Assignment file itself and later in this course guide in the section on assignment. You are

to submit five assignments, out of which the best four will be selected and recorded for you.

Presentation Schedule

There are two aspects to the assessments of the course. First are the TMAs, second, there is a written examination.

In tackling the assignments, you are expected to apply information, knowledge and techniques gathered during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work you submit to your tutor for assessment will count for 30% of your total course mark.

At the end of the course you will need to sit for a final written examination for three hours duration. This examination will also count for 70% of your total course mark.

Tutor-Marked Assignments

There are five tutor-marked assignment in this course. You only need to submit four of five assignments. You are encouraged, however, to submit all five assignments, in which case the highest four assignments count for 30% towards your course mark.

Assignment questions for the units in this course are contained in the Assignment file. You will be able to complete your assignments from the information and materials contained in your set books, reading, and study units. However, it is desirable in all degree level education to demonstrate that have read and researched more than the required minimum. Using other references will give you a broader viewpoint and may provide a deeper understanding of the subject. When you have completed each assignment send it together with a TMA form to your tutor. Make sure that each assignment reaches your tutor on or before the deadline given in the presentation schedule and Assignment file. If, for any reason, you cannot complete your work on time, contact your tutor before Assignment is due to discus the possibility of an extension. Extensions will not be granted after the due date unless there are exceptional circumstances.

Final examination and grading

The final for LAW 323 will be of two hours duration and have a value of 70% of the total course grade. The examination will consist of questions that reflect the types of self-testing, and tutor-marked problems you have previously encountered. All areas of the course will assessed.

Use the time between finishing the last unit and sitting the examination to revise the entire course. You might find it useful to review your self-assessment exercises, TMAs and

comments by your tutorial facilitator before the examination. The final examination covers information from all parts of the course.

Course marking schedule

The following table lays our how the actual course mark allocation is broken down:

Assessment	**Marks**
Assignments 1-4	Four assignments, best three marks of the count at 30% of course marks.
Final examination	70% of overall course marks
Total	100% of course marks

Table 1 course-marking schedule

Course overview

This table brings together the units, the number of weeks you should take to complete them and the assignments that follow them.

Unit	Title of work	Weeks activity	Assessment (end of unit)
	Course Guide	Week 1	
1	General Introduction	Week 1	
2	An overview of the Law of torts	Week 2	Assignment 1
3	The Reception of the Law of Torts in Nigeria	Week 3	
4	The principles of liability in Tort	Week 4	
5	Other principles of liability in the Law of Tort	Week 5	Assignment 2
6	Trespass to the person: Assault	Week 6	Assignment 3
7	**Battery**	Week 7	
8	False imprisonment and intentional harm to the person	Week 8	
9	Trespass to chattels	Week 9	Assignment 4

10	Conversion	Week 10	
11	Detinue	Week 11	Assignment 5
12	Duty of care	Week 12	
13	Standard of care	Week 13	
14	Proof of negligence	Week 14	
15	Shock	Week 15	
16	Contributory negligence	Week 16	
17	Defences to the Tort of Negligence	Week 17	
18	Mistake	Week 18	
19	Occupiers Liability		
20	Damages	Week 19	
21	Assessment of Damages	Week 20	

Table 2 course organizer

How to get the Most From this Course

In distance learning the study units replaces the university lecturer. This is one of the great advantages of distance learning; you can read and work through specially designed study materials at you own pace, and at a time and place that suite you best. Think of it as reading the lecture instead of listing to a lecturer. In the same way that a lecturer might recommend some reading, the study units tell you when to read recommended books or other material, and when to undertake practical work. Just as a lecturer might give you an in-class exercise, your study units provides exercises for you to do at appropriate time.

Each of the study units follows a common format. The first item is an introduction to the subject matter of the and how a particular unit is integrated with the other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit you must go back and check whether you have achieved the objectives. If you make a habit of doing this you will significantly improve your chances of passing the course.

The main body of the unit guides you through the required reading from other sources. This will usually be either from your recommended books or from a reading section. Self-assessment exercises are interspersed throughout the unit, and answers are given at the end of units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each

self-assessment exercise as you come to it in the study unit. There will also be numerous examples given in the study units; work through these when you come to them, too.

The following is a practical strategy for working through the course. If you run into any trouble, telephone you tutorial facilitator or visit you study centre. Remember that your tutor's job is to help you. When you need help, don't hesitate the call and ask you tutor.

1.0 Read this course guide thoroughly
2.0 Organize a study schedule. Refer to the 'Course overview' for more details. Note the time you are expected to spend on each unit and how the assignments relate to the units. Important information, e.g. details of your tutorials, and the date of the first day of the semester is available. You need to gather together all this information in one place, such as your diary or a wall calendar. Whatever method you choose to use, you should decide on and write in your own dates for working on each unit.
3.0 Once you have created your own study schedule, do everything you can to stick to it. The major reason that students do not perform well is that they get behind with their course work. If you get into difficulties with your schedule, please let your tutor know before it is too late for help.

Tutors and Tutorials

There are 10 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorial together with the name and phone numbers of your tutor, as soon as you are allocated a tutorial group.

Your tutor will mark and comment on your assignments, keep a close watch on your progress and on any difficulties you might encounter and assistance will be available at the study centre. You must submit your tutor-marked assignments to your tutor well before the due date (at least two working days are required). They will be marked by your tutor and returned to you as soon as possible.

Do not hesitate to contact you tutor by telephone, e-mail, or during tutorial sessions if you need to. The following might be circumstances in which you would find help necessary. Contact you tutor if:

a. You do not understand any part of the study units or the assigned readings
b. You have difficulty with the self-assessment exercises
c. You have a question or problem with an assignment or with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and to ask question which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit

from course tutorials, prepare a question list before attending them. You will learn a lot from participating in discussions actively.

Some of the questions you may be able answer are not limited to the following:

1. Distinguish between Battery and Assault. What defences would be available for both.
2. What are the ingredient needed to proof false imprisonment
3. Distinguish between trespass to chattel, detinue and convertion
4. What are the defences available against trespass.
5. What are the three element of negligence and how are they established
6. What defences are available in an action for negligence

Summary

Of course the list of question that you can answer is not limited to the above list. To gain the most from this course you should try to apply the principles that you encounter in every day life. You are also equipped to take part in the debate about legal methods.

Wed wish you success with the course and hope that you will find it both interesting and useful.

MAIN COURSE

Course Code: LAW 323

Course Title: Law of Torts I

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UNIT 1 General Introduction

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1.0 INTRODUCTION

This unit considers the definition, objectives and the scope of the law of tort. It also takes an overview of the subject.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) Define law of torts;
(ii) Understand the purpose of the law of torts; and
(iii) Explain the rule in Smith v. Selwyn.

3.0 MAIN CONTENT

3.1 Definition of tort

The word 'tort' is derived from the latin word *tortus*, which means 'twisted'. It came to mean 'wrong' and it is still so used in French: '*J'ai tort*'; 'I am wrong.' In English, the

word ‘tort’ has a purely technical legal meaning – a legal wrong for which the law provides a remedy.

Academics have attempted to define the law of tort, but a glance at all the leading textbooks on the subject will quickly reveal that it is extremely difficult to arrive at a satisfactory, all embracing definition. Each writer has a different formulation and each states that the definition is unsatisfactory.

Let us now consider some of these definitions.

To use Winfield’s definition as a starting point, we can explore the difficulties involved (Rogers, *Winfield & Jolowicz on Tort*, 15th edn, 1998, London: Sweet & Maxwell, p.4):

> Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

In a similar tone, Prof. Sir John W. Salmond in his book *Salmond and Heuston, Law of Tort*, 18th ed. P. 11, defined tort as:

> A civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation.

On the other hand, Kodilinye (*Kodilinye, The Nigerian Law of Torts*, p.1) defined tort as:

> A civil wrong involving a breach of duty fixed by the law, such duty being owed to persons generally and its breach being redressable primarily by an action for damages.

From the above definitions, one can deduce that a tort is a breach of a civil duty imposed by law and owed towards all persons, the breach of which is usually redressed by an award of unliquidated damages, injunction, or other appropriate civil remedy. In other words, a tort is a breach of a civil duty imposed by law, which remedy is unliquidated damages, injunction, or other appropriate remedy. A tort is a civil wrong that is not exclusively a breach of contract, and which is usually compensated by an award of unliquidated damages, injunction or other appropriate remedy. Thus, tort is the breach of a civil duty imposed by law towards all persons, the remedy of which is mainly monetary compensation, injunction or other appropriate civil remedy.

As we can see, tort is not easy to define, first, because the difference between tort and other civil wrongs is a thin line. Sharing this view, Kenny (Kennys, Outline of Criminal Law, 16th ed. by J. W. Cecil 1952, p. 543.) said:

> "To ask concerning any occurrence, is this a crime or is it a tort"? is to borrow SIR JAMES STEPHEN's apt illustration – no wiser than it would be to ask concerning a man; is he a father or a son? For he may well be both.

Secondly, tort is difficult to define because the law of tort runs through the whole of law. Explaining this feature of tort, KEETON (Law of Torts, 15th ed, 1984 p. 2-3) observed:

> "In the first place, tort is a field which pervades the entire law, and is so interlocked at every point with property, contract and other accepted classifications, that as the student of law soon discovers, the categories are quite arbitrary. In the second, there is a central theme…running through the cases of what are called torts, which although difficult to put into words, does distinguish them…from other types of cases."

In order to understand tort, it may be helpful to withdraw for a moment from the problems of definition and take an overview of the subject to consider the nature of the duties which are imposed and the interests which are protected by this branch of civil law.

3.2 The purpose of the law of torts

The word "tort" means "wrong". Any unjustifiable interference with the right of another person may be a tort. As a part of civil law, the purpose of the law of tort is to prohibit a person from doing wrong to another person, and where a wrong is done, to afford the injured party, right of action in civil law, for compensation, or other remedy, such as an injunction directing the wrongdoer who is known as a tortfeasor to stop doing the act specified in the court order and so forth. Damages is the monetary compensation that is paid by a defendant to a plaintiff for the wrong the defendant has done to him.

The essential aim of the law of torts is to compensate persons harmed by the wrongful conduct of others. The substantive law of torts consists of the rules and principles which have been developed to determine when the law will and when it will not grant redress for damage suffered. Such damage takes several different forms such as physical injury to persons; physical damage to property; injury to reputation; and damage to economic interests. The law of torts requires every person not to cause harm to others in certain situations, and if harm is caused, the victim is entitled to sue the wrongdoer for damages by way of compensation.

Monetary damages are the normal remedy for a tort. But there is another important remedy, the injunction, which is a court order forbidding the defendant from doing or continuing to do a wrongful act. Whether the plaintiff is claiming damages or an injunction, he must first prove that the defendant has committed a tort, for the law of torts does not cover every type of harm caused by one person to another. The mere fact that A's act has caused harm to B does not necessarily give B a right to sue A for damages in tort, unless B can show that A's act was of a type which the law regards as tortuous, that is, actionable as a tort.

Thus, the purpose of the law of tort is to prohibit torts, and where a tort is committed the law of tort provides a remedy for it, by an award of damages or other appropriate relief. The law of tort deals with a wide variety of wrongs, related and unrelated. Thus, the law of tort enforces rights and liability and provides remedy in the areas covered by the law of tort which includes the following:

1. Trespass to person, that is, assault, battery and false imprisonment.
2. Malicious prosecution
3. Trespass to chattel, that is, conversion and detinue
4. Trespass to land
5. Negligence
6. Nuisance
7. The Rule in *Rylands v. Fletcher(strict liability)*
8. Liability for animals
9. Vicarious liability
10. Occupier's liability
11. Defamation
12. Deceit
13. Passing off
14. Economic torts, such as, injurious falsehood, interference with contract, etc.

Essentially, the law of torts protects personal and property interests from being harmed by other persons. Everyone is under a duty not to interferes with the interests of other persons. Where a person interferes with the interest of another person, without legal justification or excuse, the law of tort intervenes to apportion blame and award damages or other appropriate remedy. The main remedies available to a person in the law of tort are several and include:

1. Award of damages that is monetary compensation. See the case of *Shugaba v. Minister of Internal Affairs & Ors (1981) 2 NCLR 459.*
2. Injunction and/or:
3. Any other remedy, such as, an order to abate a nuisance, or for specific restitution of a chattel of which the plaintiff has been dispossessed, etc.

The law of tort should be of interest to the average individual because tort is an everyday occurrence and the law of tort provides remedy for many common incidents of daily life. The torts which occur everyday include trespass to person, nuisance, negligence, etc. The law of tort defines tortuous acts, apportions blame and determines the appropriate remedy to be granted when a tort has been committed.

A summary of the objectives of tort

The objectives of the law of tort can be summarized as follows:

1. **Compensation:** The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.

2. **Protection of interests:** The law of tort protects a person's interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person's use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.

3. **Deterrence:** It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies.

4. **Retribution:** An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.

5. **Vindication:** Tort provides the means whereby a person who regards himself or herself as innocent in a dispute can be vindicated by being declared publicly to be 'in the right' by a court. However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

6. **Loss distribution:** Tort is frequently recognized, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expenses which are reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and the courts, and practical difficulties such as the funding of claims which may mean that many who deserve

compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.

7. **Punishment of wrongful conduct:** Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

SELF ASSESSMENT EXERCISE 1

What do you understand by injunction?

3.3 The Rule in Smith v. Selwyn (1914) 3 KB 98

The common law rule in *Smith v. Selwyn* states that where a civil wrong is also a crime, prosecution of the criminal aspect must be initiated, or reasons for default of prosecution given, before any action filed by the plaintiff can be heard. Thus, it was the position that where a tort was also a crime, the filing of criminal proceedings against the wrongdoer, preceded the filing of a civil suit by the aggrieved party. This is known as the rule in *Smith v. Selwyn.* When the rule in *Smith v. Selwyn* was not observed, the civil action by the plaintiff could not proceed and it was bound to fail as long as the defendant had not been prosecuted or a reasonable excuse given for the lack of prosecution.

Formerly, the proper course when a civil suit was filed, was for the court to stay proceeding in the civil action until the criminal prosecution was finally completed.

Exception to the Rule in *Smith v. Selwyn*

The right of an aggrieved party to sue in tort is not affected, once the matter was reported to the police and the police in the exercise of their discretion decide not to press criminal charges.

In *Nwankwa v. Ajaegbu (1978) 2 LRN 230*, The plaintiff reported an assault. The police did not bring criminal proceedings. The plaintiff then brought civil action claiming damages for assault and battery. The defence contended that the civil action could not proceed as criminal charges had not been filed by the police. The court held that the civil action was not caught by the rule in *Smith v. Selwyn* which required that where a case discloses a felony, the civil action should be stayed until criminal proceedings were concluded. The plaintiff having reported the assault to the police, whose duty it was to prosecute, if the police in their discretion failed to press charges, it was not the fault of the plaintiff. He was free to initiate civil proceedings for remedy.

Abolition of the Rule in *Smith v. Selwyn* in Nigeria

However, the rule in *Smith v. Selwyn* which has been abolished in Britain, also no longer apply in Nigeria. In view of the fact that the rule is a breach of the Nigerian Constitution and other statutes, that is to say:

1. Criminal Code Act;
2. Interpretation Act; and
3. The Nigerian Constitution

The rule in *Smith v. Selwyn* for instance breaches sections 6(6)(b), 17(2)(e), 46(1) and 315(3) of the 1999 Constitution, which provisions forbid the blocking of access to court. The above mentioned provisions of the Nigerian Constitution guarantee right of access to court for every person to institute action for the protection, or determination of his civil rights and obligations according to law.

The applicability of the rule in *Smith v. Selwyn* in Nigeria was considered by the Court of Appeal in the case of *Veritas Insurance Co. Ltd. V. Citi Trust Investments Ltd. (1993) 3 NWLR Pt. 281, P. 349 at 365 CA.* where it held that in view of the provisions of the Nigerian Constitution, Criminal Code Act and the Interpretation Act, the rule no longer applies in Nigeria. Niki Tobi JCA as he then was, reading the unanimous judgment of the Court of Appeal said:

"It appears that the decisions to the effect that the rule applies in Nigerian law were made per incuriam. It is my view that the rule is not applicable in Nigeria in view of the very clear two local statutory provisions. Section 5 of the Criminal Code Act ... is one, section 8 of the Interpretation Act... is another. Let me state verbatim ad literatim the provisions the provisions of the two statutes: First, section 5. The section provides that the Criminal Code: 'Shall not affect any right of action which any person would have had against another if the Act had not been passed'.

Second, section 8 (of the Interpretation Act). The section provides thus: 'An enactment shall not be construed as preventing the recovery of damages in respect of injury attributable to any act by reason only of the fact that the enactment provides for a penalty, forfeiture or punishment in respect of the act'.

In the light of the above statutory provisions, it is not correct to contend, ... that the rule applied in the case. It does not. Apart from the clear position of our law, it does not even seem to be a sensible thing to stop a plaintiff from instituting an action merely because the criminal action on the same matter has not been prosecuted. Certainly, a man who is aggrieved should have nothing to do with a criminal matter before instituting a civil action. The criminal matter is the concern of the State, so to say, while the civil matter is the concern of the aggrieved individual. "... The rule is now an anachronism even in England, since the enactment of the Criminal Justice Act 1967, an Act which put to final rest the erstwhile distinction between felony and misdemeanour".

In view of the above provisions of the law, the rule in Smith v. Selwyn no longer apply in Nigeria. See also *Adediran v. Interland Transport Ltd. (1991) 9 NWLR Pt. 214, P. 155 SC.* Finally, the rule does not also apply in the United Kingdom where it originated, as it was abolished by the Criminal Justice Act 1967, which abolished the distinction between felony and misdemeanour in the United Kingdom.

4.0 CONCLUSION

In this unit we have learnt generally about the law of tort, we learnt about the summary of the objective of the Law of tort which includes but not limited to (a) compensation, (b) protection of interest, Differences, retribution, vindication loss of distribution, punishment for wrongful conduct, injunction and the rule in Smith v Selwyn.

5.0 SUMMARY

The objectives of the law of tort can be summarized as follows:

1. **Compensation:** The most obvious objective of tort is to provide a channel for compensating victims of injury and loss. Tort is the means whereby issues of liability can be decided and compensation assessed and awarded.

2. **Protection of interests:** The law of tort protects a person's interests in land and other property, in his or her reputation, and in his or her bodily integrity. Various torts have been developed for these purposes. For example, the tort of nuisance protects a person's use or enjoyment of land, the tort of defamation protects his or her reputation, and the tort of negligence protects the breaches of more general duties owed to that person.

3. **Deterrence:** It has been suggested that the rules of tort have a deterrent effect, encouraging people to take fewer risks and to conduct their activities more carefully, mindful of their possible effects on other people and their property. This effect is reflected in the greater awareness of the need for risk management by manufacturers, employers, health providers and others. This is encouraged by insurance companies.

4. **Retribution:** An element of retribution may be present in the tort system. People who have been harmed are sometimes anxious to have a day in court in order to see the perpetrator of their suffering squirming under cross-examination. This is probably a more important factor in libel actions and intentional torts than in personal injury claims which are paid for by insurance companies. In any event, most cases are settled out of court and the only satisfaction to the claimant lies in the knowledge that the defendant will have been caused considerable inconvenience and possible expense.

5. **Vindication:** Tort provides the means whereby a person who regards himself or herself as innocent in a dispute can be vindicated by being declared

publicly to be 'in the right' by a court. However, again it must be noted that many cases never actually come before a court and the opportunity for satisfaction does not arise.

6. **Loss distribution:** Tort is frequently recognized, rather simplistically, as a vehicle for distributing losses suffered as a result of wrongful activities. In this context loss means the cost of compensating for harm suffered. This means re-distribution of the cost from the claimant who has been injured to the defendant, or in most cases the defendant's insurance company. Ultimately, everyone paying insurance or buying goods at a higher price to cover insurance payments will bear the cost. The process is not easily undertaken and it involves considerable administrative expenses which are reflected in the cost of the tort system itself. There are also hidden problems attached to the system, such as psychological difficulties for claimants in using lawyers and the courts, and practical difficulties such as the funding of claims which may mean that many who deserve compensation never receive it. It has been suggested that there are other less expensive and more efficient means than tort for dealing with such loss distribution.

7. **Punishment of wrongful conduct:** Although this is one of the main functions of criminal law, it may also play a small part in the law of tort, as there is a certain symbolic moral value in requiring the wrongdoer to pay the victim. However, this aspect has become less valuable with the introduction of insurance.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the objectives of the law of torts.

7.0 REFERENCES

Harpwood Vivienne: Modern Tort Law, 5th ed., US: Cavendish Publishing Ltd, 2003.

UNIT 2 An Overview of the Law of Torts

TABLE OF CONTENTS

1.0 INTRODUCTION

In this unit, we shall distinguish tort from other legal conceptions and consider the forms of action. We will also consider the various classifications of tort and how the law of torts was received into Nigeria.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) compare torts with other laws;
(ii) understand the forms of action in tort;
(iii) classify torts; and

3.0 MAIN CONTENT

3.1 Tort compared with some other laws

The dividing line between tort and other civil wrongs is thin. Furthermore, tort runs through the whole law. Like crime, a tort may occur in any other area of law.

We shall briefly compare tort with the following areas of law:

1. Criminal Law
2. Law of Contract; and
3. Trust

Tort and crime

The main purpose of criminal law is to protect the interests of the public at large by punishing those found guilty of crimes, generally by means of imprisonment or fines and it is those types of conduct which are most detrimental to society and to the public welfare which are treated as criminal. A conviction for a crime is obtained by means of a criminal prosecution, which is usually instituted by the State through the agency of the police.

A tort on the other hand, is a purely civil wrong which gives rise to civil proceedings, the purpose of such proceedings being not to punish wrongdoers for the protection of the public at large, but to give the individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct.

Another important difference between tort and crime in Nigeria is that the entire criminal law has been codified in the form of the Criminal Code of Southern Nigeria and the Penal Code of the Northern states, whereas the law of torts remains a creature of judicial precedent modified here and there by statute.

There thus fundamental differences between criminal and tortuous liability. It is significant however that some torts, particularly trespass, have strong historical connections with the criminal law. So the same act may be both a tort and a crime, for example, assault, false imprisonment and defamation are both torts and crimes. See sections 252, 365, 373-381 of the Criminal Code and sections 263, 264 and 391 of the Penal Code.

There are in addition several examples of conduct which are both criminal and tortuous. If A steals B's bicycle, he will be guilty of stealing (a criminal offence, see sections 382-388 of the Criminal Code and sections 286-290 of the Penal Code), and at the same time be liable to B for the tort of conversion. Again, if A wilfully damages B's goods, he is liable for the crime of malicious damage to property (see section 451 of the Criminal Code and section 326 of the Penal Code) and for the tort of trespass to chattels. The effect in such cases is that the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished by imprisonment or fine and he may also be compelled in a civil action for tort to pay damages to the injured person by way of compensation.

Finally, an important distinction between tort and crime is that, to succeed in a criminal trial, the prosecution must prove its case beyond reasonable doubt. The same does not exist in civil actions because in an action in tort the plaintiff need only prove his case upon a balance of probabilities. However, where a tort is also a crime, the criminal standard of proof is under the Evidence Act is what is also required in the civil trial. In other words, whenever the commission of a crime is directly in issue in any civil or criminal proceedings, it must be proved beyond reasonable doubt. See section 138(1) Evidence Act 2004 and the case of *Okuarume V. Obabokor* (1966) NMLR 47. It is

therefore easier for a plaintiff to succeed in tort than for the prosecution to secure a conviction in crime.

Tort and Contract

Tort is a breach of a duty imposed by law. In many instances, the parties in a tort are previously unconnected. There is often no privity of contract. Tort is concerned with protecting interests and compensating wrongs, injuries or damage. Liability in tort is often based on fault or occurrence of damage. It is alsoconcerned with unsafe products. Liability is determined by the remoteness of damage based on foresight of the type of harm. Tort aims to restore a plaintiff to his pre-accident or pre-wrong position. Limitation of time runs from the date the wrong or damage occurred.

A contract is a binding agreement between two or more persons. The main distinction between tort and contract is that in tort the duties of the parties are primarily fixed by law, whereas in contract they are fixed by the parties themselves. In other words, contractual duties arise from agreement between the parties; tortuous duties are created by operation of law independently of the consent of the parties. However, parties to a contract are also subject to those underlying rules and principles of contract which the law imposes on them.

Secondly, the duties owed by two contracting parties towards another are frequently not duties which they expressly agreed upon but obligations which the law applies. Conversely, some duties in tort can be varied by agreement, for example, the duties owed by the occupier of premises to his visitors; and liability in tort can be excluded altogether by consent (the doctrine of *volenti non fit injuria*),

When a wrong arises exclusively from a breach of agreement between parties, then the wrong is not a tort but a breach of contract, or trust, or other legal or equitable obligation as the case may be. On the other hand, if the relationship of the plaintiff and the defendant is such that a duty of care arises irrespective of contract and a wrong is done, and the defendant is negligent, then the wrong is often a tort even though it may also be a crime. In other words, if the law imposes a duty on a person to take care, so that his conduct does not injure his neighbour, if the person fails to exercise reasonable care, the wrong that may result is often a tort, even though it may also be a crime or other civil wrong.

In *Kelly V. Metropolitan Railway Co. (1895) 1 Q.B. 944 CA.*, the plaintiff sued the defendant railway company for personal injuries he suffered due to the negligence of the servants of the company while he was traveling on the railway. The court held that the case was founded upon tort and not contract, although the tort occurred as a result of a contract to carry him as a passenger. See also *Tai Hing Cotton Mill V. Lui Chong Hing Bank (1986) 2 All ER 947.*

In *Jackson V. Mayfair Window Cleaning Co. Ltd. (1952) 1 ALL ER 215*, the plaintiff house owner contracted the defendant company to clean his house. In the course of cleaning a chandelier, it fell from the ceiling and was damaged. In an action for

negligence for its damage, the court held that the company had failed to exercise reasonable care in the cleaning of the chandelier and gave judgment in favour of the plaintiff. The cause of action was not the failure of the company to perform the contract to clean the house, but it arose out of the breach of duty to exercise reasonable care to keep the plaintiff's properties safe. The plaintiff's claim was founded on tort and not on contract. See also the case of *Henderson V. Merrett (1994) 3 All ER 506.*

On the other hand, where a damage is purely contractual, then any breach of agreement between the parties can only be remedied by a claim for breach of contract. This view was affirmed by the Supreme Court in *Quo Vadis Hotel Ltd V. Nigeria Marine Services Ltd. (1992) 6 NWLR Pt. 250, p.653 at p.664 SC.*

Sometimes a wrongful act may be both a tort and a breach of contract. For example: (i) if A has contracted to transport B's goods and due to A's negligence the goods are lost or damaged. A will be liable to B both for breach of the contract of carriage and for the tort of negligence. (ii) A dentist who negligently causes injury in the course of extracting a tooth may be liable to the patient both for breach of an implied term in his contract with the patient to take reasonable care and for the tort of negligence. See the following cases:

Nigerian Bottling Co. Ltd. V. Ngonadi (1985) 1 NWLR pt. 4, p. 739 SC.
Abusomwan V. Mercantile Bank of Nig. Ltd. (1987) 3 NWLR pt. 60, p. 196 SC.
Osemobor V. Niger Biscuit Co. Ltd. (1973) NCLR 382.
Amadi V. Essien (1994) 7 NWLR pt. 354, p. 91 CA.

Lastly, there are some areas of overlap between contract and tort. For instance, a victim of fraudulent misrepresentation in contract may sue for the tort of deceit, and a victim of negligent misrepresentation may sue for the tort of negligence. Also, there are some concepts which are common to both contract and tort, for example, the concepts of remoteness of damage and agency. The main object of legal proceedings in both contract and tort is damages. That is monetary compensation and or a grand of other appropriate remedy to the injured party for the injury or loss occasioned to him by a breach of contract or commission of a tort.

Tort and Trust

Tort and trust are civil laws. A trust arises in any situation where one or more persons hold property for the benefit of another person or objects. However, there is little or no difference between the legal rights and liabilities of tort and trust. The only real difference is mainly that of history; that the law of tort arose or developed from common law, whilst the law of trust grew from the doctrine of equity in the Court of Chancery.

In other words, the remedies of tort are mainly based on law, whilst the remedies of trust were originally equitable and discretionary, although many remedies are now legal or statutory. Both laws of tort and trust have since then been developed by statutory enactments.

Similarly, tort, crime, contract and trusts are not exclusive; a single conduct can give rise to liability in all these areas of law. Thus, where a trustee steals trust funds or misappropriates trust property, he may be liable for breach of trust under civil law. The trustee may also be successfully prosecuted for breach of trust in criminal law. Where the trust was constituted by a written instrument, there may be liability for contractual failure to carry out the trust duties. Additionally, there may be liability in tort for detinue, or conversion of the trust property.

Where a single wrongful act gives rise to a right of claim in several areas of law, it is advisable to bring the action in that one or more areas of law where it will yield the desired remedy. Therefore, the party who is suing should rely upon that aspect of law which puts him in a more favourable position. See the case of *Chessworth V. Farar (1967) 1 QB 407 at 110; (1966) 2 All ER 107.*

3.2 Forms of Action

In order to understand the categories, boundaries and definitions of modern torts, it is necessary to look at their historical origins. There is probably no branch of the common law (apart from English land law) which is more rooted in the past than the law of torts.

Torts were developed from about the thirteenth century onwards in the King's common law courts, in which every action had to be commenced by the issue of a royal writ. Each writ was in a set of form, known as a form of action. There was a limited number of recognized forms of action and each plaintiff had the difficult task of fitting his claim into an existing form: if his claim did not fit, he had no remedy. This system of writs and forms of action dominated the law of torts and indeed the whole common law system until the forms of action were eventually abolished by the Common Law Procedure Act in 1852. Before the abolition of the forms of action, the question in every tort claim was not "has the defendant broken some duty owed to the plaintiff?" but "has the plaintiff any form of action against the defendant, and, if so, what from?"

The main forms of action in tort were: (i) the writ of trespass and (ii) the writ of trespass "on the case", or simply "the action on the case." The writ of trespass lay only for forcible, direct and immediate injury to land, persons and chattels. Examples include where the defendant throws a log of wood at the plaintiff, striking him as he walks along the road. The action on the case, on the other hand, covered all injuries that were indirect and consequential or non-forcible. For example where the defendant negligently leaves a log of wood in the road over which the plaintiff stumbles and is injured (indirect injury), or where the defendant defames or deceives the plaintiff (non-forcible injury).

Before 1852 it was vital to choose the correct form of action – trespass for direct, forcible injury; case for indirect or non-forcible injury–and if the plaintiff made the wrong choice, his claim failed. Now all the plaintiff needs to do is to set out the relevant facts in his statement of claim. Nevertheless, the distinction between direct and consequential injury

still remains. Thus the modern tort of trespass is concerned with direct injuries; whilst the tort of nuisance (derived from the action on the case) covers indirect injuries. See *Onasanya V. Emmanuel (1974) 9 C.C.H.C.J. 1477, at p.1484* where throwing water and refuse onto plaintiff's land was held to be trespass and allowing excreta to seep into plaintiff's well from defendant's salga was held to be nuisance. See also *Lawani V. West African Portland Cement Co. Ltd. (1974) 2 W.S.C.A. 36 at pp.41, 42.*

It is no longer necessary for the plaintiff to plead any particular form of action, but he must nevertheless show that some recognized tort has been committed. He can do this only by showing that the defendant's conduct comes within the definition of trespass, nuisance, negligence, etc., as the case may be. The boundaries and definitions of modern torts thus depend to a large extent on the boundaries of the old forms of action; hence Maitland's celebrated remark: "The forms of action we have buried, but they still rule us from their graves."

3.3 Classification of torts

The classification of torts is a good academic exercise. The classification of torts helps to ensure a better understanding and study of the law of tort as a whole by putting it in a better perspective. It also helps to know the relationship between various torts. Torts may be classified according to the kind of rights or interests which they protect. Therefore, torts may be grouped as follows as those that protect or concern:

1. Personal Interests
2. Interference with judicial process
3. Property interests
4. Interest in reputation
5. Economic interests
6. Interference with relationships; and
7. Miscellaneous interests

Let us briefly examine the classes of torts.

Torts Protecting Personal Interests

The torts that protect a person, or prohibit trespass to person include the torts of trespass, such as, assault, battery, false imprisonment, malicious prosecution, the Rule in *Rylands V. Fletcher*, negligence, occupier's liability, etc. These torts are concerned with protecting a person from being injured in the body. They also protect the freedom, liberty and dignity of a person from being denied by way of arrest, false imprisonment, etc.

Torts Prohibiting Interference with Judicial Process

The torts that prohibit interference with judicial process include malicious prosecution. This tort aims to protect persons against criminal prosecution without lawful excuse.

Torts Protecting Property Interests

The torts that protect interests in property include trespass to chattel, trespass to land, nuisance, the Rule in *Rylands V. Fletcher*, negligence and interests in intellectual property, such as, copyright, passing off, injurious falsehood, patents, trademark, etc. These torts protect the proprietary interests of a person.

Torts Protecting Interests in Reputation

The tort that protects the reputation of a person is the tort of defamation. The law of defamation which is divided into libel and slander protects a person's right to his good reputation. It deals with wrongs to reputation. Defamation is also a crime. In criminal law, defamation consists of slander and libel. However, if a person does not have a good reputation, then there is nothing for the law to protect as the case may be.

Torts Protecting Economic Interests

The torts which protect economic interests include; vicarious liability, deceit, passing off, interference with contractual relations and inducing breach of contract, malicious or injurious falsehood, conspiracy, intimidation, occupier's liability, etc. These torts protect the economic interests of a person, such as economic relations and trading interests. They protect the right of a person to be free from financial or economic harm.

Torts Prohibiting Interference with Relationships

The torts which protect relationship between one person and another person include, interference with contractual relations, enticement and harbouring, etc. On the other hand, the law of tort cares about economic and contractual relationships. For instance, the law of tort protects one contracting party from being denied the service of the other contracting party through inducement by a third party to break the agreement. See the case of *Lumley V, Gye (1853) 118 ER 749, 1083* and *British Motor trade Asso V. Salvadori (1949) Ch. 556.*

The torts of enticement and harbouring are old common law torts which protect the matrimonial rights of married persons; for instance the right of one spouse not to be denied the consort of the other spouse by a third party. Although, enticement and harbouring are valid torts in Nigeria, they have been abolished in England. (See section 2(9) of the Administration of Justice Act, United Kingdom; and the case of *Best V. Samuel Fox & Co. (1952) 2 All ER 394.*) Furthermore, in these modern days, nobody will want to sue for these torts because they want to relate with their spouse freely and not by force of law.

Torts Protecting Miscellaneous Interests

This group of torts covers other multifarious and less common interests which are protected by the law of torts.

SELF ASSESSMENT EXERCISE 1

Mention the various classifications of torts.

4.0 CONCLUSION

One of the mysteries of Legal Education is the exact or precise meaning and ambit of tort liability. Tortuous liability arises from the breach of a duty of primary care fixed by law. Such duty is towards persons generally and its breach is redressable by an action for unliquidated damges. Although universally acclaimed, this definition does little more than purport to assist us to distinguish tort form other branches of Law.

5.0 SUMMARY

In this unit, you learnt about the Law of Tort in comparison and difference between Torts and Crime, Tort and Breach of Trust, Tort and Contract.

6.0 TUTOR MARKED ASSIGNMENT

Write short notes on the following:
(i) Tort and crime
(ii) Tort and contract
(iii) Tort and breach of trust

7.0 REFERENCES

Criminal Code of the Southern States of Nigeria

Penal Code of the Northern States of Nigeria

UNIT 3 The Reception of the Law of Torts in Nigeria

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1.0 INTRODUCTION

The evolution of the law of tort has been somewhat haphazard and it is an area of law which is still developing. Note until 1932, was negligence officially recognized by the House of Lords in England as a separate tort, has negligence been of central importance. However, the vast majority of tort claims today are for negligence. Negligence has proved the most appropriate action in modern living conditions, especially since the development of the motor car. We shall consider how the law of torts was received into Nigeria.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) explain how the law of torts was received into Nigeria;
(ii) enumerate the sources of the Nigerian law of tort.

3.0 MAIN CONTENT

3.1 How Law of Tort was received into Nigeria

The law of tort is a part of the common law of England which is itself, a part of the English law. The law of tort came into Nigeria when English law was received into Nigeria by virtue of local statutes that permitted the application of English law in Nigeria. The English law which was introduced into Nigeria is made up of three aspects. These are:

1. The common law of England
2. Equity; and
3. The statutes of general application in force in England on January 1, 1900.

Among the local statutes that received the laws of England for application in Nigeria were the Supreme Court Act 1914, the Interpretation Act and the High Court laws of the Regions. These Nigerian statutes received the English common law, equity and statutes of general application, which were in force in England on January 1, 1900 and made them applicable in Nigeria. Later on, in the Western Region of Nigeria, the regional parliament enacted the Law of England (Applicable) Law and limited itself to receiving only English common law and equity. See section 3, Laws of Western Region of Nigeria, 1959.

This law made statutes of general application in respect of subject matters that were within the legislative competence of the Western Region parliament inapplicable to the Region. The Western Region parliament then re-enacted such English statutes of general application that were relevant for the region *mutatis mutandis* and made them part of its law to fill the gaps that would have been created.

It is generally agreed that the cut off January 1, 1900 date is applicable only to English statutes of general application and therefore bars English statutes made after that date onwards to this day, from application in Nigeria. Thus, the principles of English common law and equity which are current in England should apply in Nigeria as they are not affected by the January 1, 1900 cut off date. Provided that:

1. Such principle of common law is not in conflict with any Nigerian statute or case law on the subject matter; and

2. The jurisdiction of the relevant court permits it to apply English law, subject of course to the overriding power of the court in question to ascertain the current state of the law in England.

In the light of the fact that statutes made in England after January 1, 1900 are not applicable in Nigeria, the legislature at the Federal, State and local councils levels now have the full responsibility of enacting legislations to meet the needs of Nigeria and maintain parity with legal developments in other countries, especially common law countries, such as England and the rest of the Commonwealth of Nations.

In this wise, many statutes have been enacted by the legislatures in Nigeria. Some of these statutes are reproductions *mutatis mutandis* of the relevant English legislations after which they are modelled. Examples are the Defamation Law, Law Reform (Torts) Law, Fatal Accidents Law, Weights and Measures Act, Food and Drugs Act and the Consumer Protection Council Act to mention a few. (See Laws of Lagos State, 2003 and Laws of the Federation of Nigeria, 2004).

It is hoped that the enactment of statutes in Nigeria will be a pro-active, timely and responsive exercise, so that reform will continue to be made in deserving aspects of Nigerian law. For instance, in the law of tort, such as, in trespass to goods, liability for defective buildings and structures, etc.

3.2 The Sources of the Nigerian law of tort

The sources of the Nigerian law of tort are several. They include:

1. Common law
2. Case law; and
3. Statutes

We shall briefly examine these.

COMMON LAW

Common law or the common law of England is known and called by this name because it is the law which was common to all parts of England and Wales. It grew over time from the practices, customs and ways of life of the people. Therefore, common law is the general custom of the people of the United Kingdom. It is largely an unwritten law as opposed to statutory law which is codified.

The first common law judge was the king himself. He held court and sat as judge. The people sought justice at his hands. He was the dispenser of justice and the people reveried him. When the king became too busy by reason of state affairs to hear all the cases coming before him, he appointed members of his court or council to sit in judgment and minister justice on his behalf throughout the realm. Though the king was not physically present in the court-room, he was assumed to be there spiritually, guiding the hand of justice. Thus, any disrespect or disobedience to the judge was considered to be disrespect or disobedience to the king or the spiritual presense of the king. Thus, punishment of such contempt of court by the presiding judge was just as swift and as sure as punishment by the king would have been. See C. F. Padfield, Law Made Simple, 1978 5th ed. p.11 and also Don R. Pember, Mass Media Law, 2nd ed. p. 296.

Itinerant Judges and the growth of common law

The common law of England really started to grow as a result of the practice of the kings who appointed and sent out royal judges, on itinerary to dispense justice in the countries of the realm on his behalf and in his name. These itinerant justices went out from London to all of the kingdom on visits regularly, to dispense better justice which obtained the approval of the people.

The royal judges were usually nobel personalities, such as, bishops, barons, knights and other nobility and were appointed from the king's council. These judges were mainly untrained in law and when they came to a country, they first of all had to ascertain the custom of the country, or community, which custom they then applied in the local country court to the cases brought before them. The judgments given in these cases were then enforced in the name of the king.

The complete formation of common law

On completing their regular circuits, the judges returned to the royal courts at Westminster, London and discussed the customs they ascertained from the various countries and the decisions they gave in the cases. As a result of sifting these customs, discarding those which were unreasonable and retaining those which were fair and using good judgment and reason, the judges over time arrived at a uniform body of custom law from these customs which commonly applied in the kingdom.

This uniform body of custom law, formed from the customs of the people is and has since been known as the common law of England. Common law continued to grow with the application of *stare decisis*, which means "let the decision stand". Stare decisis is the practice of standing by an earlier decision and applying it to the new case at hand. *Stare decisis* is the application of judicial precedent whereby any legal rule or law rightly stated or formed in a new case was applied and followed by other judges in subsequent matters and problems of law which were similar to the earlier case sought to be followed as precedent.

English text writers generally agree that the formation of common law was completed around 1250 A. D. at which time Henry de Bracton (d.1268) wrote his famous book known as ***Treatise on the Laws and Customs of England.*** This book is regarded as the first exposition of a portion of this law of England. By this time, common law through application of judicial precedent had become more certain and predictable, thus acquiring the basic essentials of a good law which are certainty, uniformity and consistency.

However, with the possession of these qualities, new problems arose. Common law was inflexible and worked hardship in some cases, whilst it did not even provide redress for litigants in other instances. Thus, common law was inadequate to meet all legal problems. At this time, Equity, which was fairness, natural justice or good judgment, was then developed by the Lord Chancellor of England and his colleagues in the Court of Chancery, together with statute law, were brought in to act as a gloss to supplement and smoothen the hardships and fill in the gaps of the common law, thus making English law a more complete legal system. The common law of England has today reached all parts of the world, especially the Commonwealth of Nations which are sometimes referred to as common law countries, or common law jurisdictions.

SELF ASSESSMENT EXERCISE 1

Define common law.

CASE LAW OR JUDICIAL PRECEDENT

Case law or judicial precedent is law formed from earlier decided cases. It is law formed from the legal principles laid down in earlier cases. Thus case law or judicial precedent is the practice of following precedents or law laid down in earlier cases. In other words, case

law is law based on the principle of stare decisis, that is, the practice of standing by and applying an earlier decision, provided that the case at hand is similar to the earlier case or cases sought to be followed.

In both civil and criminal cases, judges usually state the reasons for a decision, when giving a ruling or judgment. In future, when a case involving similar facts comes before a court, the judge will refer to the reasons for the decision in the earlier case. If the principle of law to be applied in the present case is the same, the judge will then follow the earlier decision, that is, the legal principles established in the earlier case. This practice of following the legal principles or law laid down in earlier cases that are similar to the case at hand, causes law to be more certain and uniform in application. The law so laid down in earlier decided cases is called case law, as opposed to statute law which is usually codified at the instance of the relevant law maker, or for instance, customary law which usually grows over time from the customs and ways of life of the people who are subject to the customary law.

The bindingness of case law

Likewise, the position in other countries, the judgments of the highest courts in Nigeria, such as, the Supreme Court at Abuja and the Court of Appeal which has several divisions sitting in various parts of the country, have from time always commanded the greatest respect. The general rule of precedence established long ago in England in the 19th century and which is consistently observed in the Nigerian legal system, is that decision of the higher courts bind the lower courts. Thus the decisions of the Supreme Court which is the highest court in Nigeria binds all courts in the country.

The order of precedence or bindingness of case law

The order of bindingness of case law is usually according to the superiority of the court that decided the given case. The order of precedence or bindingness of decisions as it applies in the courts in Nigeria is as follows:

S/N	Name of Court	Courts bound to follow decision
1.	Supreme Court	All courts in Nigeria, but not itself
2.	Court of Appeal (The practice of the English Court of Appeal as stated in *Young V. British Aeroplane Co. (1994) KB 718* is applicable to the court.	Itself and all lower courts in Nigeria. However, it is not bound by its own decision in the following instances: (a) It is free to choose between two conflicting decisions of its own; (b) It is not bound to follow its own decision, which though not overruled, but cannot stand with a decision of the Supreme Court; and (c) Finally, it is also not bound to follow its own decision which was given per incuriam, that is, a case decided based on its peculiar facts.
3.	High Court	Itself and lower courts.

4.	Magistrate Court	Their decisions do not bind any other court. Also, they are not bound to follow their own previous decision.

Courts of co-ordinate jurisdiction or equal powers

Courts of co-ordinate jurisdiction are courts of equal status or equal powers. Each division of the Court of Appeal is of equal status with another division of the Court of Appeal sitting in another part of the country, and each is not bound by the other's decisions. But in practice, each court does pay attention to the rulings and judgments of the other and the decisions of each court has a strong persuasive influence on the other divisions of the court in order to ensure certainty and uniformity of the law. This position also applies to the High Courts. The High Courts, whether it is a Federal High Court or a State High Court are also courts of co-ordinate jurisdiction, equal power or of equal status.

Thus stare decisis, or the practice of referring to earlier decisions and drawing similarity from them to the present case, in order to reach a decision in the case at hand is known as the application of judicial precedent. The practice of judicial precedence leads to case law. Case law is law developed or formed from decisions reached in earlier cases.

Nigerian Judges and case law

In Nigeria, it is not the duty of judges to make law but to interpret and apply the law as it is. But in countries where case law in the strict sense of law making by judges obtain, it will be necessary to emphasis certainty and flexibility side by side, so that certainty will not lead to rigidity, while flexibility to create new law on the other hand should also not lead to uncertainty and thus hamper the development of the law to meet the needs of society.

Examples of case law or judge made law

Some notable examples of law making or case law arising from judicial decisions of judges in the law of tort are:

1. The Rule in *Rylands V. Fletcher (1866) LR. 1 Exch. 265, (1861-1873) All ER 1. Affirmed in (1868) LR 3 HL 330*. The case was decided by Blackburn J. as he then was. In this case, His Lordship in the English High Court laid down the law that a person who brings anything that is likely to do mischief onto his land or premises, is strictly liable for any injury caused by it if it escapes.

2. *Donoghue V. Stevenson (1932) All ER 1*. Where Lord James Atkin in the House of Lords established the concept of duty of care, when it exists and to whom it is owed. The duty of care as laid down by Lord Atkin in the law of negligence is that a person whose action is likely to cause harm, should be careful and conduct himself in such a way to avoid harm to anyone.

LEGISLATIONS

Common law and equity are important parts of Nigerian law. However, before and since independence, legislations or statutes have continually increased in power and coverage in Nigeria. Today, legislations are the main source of law making, reform and legal development in Nigeria, just as in other countries.

The National Assembly has power to make and repeal laws for the peace, order and good government of Nigeria, while the House of Assembly of a State has power to make laws for the peace, order and good government of a state. By means of legislation, successive governments have reformed and continued to affect more positively the social, economic and political life of the country. For instance, criminal law is entirely statutory and thus it is completely codified or written in Nigeria, so also are many aspects of civil law.

Legislations or statutes are usually enacted by parliament in writing, that is in written form and are therefore called written law, as opposed to the common law of England or customary laws in Nigeria which are not strictly in codified form or code law. However, common law and customary law are partly unwritten and partly written nowadays especially when it is written as part of the judgment or decision of a court.

Legislations are usually enacted in the legislature or parliament, such as the National Assembly or House of Assembly of a State, which are made up of the elected representatives of the people. In a parliament, the law has to be passed according to the prescribed legislative procedure stipulated in the Constitution. After the required number of readings and debate, some of the laws require at least two third votes of the total members to become law, whilst others require only a simple majority of votes.

The National Assembly in Nigeria is made up of two houses or chambers, that is, the Senate which is the upper house and the House of Representatives which is the lower house. Some legislatures have a single house, for instance a State House of Assembly in Nigeria. After a bill, as a law is first called, has been passed, it has to be sent to the President or the State Governor, as the case may be, who assents to it by subscribing or appending his signature to it and it becomes law.

Where the executive vetoes the bill by not signing it, the legislature may override the executive and on its own by the required two-third majority vote, pass the bill into law and the signature of the President or Governor as the case may be, will no longer be required. The National Assembly and State Houses of Assembly can enact statutes within the ambit of the legislative lists assigned to them by the Nigerian Constitution.

Legislations or statutes are known by different names depending on the legislature or law maker that enacted the statute or the government in power. In Nigeria, statutes or legislations include:

1. Acts and Laws
2. Decrees and Edicts

3. Bye-Laws; and
4. Delegated Legislations or subsidiary legislations, etc.

Let us briefly examine these.

Acts and Laws

Statutes enacted by the National Assembly are called Acts, that is, Acts of Parliament; while statutes passed by a State House of Assembly are called Laws. However, any statute passed by a parliament, whether it is the National Assembly or House of Assembly of a State is known as an Act of Parliament. Various acts and Laws have been passed to regulate different aspects of the law of tort in Nigeria.

Decrees and Edicts

When a military government is in power, a statute passed by the Federal Military Government of Nigeria is called a Decree while a law enacted by the Military Government of a State is called an Edict. However, a military government in power may by law convert and deem specified decrees and edicts to be Acts or Laws respectively and from the date of such legislation making the conversion, the affected decree or edict are referred to as an Act or Law, such as was done by the government of General Ibrahim Babangida in the Laws of the Federation of Nigeria, 1990.

All decrees in the Laws of Nigeria 1990 are called Acts, even though most of the statutes were decrees of the Federal Military Government. Furthermore, when a democratic government assumes power, all existing decrees and edicts that are not abolished by the Constitution are deemed converted and are thereafter referred to as Acts and Laws from the day the Constitution takes effect.

Bye-Laws

Legislations passed by a Local Government Council are known as bye-laws. Many local government councils across the country have various bye-laws which have one thing or the other to do with the law of tort, especially with regard to cleanliness of premises, obstruction of public roads, etc.

Delegated Legislation

Apart from the above mentioned statutes, we also have delegated legislation. This is legislation made by some administrative officer, authority or body under power delegated or given to that person, authority or agency by the Constitution or other enabling statute permitting such administrative authority to make laws. Examples of administrative law makers or rule makers include, the President, Governors, Ministers, Commissioners, ministries, departments, public agencies, etc acting under appropriate enabling statutes which empower them to make delegated legislation.

Delegated legislation is also known as subsidiary legislation or subordinate legislation. Delegated or subsidiary legislation is usually controlled by parliament, in that the proposed orders or rules are supposed to be printed and laid before parliament which may then debate them and approve same for enforcement, amend or reject it. These subsidiary legislations when made according to the stipulated procedure are valid laws just as the parent statute itself.

Delegated legislation is an indirect form of legislation because they are laws made by persons who are not members of parliament. Delegated legislation may take various forms. These include:

1. Statutory instruments
2. Orders-in-council
3. Bye-laws
4. Regulations, rules, orders and directives
5. Rules of court, forms and precedents, etc.

Annually, many statutes are passed by the National Assembly and State Houses of Assembly; and much subsidiary legislation especially in the form of rules and regulations are made pursuant to these parent statutes by various administrative authorities. See statutes contained in the Laws of the Federation of Nigeria, 2004 edition e.g Weights and Measures Act.

4.0 CONCLUSION

It is important in the knowledge of general principles of Law to be acquainted with the Sources of Law applicable in a particular country and locality. This is because the whole body of Law culminating in a proper reception of the Legal System is determined by the sources of applicable Laws.

5.0 SUMMARY

In this unit, we discussed the various sources of the Law of Tort, legislation and the Received English Law and Equity and Common Law.

6.0 TUTOR MARKED ASSIGNMENT

1. What do you understand by *stare decisis*?
2. What is delegated legislation?

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UNIT 4 The Principles of Liability in Tort

TABLE OF CONTENTS

1.0 INTRODUCTION

Generally, each kind of tort has its own rules of liability. However, the rules which determine liability in various torts include the following:

1. The principle of fault or negligence: Liability in many torts is based on the principle of negligence or existence of fault, with the exception of strict liability torts. For instance, liability in the torts of negligence, occupier's liability, professional negligence, road traffic accidents, etc are based on the principle of fault or negligence.

2. The principle of damage: Here, liability attaches because the claimant or plaintiff has suffered damage as a result of the defendant's conduct. This is with the exception of torts which are actionable *per se*, that is without the necessity of proving damage, for instance, trespass and libel.

3. De minimis non curat lex: Which means the law does not bother or concern itself with trivialities and thus there is no liability.

4. Intentional damage is never too remote: Where a damage is intentional, the wrongdoer is usually liable.

5. A tortfeasor takes his victim as he finds him: This is known as the "egg shell" rule, "thin skull" rule or the "unusual plaintiff's" rule.

6. Strict liability: As a general rule, the principle of strict liability means that a defendant is liable for his tort, even though there is no fault or negligence on his part and whether or not damage is done to the plaintiff.

We shall examine these principles of liability in the next two units with the exception of the principle of fault or negligence which shall be examined fully later.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) explain the principle of damage.

3.0 MAIN CONTENT

3.1 Damage and liability in Tort

Often times, for a defendant to be held liable for a tort, the plaintiff must have suffered damage as a result of the conduct of the defendant. Where damage has been proved by a plaintiff, then the test of reasonable foreseeability or remoteness of damage will be applied to determine the extent, scope or amount of damage for which the defendant will be held liable and ordered to pay to the plaintiff.

However, because damage does not always lead to liability, three principles exist with respect to damages. These are:

1. Damage without legal wrong: that is *damnum sine injuria*. This means that there is no legal remedy even though loss was suffered.

2. Legal wrong without damage: that is *injuria sine damnum*. This means that there is liability and remedy based on fault, even though there is no damage.

3. Damage leading to tortuous liability and legal remedy: This is damage and legal remedy. This is the commonest situation in most torts and civil claims.

Ordinarily, a damage is a loss or injury suffered by a person. A damage may be physical such as one done to the body and property, or economic, that is financial, etc. Furthermore, the word "damage" also means the money compensation which is usually paid by a wrongdoer to a person who suffered a loss or injury. Thus damage is the estimated money compensation which court usually orders a defendant to pay to a plaintiff or claimant who has suffered a loss or injury. See the following cases: Mahon V. Osborne (1933) 2 KB 14; Byrne V. Boadle (1863) 159 ER 299 and Ward V. Tesco Stores Ltd. (1976) 1 All E 219.

We shall now examine the various principles regarding damage.

3.1.1 Damage without a legal wrong: *Damnum sine injuria*

Damage without a legal wrong or d*amnum sine injuria* is a loss or damage which does not have a legal remedy. Damage without a legal injury is where a wrong or damage has been done to a person, nevertheless, the person has no right of action to recover compensation because no legal wrong has been committed. It is a damage suffered without the breach of

a legal right. Thus, the mere fact that a person has been harmed does not entitle him to maintain an action, unless a legal wrong has been done to him.

For a suit to succeed, the damage must result from a breach of a legal right of the plaintiff. Where a damage is suffered without the breach of a legal right, it is known in Latin as d*amnum sine injuria* that is, damage without injury. Examples of damages without legal injury are:

1. Trade compensation
2. Defamation on a privileged occasion
3. Lawful use of property or lawful conduct; and
4. Perjury

We shall briefly examine these torts.

Trade Competition

Ordinary trade competition among several traders who sell the same or similar goods or services may cause harm to a trader who cannot compete. This may lead to loss of customers and livelihood. However, this does not give a right of action. Thus, where a big supermarket or dealer sets up business next to a small retailer and sells at cheaper prices, as a result of which the retailer being unable to compete is forced to close down his business, harm is done to him as his livelihood is lost and he may suffer other consequential losses. Nonetheless, there is no legal wrong committed by the big supermarket. Thus, right of action will not lie and no remedy will be offered to the retailer who has suffered.

Therefore, where right of action is based on the occurrence of a legal wrong or legal damage; a tort or wrongful act is not actionable *per se* upon commission, unless a legal wrong or legal damage is done to the plaintiff. In such instances, liability only attaches when damage is caused to the plaintiff. Accordingly, the plaintiff will only succeed if he can prove that the defendant has infringed his legal right or done a legal wrong and that thereby he has suffered harm or injury.

In *Mogul Steamship Co. V. McGregor Gow & Co. and Ors. (1892) AC 25*, the plaintiff appellant company and the defendant respondent companies were rival traders in China tea. The defendants formed an association to the exclusion of the plaintiff and persuaded tea merchants in China not to act as the plaintiff's agents; otherwise their agency would be withdrawn by the association. The plaintiff then brought action against the associated defendants alleging a civil conspiracy to injure the plaintiff's trade.

The House of Lords held that the defendant companies acted with the lawful object of protecting, extending their trade and increasing their profits. The House of Lords went on to say that since the means they used were not unlawful, the plaintiff had no cause of

action even though the plaintiff may have suffered injury. Therefore, trade conspiracy per se without more is not a tort unless it is accompanied by some unlawful act.

Defamation made on a privileged occasion

Another example where there is a damage but there is no right of action is when a defamatory statement is made on a privileged occasion. Defamation on a privilege occasion is where a person is defamed but the plaintiff has no right of action because the defamation was made on a privileged occasion. In this instance, damage is occasioned to the plaintiff but there is no legal wrong done and consequently there is no right of action to recover compensation for defamation. See the case of *Chatterton V. Secretary of State fro India (1895) 2 QB 189*; and *Ayoola V. Olajire (1977) 3 CCHCJ 315*.

Lawful use of Property

As a general rule of law, lawful use of property or lawful conduct without more is not a legal wrong against which right of action and remedy lies. However, when lawful use of property degenerates or graduates into nuisance or other legal wrong or breach of law, right of action and remedy then lies.

In *Bradford Corporation V. Pickles (1895) AC 587 HL*, the parties were adjoining land owners. The defendant corporation had statutory powers to take water from certain springs. Water reached these springs by flowing in undefined channels through the neighbouring land belonging to the defendant. The defendant with a view to inducing Bradford Corporation to buy his land at a high price, sank a shaft on his land to collect the passing water and thereby interfered with the flow of water into the corporation's reservoir.

The corporation applied to court for an injunction to restrain him from collecting the underground water in his borehole. The court held that an injunction would not lie. The defendant was entitled as an owner to draw from his land the underground water. His "malice" if any, in trying to force the purchase of the land was irrelevant. No lawful use of property can become illegal if done with an improper motive. Therefore as a general rule, lawful use of one's property is not a legal wrong, unless such use degenerates into nuisance or other breach of law.

Perjury

Perjury is the offence of knowingly making a false statement or giving false evidence in a judicial proceeding in which one is a party or was called as a witness to give evidence. Therefore if a person goes to court and gives any evidence which the person knows to be false, he commits the offence of perjury and if he is discovered he may be prosecuted and sanctioned for it in criminal law. See section 117 of the Criminal Code Act. See also the following cases: *Cadell V. Palmer (1831) 6 ER 956; R V. Hall (1982) 4 CAR 153; R V. Rider (1986) 83 CAR 207;* and *R V. Peach (1990) 2 All ER 966*.

However, whether or not the person is discovered and prosecuted for it, the party who is injured by the perjury has no right of civil action for remedy in respect of the perjury *per se*, although he may be able to go on appeal on other points of law in the proceedings in which the perjury was committed.

In *Hargreaves V. Bretherton (1958) 1 QB 45*, the plaintiff brought an action for damages against the defendant on the ground that the defendant had falsely, maliciously and without just cause committed perjury as a witness by giving false evidence at the trial of the plaintiff for certain criminal offence and that consequently he the plaintiff had been convicted and sentenced to eight years imprisonment. The court held that no right of action lied as the plaintiff's action was based on the purported tort of perjury. There is no tort of perjury.

In *Roy V. Prior (1971) AC 470*, the plaintiff sued the defendant for damages alleging *inter alia* that the defendant caused his arrest and forcible attendance at court to give evidence as a witness in a criminal proceeding by falsely saying in court that the plaintiff was evading a witness summons. It was held that there was no tort of perjury and therefore no cause of action lay against the defendant. See also *Evans V. London Hospital Medical College (1981) 1 WLR 184*.

The reason for this immunity from liability in civil action for perjury, lies in the public policy that witnesses should feel free to come and give evidence in legal proceedings. However, the English Criminal Justice Act 1988 gives a prisoner whose conviction is quashed or pardoned due to perjury and so forth, a right to monetary compensation from the government to assuage his feelings and alleviate his sufferings for the perjury committed against him and his resultant conviction.

3.1.2 Legal wrong without damage: *Injuria sine damno*

Legal wrong without damage means legal wrong without loss. It is the breach of a person's legal right but without damage to the person. It is a legal wrong without damage. Whenever there is a breach of a person's legal right, the person has a right of action and may bring action to recover damages even though it is nominal damage. See *Ashby V. White (1703) 1 ER 417*. He may also obtain such other appropriate remedies, although he never suffered any harm as a result of the tort. This is a contrast to damage without legal wrong. This is a situation where there is a legal wrong committed or done against a person but no loss or damage was suffered by the plaintiff or no damage was established by the plaintiff.

As a general rule, where there is a legal wrong without damage, the law presumes damage even though damage was not suffered by the plaintiff nor was proved by the plaintiff. For the simple reason that a legal wrong has been done to the plaintiff and the plaintiff is thereby entitled to an award of general damages, at least nominal damages, however small the amount. See *Newstead V. London Express Newspapers (1940) 1 KB 377;* and *Basely V. Clarkson (1681) 83 ER 565.*

The principle of legal wrong without damage or *injuria sine damno*, is an exception to the general rule that there must be damage or injury before legal action may be brought against a wrongdoer in tort. The torts in which damage need not be proved for a right of action to lie, are torts which are actionable *per se*, that is, they are actionable upon being committed. In other words, these torts give a right of action to the plaintiff to sue, once they are committed even though no harm resulted to the plaintiff.

To succeed in a claim for compensation in torts that are actionable per se, the plaintiff only needs to prove on the basis of probability, that the tort he alleges was committed. However, the plaintiff need not go on to establish damage, except where he actually suffered damage, in which case the amount of damages the plaintiff will recover will accordingly be increased beyond nominal damages. Examples of torts which are actionable per se, upon commission without the necessity of establishing damage include:

1. Libel and sometimes slander
2. Trespass to the person
3. Trespass to chattels
4. Trespass to land

We shall examine these torts briefly.

Libel and sometimes slander

Defamation consists of libel and slander. Libel is actionable upon mere commission without the necessity of proving damage. As a general rule, slander is not actionable *per se*, except in four instances. These are:

1. Implying that a person has committed a criminal offence. See *Farashi V. Yakubu (1970) NNLR 17.*

2. Saying that a person has an infectious disease. See *Bloodworth V. Gray (1844) 135 ER 140.*

3. Accusing a woman or girl of unchastity. See *Kerr V. Kennedy (1942) 1 KB 409.*

4. Implying that a person is incompetent in his or her profession, business or office. See *African Press Ltd. V. Ikejiani (1953) 14 WACA 386*.

Like in libel, these four heads of slander give rise to a right of action in themselves. To succeed, the plaintiff only needs to establish that the slanderous expression was published, without the necessity of proving damage. He may however prove any specific damage that he has suffered in addition to the general damages that may be presumed in his favour.

Trespass to Person

For instance, assault and battery, each gives a right of action in itself.

Trespass to Chattel

Trespass to goods is actionable *per se*.

Trespass to Land

A right to sue arises for every unlawful entry or trespass to land, even though no actual damage was done to the land. Therefore, trespassing on another person's land such as by mere entry on the land or removing anything from it, without lawful authority or excuse constitutes trespass.

The general rule of law is that where there is a wrong, there is a remedy, even though no specific damage was suffered. Thus, legal wrong and remedy usually go together. This rule of law is well illustrated in the case of: *Ashby V. White (1703) 1 ER 417*.

The plaintiff, a voter was prevented from casting his vote at an election by White, the Mayor of Aylesbury, England and his vote was discountenanced. He sued alleging wrongful rejection of his vote. The court held in his favour that an elector had a right of legal action for a form of nuisance or disturbance of rights, when his vote was wrongfully rejected by the returning officer even though the candidate he had tried to vote for was elected. In this case, Holt CJ took time to explain that the existence of a legal right and remedy go together:

> "If the plaintiff has a right he must of necessity have the means to vindicate it, and a remedy, if he is injured in the exercise of it, and indeed, it is a vain thing to imagine a right without a remedy; for want of right and remedy are reciprocal."

On appeal, the House of Lords upheld the judgment. Therefore, where there is a right, there is a remedy – *ubi jus ibi remedium*. And where there is no right, there is no remedy. See also *Bello V. A. G. Oyo State (1986) 5 NWLR pt. 4, p. 828 SC*.

However, in a case where there is a legal wrong but damage did not occur or was not proved by the plaintiff, the amount of damages the court may award would usually be small as no loss was established. In such instances, nominal damage may be awarded. Nominal damage is an award of small damages. It is usually awarded where little or no damage was proved in order to discourage people from running to court at every minor breach of right to litigate. The reason being that, the law does not concern itself with trifles. This in part gave rise to the principle of *de minimis non curat lex* meaning that

court does not concern itself with trivialities. This is a principle the court may consider in appropriate cases in determining liability.

SELF ASSESSMENT EXERCISE 1

What do you understand by nominal damages?

3.1.3 Causation and liability for damage

The consequences of a wrong conduct done by a defendant may be minimal, limited or even seemingly endless. In other words, when a tort is committed, the damages caused may be:

1. Minimal
2. Limited; or
3. Seemingly endless.

Therefore, we need to ask, for what consequences of a tort is the defendant liable? Is a defendant liable for only immediate damage or for the far flung remote damages? Is he liable for all damages occasioned by his tort? In other words, what is the liability of a tortfeasor; is he liable only for the reasonably foreseeable damages, or is he liable for continuous loss and for the consequences? For what result of his torts is a tortfeasor liable? What is the relationship between cause and liability?

As a general rule, a tortfeasor is only liable for the reasonably foreseeable damages of the tort he committed. Accordingly, a plaintiff is only entitled to compensation for damages which in the estimation of the court flows naturally from the alleged tort, that is to say, a tortfeasor is only liable for damages that are reasonably foreseeable. Thus, where damage is too remote to be the result or consequence of the alleged tort, no compensation would be awarded.

A helpful question which courts sometimes apply to determine cause and liability of a defendant or whether the damage is the natural or reasonably foreseeable result of an alleged tort, is the "but for" test. Meaning that if the damage would not have occurred but for the defendant's tortuous conduct, then the defendant is liable. The following two cases illustrate the application of the "but for" test.

Barnett V. Chelsea & Kensingson Hospital Management Committee (1968) 1 All ER 1068.

The plaintiff's husband after drinking some tea persistently vomited for three hours. Two other men who drank the tea were similarly affected. Later that night, they went to the defendant hospital where a nurse contacted the duty doctor, an employee of the defendant hospital who himself feeling unwell could not attend to them and asked them to go home to sleep and consult their own doctors.

The plaintiff's husband died that night of arsenic poisoning according to the report of the coroner's inquest. The issue was whether "but for" the doctor's failure to examine the deceased would he have died? The court held that if the deceased had been examined and treated with proper care, he would probably have died anyway. It could not be said conclusively that the doctor's failure to treat the deceased was the cause of his death. The hospital was accordingly not liable.

McWilliams V. Sir William Arrol & Co. Ltd. (1962) 1 WLR 295

A worker who was erecting steel fell from the building where he was working and died. If he had been wearing a safety harness he would not have fallen to death. The defendants who were his employers were under a legal duty under statute to provide all the workers with safety harness. They were in breach of that duty by failing to provide them on the day of the accident.

However, it was proved that on previous occasions when the employer provided safety harness, the deceased worker had not bothered to wear it. The court held that the defendants were not liable. The inference was that even if a safety harness had been provided on the day of the accident, the deceased would not have worn it and so would have died anyway.

Cause and the limit of liability for damage

The tort must have caused the damages claimed. The damage must be the natural or reasonably foreseeable consequence of the tort, otherwise the defendant would not be liable. In other words, it must be possible to draw a causal link or connection between the tort and the damage. The tort must be what caused the damage. Generally, the damage for which compensation is claimed must be a reasonably foreseeable consequence of the tort alleged. The damages must not be too remote from the tort for the action to succeed. Where an injury is the reasonably foreseeable result of a tort, a court will usually award compensation for it.

On the other hand, where the damage suffered is too remote to be the consequence of the tort, the claim will usually fail. As a general rule, court will only award damages for the natural or reasonably foreseeable consequences of a tort. This is so because in law, a person is taken as intending the natural consequences of his action. It is always assumed that there must be a limit to a defendant's liability. An example of the application of this principle of putting a limit to the liability of a tortfeasor is the case of:

Liesbosch Dredger V. Edison Steamship: The Edison (1933) All ER 144.
The plaintiff contractors who were doing a dredging work lost their ship due to the negligence of the defendant's ship which ran into it and caused it to sink. Due to impecuniosity, the plaintiff could not replace its ship and continue its contract job and consequently, the company suffered financial embarrassment. They sued the defendant

claiming for the loss of the ship and for consequential financial embarrassment which followed the loss of the ship.

The House of Lords held that damages would lie for loss of the ship, which was the natural and reasonably foreseeable result of the defendant's negligent navigation that caused it to sink. But the defendant were not liable for the alleged financial embarrassment suffered by the plaintiff which was a consequence of consequences. In this case, Lord Wright took time to explain the principle of law that there must be a limit to the extent, amount or scope of damages a defendant should be made to pay in these words:

> "The appellants actual loss in so far as it was due to their impecuniosity, arose from that impecuniosity as a separate and concurrent cause, extraneous to and distinct in character from the tort. The impecuniosity was not traceable to the respondent's acts and in my opinion was outside the legal purview of the consequences of these acts. The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection because it were infinite to trace the cause of causes or consequence of consequences. Thus, the loss of a ship by collision due to the other vessel's sole fault, may force the ship owner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons. In the present case, if the appellant's financial embarrassment is to be regarded as a consequence of the respondent's tort, I think it is too remote."

See also *Obasuyi V. Business Ventures Ltd. (1995) 7 NWLR pt. 406, p. 184 CA*.

Thus for instance, damages will not be awarded for the plaintiff's distressed financial position, impecuniosity or his failure to mitigate his loss; to do so, would amount to holding the defendant liable for the consequence of consequences, which is not the aim of the law of tort. Accordingly, where a plaintiff proves that a defendant's wrongful conduct caused his loss, he may not be able to recover damages if his loss is not the natural or reasonably foreseeable result of the defendant's conduct. Therefore, a defendant is not liable for the consequence of consequences and a plaintiff has a duty to mitigate his loss by preventing continuous loss.

The tests for determining the extent of liability for damage

When is a loss the natural outflow of a tort? When is a tort the cause of a damage? When is an injury too remote to be the result of a tort? How do we determine when a harm is the reasonably foreseeable result of a tort and therefore deserving compensation. On the other hand, when is a damage too remotely connected to a tort that it cannot be the consequence of the tort and therefore not deserving an award of compensation?

The modern test used by courts for determining the liability of a defendant is the test of remoteness of damage, otherwise known as the test of reasonable foreseeability of damage as laid down by the Judicial Committee of the Privy Council of the House of Lords in the *Wagon Mound's case (No. 2). (1967) 1 AC 617 PC*. However, for historical understanding, we shall look at the old test of liability which is the test of directness of damages, before looking at the new test, known as the test of remoteness of damages or reasonable foreseeability. In other words, we shall examine:

1. The old test of directness of damage - which has been abolished and is no longer being used because the test was hard and unfair to defendants, as the liability of a defendant for damages was too wide under the test of directness of damages; and

2. The test of remoteness of damage or reasonable foreseeability of damage – This is the new or current test for determining the extent, amount or scope of damage for which a defendant should be liable. The test of foreseeability of damage limits or restricts the liability of a defendant to the damages which are reasonably foreseeable to a reasonable man in his shoes. Accordingly, under the test of remoteness of damage, the liability of a defendant is reasonably limited and he is not liable for the consequences of the consequences of his tort.

The Test of directness of Damage

The test of directness of damage was the old test for determining liability in tort. The test was laid down by the English Court of Appeal in the case of *Re Polemis and Furness Withy & Co. (1921) All ER 40*. This old test is no more in use as it was overruled in the *Wagon Mound's case*. However, we shall look at it for historical purposes. The test of directness of damage or test of direct consequence was a test of the directness of damage, that is, the nearness connection or relationship of the damage to the tortuous act. This test was used to determine whether a loss was a direct result or direct consequence of a tort.

Under this test, a defendant was liable for all damages which were the direct result of his tort, whether or not such damage was foreseeable. In other words, the defendant was liable for all the damages which were the direct consequences of his tort, whether or not such damage was foreseeable by a reasonable man. Accordingly, under the old test, a person was liable in damages for all the direct consequences of his tort, even though such consequences were not foreseeable by a reasonable man and whether or not the damages are far flung or whether or not the damages are the consequence of consequences. Thus, under the old rule, the liability of a tortfeasor could be wide, much and far flung.

In *Re Polemis and Furness Withy & Co. (supra)*, Charterers employed stevedores to unload the hold of a ship that contained drums of petrol. Due to leakage of the drums, the hold of the ship contained inflammable vapour. A stevedore negligently knocked a plank into the hold which caused a spark that ignited the petrol vapour into fire. The fire destroyed the ship. The ship owners sued the charterers and stevedores for its loss. The English Court of Appeal held that even though the stevedore could not reasonably have

foreseen that his negligent act would destroy the ship, the loss of the ship was a direct consequence of his negligent act. The charterers who hired the stevedores were vicariously liable to pay for the loss of the ship.

The test of directness of damage was a wide and a hard rule. Under the test, a tortfeasor was liable for all the damages that were the direct result of his tort, whether or not the damages were reasonably foreseeable or not and whether such damage was immediate and natural or far flung and remote. The test of directness of damage caused a lot of hardship to defendants; as a defendant's liability under it was seemingly endless. It was not a good law. For this reason, it was abolished and overruled in the *Wagon Mound's case (supra)* in which the test of reasonable foreseeability or test of remoteness of damages was established as the new test for determining the liability of a defendant for his tort.

Comparatively, the principle of directness provides a wider ambit to find a defendant liable. The extent of a defendant's liability was much wider under the directness rule. As a result, a defendant could be held liable for every damage directly traceable to the tort in question, whether or not such alleged consequences were reasonably foreseeable or not.

SELF ASSESSMENT EXERCISE 2

Why was the test of directness of damage abolished?

The Test of reasonable foreseeability or remoteness of Damage

The test of reasonable foreseeability or reasonable foresight is the later, new and current test applied to determine the liability of a tortfeasor. The test of reasonable foreseeability or remoteness of damage has replaced the old test of directness of damage. The test of reasonable foreseeability looks at the foreseeability of the damage, that is, whether the damage alleged is reasonably foreseeable by a reasonable man. The tortfeasor is only liable for the reasonably foreseeable consequence of his conduct.

Under this test, a defendant is liable for all damages which should have been foreseen as the result of his tort by the exercise of ordinary or reasonable foresight. In determining foreseeability, the question to be asked is whether the damage alleged is reasonably foreseeable by a reasonable man. If the damage is reasonably foreseeable by a reasonable man exercising ordinary prudent care, the tortfeasor is liable. If the damage is not reasonably foreseeable by a reasonable man, or if the damage is a far flung, or remote damage, the tortfeasor is not liable.

In other words, under this test, a defendant is liable for all damages which are reasonably foreseeable by a reasonable man as the consequence of the tort in question. While on the other hand, a defendant will not be liable for damages that are not reasonably foreseeable or are too remote or far flung to be a consequence of the tort. The test of reasonable

foreseeability of damage as laid down in the *Wagon Mound's case* applies the foresight of a reasonable man in determining the:

1. Culpability, that is, blameability or responsibility of a defendant for damages if any; and accordingly his liability to compensate the plaintiff; or

2. Remoteness of damage because the damage is far flung or unrelated and therefore excuse the defendant from liability.

The definition of a reasonable man

In simple terms, the reasonable man in any given case, is the reasonable man in the shoes of the tortfeasor, that is, a reasonable man or person in the position or station in life as the tortfeasor in the case at hand. See *Adigun V. A.G. Oyo State (1987) 1 NWLR pt.53, p.678 at 720 per Eso JSC.*

The test of reasonable foreseeability of damage or remoteness of damage in detemining responsibility is an objective test, whereby the law puts a hypothetical reasonable man into the shoes of the defendant. The question then becomes what consequences of the tort are reasonably foreseeable to a reasonable man in the shoes of the tortfeasor. Once the reasonably foreseeable consequence is determined, the line is drawn thereat to exclude the consequences or damages that are too remote. The court then proceeds to hold the defendant liable for such damages which a reasonable man in the position of the defendant should have foreseen as the likely consequences of the tort in question.

Therefore the test of reasonable foreseeability or remoteness of damage is restrictive in scope and limits the extent of a defendant's liability. Thus, damages may be established by the plaintiff, but a defendant may not be held liable unless such damage is found to be reasonably foreseeable.

Affirmation of the Reasonable Foreseeability Test

By virtue of the fact that the Privy Council is strictly not part of the English court system, the decision of the Privy Council in the *Wagon Mound's case* establishing the test of reasonable foreseeability, had only persuasive influence on English courts, until it was subsequently affirmed by the House of Lords in 1963 in the case of *Hughes V. Lord Advocate (1963) AC 837 HL*. In that case the House of Lords stated that the test of remoteness of damage established in the *Wagon Mound's case*, which makes a tortfeasor liable only for the reasonably foreseeable consequences of his tort, was the correct statement of the law.

In *Hughes V. Lord Advocate*, the House of Lords made an addition to the test of reasonable foresight by adding that, once the consequence of a conduct is foreseeable, the precise chain, sequence of events, or circumstances leading to the said foreseeable consequence need not be foreseeable or envisaged, so long as:

1. The damages or consequences of the tort are within the sphere of reasonable foreseeability or contemplation; and

2. The damages or consequence is not entirely of a different kind which no one can reasonably foresee or contemplate.

In other words, the damages must be reasonably foreseeable for there to be liability, but the precise sequence of events leading to the damage need not be foreseeable. That is to say, once the consequence is foreseeable, the circumstances leading to it need not be foreseeable for the defendant to be liable. A defendant is liable so long as the damages are not of an entirely different kind which a reasonable man will not contemplate. The defendant need not foresee all the possible manners in which his conduct can cause injury. What is required in law is that, some kind of injury is foreseeable and the injury which resulted is a kind that is reasonably foreseeable.

Let us now consider the facts of some cases.

Overseas Tankship (U.K) Ltd. V. Mordock & Eng. Co. Ltd. (No. 1): The Wagon Mound's case (1961) All ER 404 PC; (1966) AC 388.

The defendant appellants negligently discharged fuel from their ship into Sydney harbour, Australia. The fuel was carried by tide into the plaintiff/respondent's wharf where the employees of the plaintiff were welding. A piece of cotton floating in the midst of the fuel was ignited by sparks from the welding operation. The floating oil burnt and the fire severely damaged the wharf and the ship which the plaintiff/respondents were repairing.

The Judicial Committee of the Privy Council held that the defendants appellants neither knew nor ought to have known that the oil spilt was capable of catching fire when spread over water. They could not reasonably have foreseen that the oil they discharged would catch fire, which would damage the plaintiff's wharf, even though the damage was the direct consequence of their negligent oil spillage. The damage was too remote and not reasonably foreseeable and they were not liable for it. The test of liability for the damage done by the fire was the foreseeability of injury by fire and as a reasonable man would not on the facts have foreseen injury by fire, the defendant appellants were not liable.

However, the appellants were liable for fouling up the respondents slipways since the fouling was a reasonably foreseeable consequence of the discharge of the oil. In this case, Viscount Simmonds in the Privy Council said that:

> "It does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or menial, which results in some trivial foreseeable damage, the actor should be liable for all consequences, however unforeseeable and however grave, as long as they can be said to be direct."

The liability of a tortfeasor is thus limited to the damages which are foreseeable by a reasonable man, as Pollock CB rightly said much earlier in *Greenland V. Chaplin (1850) 5 Exch. 243 at 248* thus:

> "A person is expected to anticipate and guard against all reasonable consequences, but he is not…expected to anticipate and guard against that which no reasonable man would expect to occur."

The test of reasonable foreseeability laid down as the basis of liability in the law of tort in the Wagon Mound's case (Supra), has been followed since then not only by English courts, but by courts in all common law countries. Reasonable foreseeability or remoteness of damage as laid down in this case, is almost the same in tort as in the law of contract.

In *Hughes V. Lord Advocate (Supra)*, two children went to explore a shelter which was covering a man-hole that was opened for repairs in a street. The shelter was unattended but marked by lighted paraffin lamps. A lamp was accidentally kicked by one child into the man-hole and there was an explosion which caused burns to one of the children. It was held that the defendants were liable. Accident by burns by the lamps was reasonably foreseeable, even though explosion was not reasonably foreseeable.

But in *Doughty V. Turner Manufacturing Co. Ltd. (1964) 1 QB 518*, the plaintiff who was an employee of the defendant company was wearing an asbestos cement covering. A fellow employee of the plaintiff let the plaintiff slip into a cauldron of molten metal. At that time, it was not known that asbestos cement coming into contact with molten metal would cause an explosion. An explosion followed and the plaintiff was injured. In a suit for damages, the English Court of Appeal held that though the accident was a direct result of the action of the defendant's servant, the damage was not reasonably foreseeable and therefore the defendants were not liable.

Also in *Glasgow Corp. V. Muir (1943) AC 448*, two picnickers were carrying a tea urn through a passage of the defendant corporation's tea house. For a reason which was not explained, one of the picnickers slipped and children buying sweets at a corner in the passage were scalded by the hot tea, which splashed from the urn. An action by the children in negligence against the defendant failed because harm by tea was not reasonably foreseeable.

4.0 CONCLUSION

Trespass is the unauthorized intervention with a person's property or his possession. Where it is trespass to a person, it could take the form of battery, assault, or false imprisonment. Where it is his property, it could take the form of trespass to land, detinue or conversion.

5.0 SUMMARY

This unit has thought the learner;

a. The basic concept of trespass in the Law of torts
b. The tort of assault, elements of assault and essentially the purpose o the law of assault.

6.0 TUTOR MARKED ASSIGNMENT

1. Why is there immunity from liability for perjury?
2. Who is a reasonable man in law?

7.0 REFERENCES

1. Bodunde Bankole, Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
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6. The Criminal Procedure Code of the Northern States of Nigeria.

UNIT 5 Other Principles of Liability in the Law of Tort

TABLE OF CONTENTS

1.0 INTRODUCTION

Apart from the principle or requirement of damage which involves the application of the test of reasonable foreseeability to determine the extent, amount and scope of the liability of a defendant, there are other principles of liability.

In other words, in addition to the test of reasonable foreseeability or remoteness of damage, there are other principles of liability which help a court to determine the liability of a tortfeasor for his tort.

These principles which are exceptions to the test of remoteness of damage include:

1. De minimis non curat lex
2. Intentional damage
3. A tortfeasor takes his victim as he finds him(thin skull rule)
4. The principle of strict liability

We shall examine these principles of liability in this unit.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) explain the principles of liability in the law of tort.

3.0 MAIN CONTENT

3.1 De minimis non curat lex

De minimis non curat lex is a Latin phrase which means, the law does not concern itself with trifles. The law does not bother about trifles, indefinite, minor, small, worthless or trivial and insignificant things. Therefore the court does not concern itself with speculative, hypothetical, imaginary, academic, abuse of court process, frivolous or vexatious issues and will usually ignore such. Accordingly, the law or court may overlook an insignificant fact or thing in deciding an issue or case. Thus, if a litigant brings an action alleging an irrelevant matter or a small or trivial breach of his right, the court may strike out or dismiss the claim for being a triviality at the onset. However, where the claim was not so dealt with at the onset and the plaintiff goes on to prove his claim, the court applying this principle may go ahead to award nominal damages in disdain of the action. See the following cases:

Delaroy-Hall V. Tadman (1969) 2 QB 208; Regent V. Francesca (1981) 3 All ER 327; and *Smith V. Scott (1973) Ch. 314.*

3.2 Intentional damage

The general rule of law is that a tortfeasor is usually liable for his intentional tort. Thus, intentional harm or mischief is an actionable tort, whether the act is malicious, innocent or intended as a joke, etc is irrelevant. Accordingly, intended, intentional or malicious damage or harm is never too remote and will be compensated so long as the damage is foreseeable. Furthermore, the extent or magnitude of the damage need not be foreseeable by the reasonable man for it to be compensated.

Similarly, if A negligently knocks B down and unfortunately great injury is inflicted because as it is later discovered, B is unhealthy, prone to injury or has a "thin skull" or eggshell, A will not be excused by saying that if B had been a normal person, injury would not have resulted. Similarly, if D gives E a light blow which expectedly should only bruise E, but because E has a thin resistance "thin skull" or "egg shell" and he dies, the law will regard D as liable for E's death. This rule applies to all persons with unusual health conditions, including haemophiliacs, that is, persons who tend to bleed severely as a result of the inability of the blood to clot easily. This principle is called the "unusual plaintiff's" rule.

In *Scott V. Shepherd (1773) 96 ER 525,* at a market fair at Milbourne Port, England, the defendant Shepherd threw a lighted squib "firework" on the stall of one Yates. Willis, in order to protect the goods of Yates threw it away. It landed on the stall of Ryal who in turn threw it on. It hit Scott, the plaintiff in the face, exploded and blinded one of his eyes. Scott sued for damages. It was held that Shepherd was liable to Scott for injuries because he intended mischief or injury by throwing it at a shop. There was no break in the chain of cause. Shepherd should have expected that Willis and Ryal would react as they did.

Intentional harm is never too remote. The chain of events by which the damage occurred to the plaintiff need not be foreseeable. It is sufficient that the defendant intended mischief or injury and injury is reasonably foreseeable when he threw a firework at a trade fair. See also *Wilkinson V. Downton (1897) 2 QB 57;* and *Janvier V. Sweeney (1919) All ER 1056 CA*.

3.3 A Tortfeasor takes his victim as he finds him("thin skull" rule)

This principle of liability is also known as the "egg shell" rule, "thin skull" rule or the "unusual plaintiff's" rule. Under the egg shell principle, a tortfeasor "takes his victim as he finds him". In other words, a tortfeasor is bound to accept his victim as he is. If the victim is healthy and strong and powerful fist blows do not cause him any harm, all fair and well. But on the other hand, if a victim is prone to injury, ill or weak hearted and just one light blow is enough to kill him or inflict permanent incapacity on the victim, it is unfortunately too bad for the tortfeasor, who nevertheless has to bear the consequences of his tort.

The general rule of law is that a person is taken as intending the natural consequences of his action. This principle of liability is an exception to the rule of reasonable foreseeability. Under the thin skull rule, a defendant cannot plead the medical condition of his victim as a defence, even though such condition makes the loss unexpected, unreasonable or not reasonably foreseeable.

In *Smith V. Leech Braine & Co. Ltd. (1961) 3 All ER 115*, the plaintiff's husband was an employee of the defendant company. Through the defendant's negligence, a piece of molten zinc flew out of a tank and inflicted a burn on the defendant's lips. As a result of the fact that the tissues of his lips were in a pre-malignant condition, cancer developed on the site of the burn from which he died three years later. In a suit by the wife for damages for negligence, the court held that the defendants were liable, although the man's death was clearly not a foreseeable result of the accident. However, the defendants have to accept the pre-malignant condition of the deceased body as it was.

In *R V. Blaue (1975) 3 All ER 446*, the accused stabbed a victim, who as a result required blood transfusion. The victim was told that the transfusion would enable recovery. She refused the transfusion on the ground of her religious beliefs and she died. The accused was held guilty, applying the "thin skull" rule of liability. He who uses violence on another person takes the victim as he finds him. The refusal of the victim to take blood transfusion did not break the connection between the action of the accused and the death of the victim.

Limit to the unusual plaintiff's rule

However, the "egg shell", "thin skull" or "unusual plaintiff's" rule seems to apply to disability or weaknesses existing before the tort in question and not to disabilities arising after the tort.

See the case of *Morgan V. Wallis (1974) 1 LL Rep. 165*, where the plaintiff suffered injuries to his back whilst trying to avoid a wire rope thrown by a stevedore onto the barge where he was working at a port. Liability for the plaintiff's injuries was admitted by the defendants, who were his employees because they should have designed or have a better system of working. However, they contested the amount of damage payable because the plaintiff had unreasonably refused to undergo tests and medical operation out of fear of both processes. The highest estimate of the chances of success of an operation was 90%.

In a suit by the employee for damages for injuries, the court held that the defendants were not liable. The defendants had established that the plaintiff's refusal to undergo tests and operation was unreasonable, as the estimates by a surgeon have shown that the operation would have been successful on a balance of probabilities. Where there was no pre-existing disability, physical, mental, psychological or otherwise, a defendant did have to take a victim as he found him.

A person is taken as intending the natural consequences of his action

The general rule of law is that a person is taken as intending the natural consequences of his action. Therefore, the common law rule is that a tortfeasor takes his victim as he finds him except there are other extenuating or mitigating factors in his favour.

In *Martindale V. Duncan (1973) 2 All ER 355 CA*, the plaintiff's car was damaged in a collision with the defendant's car as a result of the negligence of the defendant. The plaintiff delayed repairs to his car pending approval from the defendant's insurers and his own insurers. The defendant's insurers wished to consult independent engineers for advice and did so. After about nine weeks, the defendant's insurers approved the estimate of repairs. The plaintiff's insurers also did a few days later. Repairs commenced one week after these approvals. The plaintiff claimed damages for loss of use of his vehicle for ten weeks and for cost of the hire of a substitute vehicle for the period. The defendant argued that the plaintiff was in breach of his duty to mitigate his loss by failure to effect immediate repairs and for waiting to see whether an insurance company would pay.

The English Court of Appeal held that the defendants were liable. The plaintiff was not in breach of his duty to mitigate his loss and he had acted reasonably in the circumstances. The losses suffered by the plaintiff were the natural consequences of the defendant's negligent conduct.

3.4 Strict liability in Tort

Strict liability means liability without fault. It is responsibility for a wrong without the requirement of negligence, fault or intention on the part of a wrongdoer. Strict liability is liability based on the breach of the law without more. Strict liability is common in respect of extra-hazardous activities, product liability, etc.

As a general rule, in strict liability torts, the test of reasonable foreseeability of damage as a basis for liability is not applicable. Thus, in some torts, a defendant is held strictly liable for his torts, that is, the defendant is liable once the tort occurs whether or not the act happened accidentally, innocently, negligently or intentionally. Thus, strict liability torts are torts which attract strict liability and for which a tortfeasor is held liable once the act is done or occurs, irrelevant of why the offender committed it or his state of mind at the time of its occurrence because the law strictly or absolutely prohibits the commission of the tort or conduct. Accordingly, the occurrence of the tortuous act in itself renders the wrongdoer liable without more and without regards to his state of mind at the time.

Examples of strict liability torts include:

1. Product liability or consumer protection
2. Liability for animals; and
3. The rule in Rylands V. Fletcher (1868) LR 3 HL 330; 37 LJ Exch. 161.

We shall briefly examine these strict liability torts.

Product Liability: Consumer Protection

Product liability is the liability of a producer, retailer, importer or supplier for any loss or injury caused by his product whether due to its defect or some other reason. In the area of product liability, strict liability is common as in most cases, the alleged tortuous acts are strictly prohibited by statute.

Thus, in *Pearks, Gunsten & Tee Ltd. V. Ward (1902) 2 KB 1*, the appellant company was held liable for the acts of its employees who sold its fresh butter mixed with water. Explaining on the strict liability nature of consumer protection laws in England, Channel J. in this case said that:

> "The legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done, the offender is liable to a penalty, whether he has any mens rea (guilty mind) or not and whether or not he intended to commit a breach of law."

See also the following cases:

Gammon V. A.G. Hong Kong (1985) AC 1; Pharmaceutical Society V. Storkwain (1986) 1 WLR 903; R V. Bradish (1990) 2 WLR 223; and *R. V. British Steel Plc. (1995) 1 WLR 1356.*

Liability for Animals

The general rule of law is that dangerous animals should not be brought into contact with persons, exposed or given opportunity to injure persons. Therefore, a keeper is liable for the act of a dangerous animal, even though the defendant keeper never intended the harm that was caused nor was reckless in letting it happen. Therefore, a person keeps an animal at his own peril. A dangerous animal is an animal that is not usually domesticated and is likely to do mischief, cause serious damage or even death if not restrained. See *Cummings V. Granger (1975) 1 WLR 1330*; and *Curtis V. Betts (1990) 1 All ER 769*.

In the law of tort, liability under the rule in *Rylands V. Fletcher (supra)* is strict, in the absence of a lawful excuse.

Strict Liability Torts and Criminal Liability

In Nigeria however, where a strict liability tort is also a crime, it is a moot point whether the courts will apply strict liability in construing the provisions of such law. This is in view of section 24 of the Criminal Code Act, which makes *mens rea*, that is, a guilty mind or criminal mind or criminal intention, a requirement for criminal liability under the Criminal Code Act; and section 56 of the Criminal Procedure Act, which makes the requirement of *mens rea* applicable to every criminal proceedings in Nigeria, save where the relevant criminal law specifically ousts the requirement of a guilty mind.

Motive, Intention, Malice and Liability in Tort

Motive is the reason for the conduct of a person. It is why a person did or did not do a thing. Motive is what caused the doer to act or fail to act. It is what made a tortfeasor to do what he did. As a general rule, motive is not relevant for determining liability in tort. Generally, in order to determine liability, the issue is whether a tort has been committed; and where proof of damage is necessary for a successful claim, whether damage was done.

Therefore, if the conduct of a tortfeasor is unlawful, the fact that he committed the tort for good reason will not excuse him from liability. Likewise, if the conduct of a tortfeasors lawful, the fact that he had a bad motive or reason for doing it will not render him liable. In other words, a good motive will not excuse a tort and a bad motive will not make an innocent or lawful act a tort.

Malice means acting from a bad motive. Ordinarily, malice means ill will or wickedness. It is doing something with ill will, wickedness of heart, spite or recklessness. It is doing something with a bad motive or bad reason. In legal terms, malice means two things. It means:

(a) Doing a wrong thing intentionally or without lawful excuse. It is wilful and conscious wrongdoing; or
(b) Doing any act with a bad, improper or illegitimate motive. It is doing a thing with a bad motive or with any motive the law abhors or that is wrong.

Intention is the reason for the conduct of a person. (See *Cunliffe V. Goodman (1950) 2 KB 237; R. V. Moloney (1985) 1 All ER 1025;* and *R V. Hancock & Shankland (1986) 1 All ER 641)*. Intention is the purpose, goal or aim of a conduct. It is the goal of the conduct under question. In the law of torts, the general rule is that the motive, malice or intention for doing an act is irrelevant. Therefore, an innocent or good motive, reason, malice or intention will not exonerate the commission of a tort. Conversely, bad motive, malice or bad intention on the part of a defendant will not make a lawful act unlawful.

Therefore, as a general rule, the law of tort is more concerned with looking at the result or effect of an act or conduct, whether the conduct is a tort and where necessary whether damages resulted, than with the motive, malice or intention that inspired the wrongdoer. Thus, as a general rule, the law of tort looks at an act whether it is a tort and should be compensated and not at the motive, malice or intention, whether it is wrong or excusable. The following cases illustrate this general principle:

Bradford Corporation V. Pickles (1896) AC 587.

In this case, the defendant, Pickles, with a view to inducing Bradford Corporation to buy his land at a high price sank a shaft or borehole on his land to collect water and thereby interfered with the water flowing in undefined channels into the corporation's reservoir. The corporation applied to court for an injunction to restrain him from interfering or collecting the underground water in his shaft.

The court held that an injunction would not lie. The defendant was entitled as owner to draw from the underground water on his land. His "malice" if any, in trying to force the purchase of the land was irrelevant. No use of property which is legal if done with a proper motive can become illegal if done with an improper motive.

An innocent intention is not a defence to a tort. It may only serve to reduce the amount of damages that may be awarded.

In *Wilkinson V. Downton (1897) 2 QB 57; (1895-9) All ER 984*, the defendant knowing it to be untrue but meaning it as a joke, told the plaintiff that her husband had been involved in an accident and had both his legs broken. The plaintiff on hearing this suffered a nervous shock and was ill as a result. The plaintiff sued the defendant for false and malicious representation of facts.

It was held that the fact that the defendant told the story of accident to the plaintiff as a joke was irrelevant, the plaintiff had been harmed and she was entitled to damages. Intentional physical harm is a tort and whether the act is malicious or a joke is irrelevant.

The English Court of Appeal applied the decision in *Wilkinson V. Downton (supra)* in the case of: *Janivier V. Sweeney (1919) All ER 1056*.

The defendants who were private detectives told the plaintiff, a lady, that unless she procured certain letters of her mistress for them, they would disclose to the authorities that her fiancé who was an internee was a traitor. They knew that they had no such evidence that the fiancé was a traitor. She sued for damages for the physical illness she suffered as a result of the nervous shock occasioned by the defendant's unwarranted threats.

The court held that the defendants were liable. There was a wilful act or statement by the defendants calculated to cause physical injury to the plaintiff and causing such harm was a tort. The fact that they issued the threat without any basis or intention to carry it out was irrelevant. This was so because the general rule is that intended or intentional harm is a tort. Whether the act was malicious, innocent or a joke was irrelevant.

SELF ASSESSMENT EXERCISE 1

What do you understand by "malice".

The Relevance of Motive, Malice or Intention in Tort

The general rule of law is that motive, malice and intention are irrelevant for tortuous liability. However, when is motive, malice or bad intention relevant in tort? As an exception to the general rule of liability above, motive, malice and intentional or wilful wrongdoing are relevant in several instances in tort. This is so for:

1. Successful claim in some torts: for instance malicious prosecution and injurious falsehood.

2. Malice when established in a case, usually bars a defendant from successfully relying on certain defences that otherwise would have been available to him; for instance, in the law of defamation, malice may bar the defence of qualified privilege and fair comment. Also, malice may make an otherwise reasonable act a nuisance. See *Hollywood Silver Fox Farm V. Emmett (1936) 2 KB 468*.

3. The presence of malice may lead to an award of aggravated damages in appropriate circumstances. For instance, in defamation, where a defamatory statement is proved to have been made out of malice, an award of aggravated damages when claimed by a plaintiff could be awarded by court.

The torts where improper motive, malice or bad intention are relevant include:

1. Malicious prosecution
2. Nuisance
3. Defamation
4. Conspiracy.

We shall briefly examine these.

Malicious prosecution

Malicious prosecution is intentionally setting the criminal law in motion against a person without just cause. In other words, it is intentionally causing criminal proceedings to be brought against another person without legal justification. If it is later discovered that A caused B to be prosecuted by law enforcement agents without legal excuse, out of malice, then B after his acquittal may sue A for the tort of malicious prosecution. In a claim for the tort of malicious prosecution, the fact that the prosecution was brought with a bad motive, malicious or intentionally to harm or without legal excuse, is an essential ingredient which a plaintiff needs to establish for a successful claim for compensation.

Nuisance

In the tort of nuisance, the presence of malice, spite or bad intention in the defendant's conduct is a relevant factor the court will consider in determining the reasonableness or unreasonableness of the conduct that is causing a nuisance an consequently the liability of a defendant for nuisance.

Thus, in a claim for nuisance, the plaintiff will sometimes succeed if he shows that the defendant's malice turned an otherwise reasonable act into an unreasonable act or nuisance. Accordingly, in the tort of nuisance, certain conducts which ordinarily would not be viewed as nuisance may be regarded as a nuisance if they are done unreasonably or with malice. Thus in some instances, malice is evidence of unreasonableness on the part of the defendant and vice versa. See the case of *Christie V. Davey (1893) 1 Ch. 316.*

Defamation

Malice is relevant in the tort of defamation. In a claim for defamation, if the plaintiff proves malice, it will bar the defences of qualified privilege or fair comment. Thus, the presence of malice in the defamatory statement or act will bar the defendant from successfully relying on the defence of qualified privilege. It will also deny the defendant from relying on the defence of fair comment as the statement can no longer be said to be fair comment but malicious. Furthermore, the presence of malice may lead to the award of aggravated damages.

Conspiracy

The tort of conspiracy or civil conspiracy is where two or more persons act together without lawful justification for the purpose of intentionally causing damage to a plaintiff whereby actual damage occurs to the plaintiff. Where a plaintiff alleges the tort of conspiracy, the presence of malice or the improper motive of the alleged act is a necessary ingredient for a successful claim against the several defendants or joint tortfeasors.

However, a civil conspiracy or combination of person is justified if the main purpose of it is the:

1. Self interest of the members; or

2. Protection of the trade of the members rather than a willful desire to cause damage to the plaintiff. See *Mogul Steamship Co. V. McGregor Gow & co. (supra).*

To succeed in a claim for the tort of conspiracy, a plaintiff must among other things, establish that he has suffered damage. Trade conspiracy is a common tort. However, it should be noted that civil conspiracy is not necessarily coterminous with vicarious liability.

4.0 CONCLUSION

Torts is a branch of private Law which with its companion Law of Contract spells out the legal rules, which regulate civil obligations, for example, ear accident, bursting of water pipelines, noxious films, poor processing, damages by animals and many unpleasant events – spark off litigation in tort. It must be stressed at this stage that there is no set of clear and static rules which are tailor made. For instance, application to any set of facts that may occur. The principles and the rules of tort of Law constantly change. This is not to say that the rules of Law to Torts is good for one case only. Assault and Battery have existed as torts as far back as 1348 and therefore one can safely predict that rules and inordinate contact with the person of another without the latter consent will continue to be redressed in an action for battery. But only few years ago, manufacturer's liability for harm caused by defective products was much more limited that it is now.

5.0 SUMMARY

In this unit, we learnt about the tort of defamation and the ingredients of the torts of defamation. The tort of conspiracy, nuisance and malicious prosecution treated under this unit deal mainly with the principle of liability in the law of tort.

6.0 TUTOR MARKED ASSIGNMENT

What do you understand by the" unusual plaintiff's" rule?

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1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
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MODULE 2 TRESPASS

Unit 1 Trespass to the Person: Assault
Unit 2 Battery
Unit 3 False imprisonment and intentional harm to the person
Unit 4 Trespass to chattels
Unit 5 Conversion
Unit 6 Detinue

Unit 1 TRESPASS TO THE PERSON: ASSAULT

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1.0 INTRODUCTION

Trespass to person is any intentional interference with the body of another person. It is interference with the body of another person or his liberty. It is an invasion of the body of another person. Trespass to the person consists of three types of tort.

These are:

1. Assault: putting a person in fear of bodily harm;

2. Battery: any contact, touch, force or bodily harm; and

3. False imprisonment: deprivation of personal liberty or movement, any detention, kidnap or arrest.

Where a trespass to person is committed negligently or was a result of negligence, action is usually brought in the tort of negligence.

We shall consider these three types of trespass to the person in the next three units.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) define assault;
(ii) understand the purpose of the law of assault; and
(iii) describe the elements of assault.

3.0 MAIN CONTENT

3.1 Definition of Assault

In ordinary everyday use, the word "assault" means to attack, beat or hit somebody. Thus, in ordinary parlance, the word assault is used to include both assault and battery. However, in the law of tort, assault and battery are two different and separate torts. Under the Criminal Code Act, the word "assault" is often used to cover both assault and battery. Accordingly, in criminal proceedings, they are usually charged. In view of this reason, sections 252-253 and 351-360 of the Criminal Code Act, define various types of assaults.

Assault is a crime and a tort. Since trespass to person is a tort and a crime, a victim may seek redress in both civil and criminal law. However, civil action is often not brought unless the tortfeasor or his employee has money and can afford to pay compensation. Otherwise, criminal action is often brought in the magistrate court by the police on behalf of the state as part of the public policy of the state to sanction crime and maintain law and order.

Furthermore, assault and battery often occur together because they are often committed concurrently or simultaneously. Thus they are often charged together in criminal proceedings just as civil claim is often brought for both because one seldom occurs without the other. In western societies, compensation may be awarded in criminal proceedings. For instance, under the English Criminal Justice Act, 1988 which is administered by the Criminal Injuries Compensation Board, compensation may be awarded to crime civtims. This prevents the need for a separate civil suit to recover compensation. See the following cases:

R v Criminal Injuries Compensation Board, e.p. Lain (1967) 2 QB 864;
Holden v Chief Constable of Lancashire (1986) 3 All ER 836; and
Hill v Chief Constable of West Yorkshire (1988) 2 WLR 1049.

In this unit, we shall examine assault in the context of the law of tort. According to Padfield in Law made Simple, 5th ed, p. 211, assault:

> *"is an attempt* or *threat to apply unlawful force to the person of another whereby that other person is put in fear of violence"*

Kodilinye (Nigerian Law of Torts, op.cit. p. 12), defines assault as:

"any act which puts the plaintiff in fear that battery is about to be committed against him."

In other words, an assault is threatening to harm or apply force to another person with the present ability to carry out the threat. An assault is any act which makes another person to fear the immediate application of unlawful force. It is threatening to do violence to a person short of actually striking the person. It is any intentional or reckless act which makes another person to fear the immediate application of physical harm. It is any threat to apply unlawful force to another person. The act must imply personal violence. Therefore any act, gesture, or menace by the defendant which puts the plaintiff in fear of immediate application of force to his person is an assault. Accordingly, any unlawful act of a person which puts another person in reasonable fear of battery is an assault.

As opposed to criminal law, in the law of tort, an assault is essentially:

1. An attempt or threat to apply force or violence to another person.
2. With the apparent ability to carry it out.
3. Which puts the person in reasonable fear of battery
4. Contact is unnecessary

SELF ASSESSMENT EXERCISE 1

What do you understand by assault?

3.2 The Purpose of the Law of Assault

The purpose of the tort of assault is to prohibit a person from putting another in fear of physical interference. It prohibits all physical interference with another person including revenge attack. The tort of trespass to person is actionable per se on mere occurrence and does not require proof of damage for a successful claim.

The offence that is committed or injury that is done and which the law seeks to prevent; is the putting of a person in fear of impending contact, violence or battery . People should be free to go about their lives without being threatened or subjected to fear of violence, except for instance, by the due process of law. Generally, direct and intentional trespass are dealt with by trespass to person, whilst indirect and unintentional acts are covered by negligence, for instance, road accident cases, etc.

Assault Is Wider In Criminal Law

Assault is wider under criminal law. In criminal law, the offence of assault includes both assault and battery. See sections 252-253 and 351-360 of the Criminal Code Act. Accordingly, under the Criminal Code Act, an accused is usually charged with assault and battery. You will read more in your Criminal Law course materials.

Examples of assaults are many and includes threatening a person with a knife, broken bottle, menaces, advancing towards a person and shaking your fist and threatening to beat him up, or striking at a person with a stick but missing the person, etc. All these are threats of violence and are instances of assaults. It is not necessary that the victim's state of mind should be one of fear, or alarm. It is enough, if the victim merely expects the application of unlawful force to his body, because subjection of a person to fear of immediate application of unlawful force is what the law of tort seeks to prohibit.

3.3 Elements Of Assault: What Needs To Be Proved:

The elements a plaintiff needs to prove to succeed in a claim for assault are:

1. That there was a threat to apply force

2. That the act will put a reasonable person in fear of battery. In other words, that it was reasonable for the plaintiff to expect immediate battery.

That there was a Threat to Apply Force:

There can be assault without battery. In assault it is not necessary to prove that the plaintiff was actually put in fear or experienced fear. What needs to be proved is that it was reasonable for the plaintiff to expect immediate battery. As a general principle, pointing an unloaded gun or even a model, or imitation gun at a person who does not know it is unloaded or that it is a model gun and therefore harmless, is an assault.

In *R v St. George (1840) 173 ER 921*, the defendant pointed a gun he knew to be unloaded at the plaintiff who did not know that it was unloaded, at such a distance that the complainant could have been hurt if the gun was fired. On a claim for assault the court held: that there was an assault, even though the gun was unloaded, because the complainant was put in fear of being shot. See also *Logdon v DPP (1976) Crim LR 121.*

In *Innes v Wylie (1844) 174 ER 800*, the defendant policeman who stood motionless in order to block a door way, was held not to have committed assault on the plaintiff by so doing. See also *DPP v Little (1992) 1 All ER 299.*

In *Smith v Supt of Woking Police Station (1983) Crim LR 323: 76 CAR 234*, the defendant appellant frightened the complainant by looking through her bedroom window late in the night. The court held that the accused was guilty of assault as the complainant was put in fear of personal violence.

Also in *R v Barrett (1980) 72 CAR 212 CA*, the defendant advanced towards the complainant, shook his fist angrily and threatened to beat the complainant there and then, as a result of which the complainant was put in fear of immediate application of force to his person. The court held: that there was assault.

In *Stephen v Myers (1838) 172 ER 735*, the plaintiff was the chairman at a parish meeting where he was sitting at the head of the table with about 6 to 7 persons between him and the defendant. In the course of the meeting, the defendant threatened to eject the plaintiff from the venue of the meeting. He stood up and started advancing to the plaintiff to carry out the threat when he was stopped from reaching the chairman by the person sitting next to the chairman. In a claim for damages for assault the court held that assault was committed. The defendant was proceeding to throw out the chairman, though he was not near enough at the time to have struck him. He advanced with on intention which amounted to an assault in law.

An Order Coupled With A Threat May Be Assault

It is also an assault to threaten to apply force to a person if the person does not immediately proceed to do some act or refrain from an act unless the defendant has legal justification. Similarly, an innocent act or conduct may amount to assault when coupled with threatening words.

Read v Coker (1853) 138 ER 1437.

The defendant had a business disagreement with the plaintiff, his partner. The defendant thereupon ordered his workmen to throw the plaintiff out of the premises. They then surrounded the plaintiff rolling up their sleeves and threatening to break his neck if he did not leave the premises. The court held that there was an assault. There was threat of violence together with an intent to do battery to the plaintiff. Threatening to break the plaintiff's neck if he did not leave the premises was an assault.

Ansell v Thomas (1974) Crim. LR 31.

The plaintiff who was the managing director of a company left the factory early due to the fact that two policemen invited by his co-directors threatened in words to forcibly eject him from the company's premises, if he did not leave voluntarily. In a claim by the plaintiff, the court held that the co-directors were liable in assault.

Words Alone

As a general rule, words alone, that is mere words do not amount to assault. To amount to an assault, the intention to apply force to the plaintiff must be shown by some action or gesture, however slight or subtle and not just in words or speech. A gesture alone may amount to assault. Similarly, a gesture coupled with words commonly amount to assault. On the other hand, words alone may amount to assault. This is so, for often a thing said is a thing done. Words often put a person in fear of personal violence. Thus, as an exception, whenever words of threat put a person in reasonable expectation of fear, there is assault. See for example the following cases:

R v Ireland & Burston (1997) 4 All ER 225 HL.

The defendants made repeated silent phone calls to three victims. In some calls all he did was resort to heavy breathing. The victims were stalked for months and were afraid to be alone. The victims suffered mental illness or depression. The House of Lords held that there was assault. The silent phone calls having put the victims in fear of violence amounted to assault.

Janvier v Sweeney (1919) 2 KB 316 CA.

The plaintiff, a French woman living in England was engaged to a German, who was detained in the Isle of Man, England during World War I. One of the defendants called at her home and falsely told her that he was representing the military authorities and that she was wanted, because she has been corresponding with her fiancé, a German who was suspected of being a spy. As a result of the false threat, the plaintiff suffered nervous shock and on discovery that the accusation was false she claimed damages. It was held that she was entitled to damages for personal injuries for trespass to person. See also *Wilkinson v Downton (1897) 2 QB 57.*

Words may negate assault

On the other hand, words may explain and thus negate the possibility of battery or invalidate what would ordinary have been an assault. Thus, words may prevent what would have ordinarily amounted to an assault from coming into being. This was the position in:

Tuberville v Savage (1669) 86 ER 684. The defendant put his hand on his sword, which act amounted to a menace or threat and therefore an assault, and said *"if it were not assize time [court session time] I would not take such language from you." It was h*eld that there was no assault. The words of the defendant showed that he did not intend to assault the plaintiff, as the judges were in town for a court session.

In *R v Light (1843-60) All ER 934 CA,* the accused husband raised a sword over his wife's head and said *"were it not for the bloody policeman outside, I would split your head open"*. The court held: that the accused husband was guilty of assault. See also *R v Wilson (1955) 1 All ER 744 CA.*

Sometimes, a battery may be committed straight away, without first having committed an assault, such as giving a person a blow suddenly from behind, or whilst he is asleep or otherwise unconscious.

That the Act will put a Reasonable Man in Fear of Battery:

Finally, for assault to be committed, the act of the defendant complained about must be such that would put a reasonable man in fear that force is about to be applied to him. The act must put a reasonable man in fear of violence. This test is an objective test and it is not subjective to any particular plaintiff alone. Therefore, where the threat would not put a reasonable person in the shoes of the plaintiff in fear of violence, the tort of assault is not committed.

However, the mere fact that the plaintiff who was threatened with battery is a brave person and was not frightened by the threat, will not bar the plaintiff from successfully claiming damages for assault, as long as the alleged act of assault would make a reasonable man or reasonable person in his shoes to be afraid of battery.

In *Hurst v Picture Theatres Ltd (1915) 1 KB 1 CA,* the plaintiff paid for admission to the defendant's theatre. The defendants believing that the plaintiff had entered without payment asked the plaintiff to leave. He was not afraid and refused to leave and was forcibly ejected. He sued for damages. The court held that the defendants were liable for assault and false imprisonment.

In *Brady v Schatzel (1911) St. R QD 206,* the defendant pointed a gun at the plaintiff and threatened to shoot the plaintiff. The plaintiff sued for assault. Giving evidence in court the plaintiff said that he was not scared at the time. The court held that the defendant was nevertheless liable for assault. The act in question amounted to an assault. It was immaterial that the plaintiff was not scared. The purpose of the law is to make people free from threat of violence or immediate application of battery.

Where a threat is impossible of being carried out there may be no assault. Accordingly, where a threat is clearly impossible of being carried out, there is no assault. See *Thomas v National Union of Mine Workers (1985) 2 All ER 1.*

4.0 CONCLUSION

Trespass is the unauthorized intervention with a person his property or his possession. Where it is trespass to a person, it could take the form of battery assault or false imprisonment. Where it is to his property, it could take the form of trespass to land, detinue or conversion.

5.0 SUMMARY

This unit has taught the learners:

a. The basic concept of trespass in the Law of Torts
b. The tort of Assault Elements of Assault and essentially the purpose of the Law of Assault.

6.0 TUTOR MARKED ASSIGNMENT

1. What is the purpose of the law of assault?
2. Mere words do not amount to an assault. Discuss.

7.0 REFERENCES

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UNIT 2 BATTERY

TABLE OF CONTENTS

1.0 INTRODUCTION

In this unit, we shall consider another form of trespass to the person, that is, battery.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) define battery;

3.0 MAIN CONTENT

3.1 Definition of Battery

According to C.F. Padfield, battery is:

"applying force however slight to the person of another, hostilely or *against his will."*

And according to Gilbert Kodilinye:

"battery is the intentional application of force to another person."

In view of the above definitions, it may be explained that battery is the application of force however slight, on another person. Battery is the application of force on a person without his consent and without legal justification. It is contact with another person. Battery is the slighted touch of a person. It is any undesirable contact. Thus the slightest, merest or the least touching of another person is battery. It is the use of unlawful force on another person without his consent. Accordingly, it is the unlawful application of force to another person regardless of its degree. It is any act of the defendant which intentionally

causes some physical contact with the person of the plaintiff, without the plaintiffs consent.

It includes striking, or touching a person in a rude, angry, revengeful or insolent manner. The touch must be hostile and the plaintiff must not have consented to it. It is battery to intentionally touch another person or to bring any object into contact with another person. Such contact is sufficient application of force to give right to a claim in battery. Battery includes the application of heat, light, force, gas, odour or any substance or thing whatever, if applied in such a degree as to impact the person, cause any injury or personal discomfort.

Essentially battery is:

1. Unlawful application of force or violence on another person without the person's consent,

2. However, slight the degree of force.

3. Some form of contact, direct or indirect is necessary

4. Bodily injury need not result.

5. The defendant must have acted intentionally or negligently.

3.2 The Purpose of the Law of Battery

The purpose of the law of battery is to protect the body of a person and its dignity from unlawful contact and violence by another person. The harm which the law seeks to prevent is the undesirable contact by another person, irrelevant of whether such contact was violent or not. Under law, everyone is entitled to be free from any intentional, negligent and undesirable physical contact. See the following cases:

Dele Giwa v IGP. Unrep Suit No. M/44/83 of 30/7/84; Mogaji v Board of Custom & Excise (1982) 3 NCLR 552; Fagan v MPC (1969) QB 439; Kenlin v Gardiner (1967) 2 QB 510; and *Lane v Holloway (1967) 3 WLR 1003 CA.*

Contact Is Necessary

Battery is committed if there is some contact, such as, body to body contact, or if the defendant brings some object or thing into contact with the victim; however slight the degree of contact, force or impact on the body of the victim. Thus, it does not matter whether the battery was inflicted directly on the body of the offender or through the medium of some weapon, instrument, vehicle or any other thing used, controlled or manipulated by the tortfeasor.

As a general rule, medical procedure or medical care is not battery, even when it is carried out without the consent of the patient. Because, even though there is battery, the intention is to act in the best interest of the patient and there is no intention to harm the patient.

The least touch or contact is sufficient for battery, though one may only obtain nominal damages for such contact. Where application of force is unlawful, there is battery. However, where an application of force is lawfully justifiable a claim for battery will fail.

Contact may be direct body to body contact, such as slapping or giving a person a fist blow, grabbing hold of a person by the neck, beating up a person with hands, or by kicking with feet, etc. Also, the contact may be indirect.

Examples of Battery

Battery can be committed in many different ways, for instance:

1. Beating with a stick, pouring water on a person, or shooting a person with a gun.

2. Knocking a person down, or running a person down with a motor vehicle.

3. Spitting on a person's face or throwing stone at a person. See *R v Lynsey (1995) 3 All ER 654 CA.*

4. Removing a chair from under a person who thereby falls to the ground.

5. Pulling a person away from something for his own good.

6. Setting a dog to attack a person, etc. See *Lawal v DSP (1975) 2 WSCA 72.*

There is battery where for instance C without lawful justification slaps D on the face, or pushes D. So also it is battery to cut a plaintiffs hair without his consent, or to wrongfully take a person's fingerprint. However, where a person has been detained, charged or told that he will be charged with an offence punishable with imprisonment, the fingerprints may be taken without consent under criminal law.

3.3 Elements of Battery: What Needs To Be Proved

What a plaintiff needs to prove to succeed in a claim for battery are:

1. Application of force; and
2. Intention to apply force

Also, a plaintiff may prove and recover any damage he has suffered.

We shall briefly examine these.

That there was Application of Force:

There must be application of force on the plaintiff, no matter how slight. However, common forms of social touching that are reasonable and are generally acceptable are not battery, principally, because they are not regarded as tortuous and there is implied consent to such touching. Examples of reasonable and generally acceptable social touching which are not regarded as tortuous and to which there is implied consent include tapping a person on the back as part of a congratulation, or to draw a person's attention, jostling in a crowd, etc.

That there was Intention to Apply Force:

It is sufficient for the plaintiff to establish that the intention of the defendant was to apply force. It is not necessary to prove intention to hurt the plaintiff. If there is intention to injure any person other than the plaintiff, there is battery, such as where a stray bullet hits a bystander. See the following cases: *Wilson v Pringle (1986) 2 All ER 440; Stanley v Powell (1891) 1 QB 86;* and *Lane v Holloway, supra*

Battery Need Not Be Violent, Inflict Pain, Nor Injury

It is not necessary that the contact be violent or inflict pain and injury need not result. Therefore, touching a person, or touching a person's cloth or anything attached to a person, if done unlawfully, wilfully, or angrily is battery. Therefore there may be battery without violence. Also, a surgical operation when done unlawfully without the patient's consent may constitute battery. Accordingly, battery includes the slightest contact, touch or force, so that harm need not result.

Minimum Contact Is Battery: The Minimum Contact Rule

The least touch or contact is sufficient to constitute battery. Though a plaintiff may only obtain a nominal award of damages for such contact. In light of this, unlawful application of force to a person, or contact with anything attached to a person may be battery in view of the minimum contact rule.

Let us consider some cases.

In *Scott v. Shepherd (1558.1774) All ER 295; 96 ER 525., t*he defendant lit a squib "fire work" at a trade fair and threw it at B's stall. B threw it away to C's stall, and C threw the squib to the plaintiffs stall, where the squib exploded and injured the plaintiff. In a claim for damages for battery the court held: that the defendant who lit the squib was nevertheless liable to the plaintiff. The chain of causation of damage set in motion by the defendant was not broken by the actions of Band C.

Fagan v Metropolitian Police Commissioner (1969) 1 QB 439.

A policeman asked the defendant appellant to park his car. The defendant drove the car onto the policeman's foot on which a tyre then rested. When the defendant realised what he had done, he refused the policeman's request to reverse off his foot. The court held that the appellant was liable for battery.

Collins v Wilcock (1984) 1 WLR 1172.

A police woman wishing to question the plaintiff appellant on suspicion of prostitution, took hold of the appellant's arm to detain her for the purpose of questioning her. The police woman was not exercising a power of arrest at the material time as she was not on duty. Held: that there was battery of the appellant. The defendant police woman's conduct had gone beyond acceptable lawful physical contact between persons and accordingly her act constituted battery on the plaintiff appellant.

F v West Berkshire Health Authority (1989) 2 WLR 1025

The court on application of the health authority allowed sterilization of a woman suffering from a serious mental disability without her consent. In an action for damages for unlawful sterilization without consent, the House of Lords held that the court had the power to make such order under its inherent jurisdiction provided that the operation was accepted as being in the best interest of the patient, that is, the operation was accepted as appropriate treatment by a reasonable body of medical opinion, skilled in that particular form of treatment.

R v Martin (1881) Crim LR 427 CA

The defendant placed an iron bar across an exit door of a hall, put off the lights on the staircase and shouted "fire". In the struggle to escape, several persons were injured. The court held that the defendant was liable for battery.

Leon v Met. Police Commr (1986) 1 CL 318

The plaintiff rastafarian was wrongfully suspected of carrying drugs. The police pulled him off a bus, punched and kicked him. The court held that there was battery of the plaintiff.

Ballard v MPC (1983) 113 NLJ LR 1133

The plaintiffs who were feminists were attacked by police during a demonstration. One was felled down and carried away unconsciously. Another was felled down and poked with a baton in the stomach and hit over an eye. The police hit the head of the third lady with a baton. The court held: that there was battery. See also *Freeman v Home Office (1984) QB 524.*

Pursell v Horn (1838) 112 ER 966.

The defendant threw water on the plaintiff. The court held that it was battery to .throw water on a person.

In *Cole v Turner (1704) 87 ER 907. Letang v Cooper (1965) 1 QB 232 at 239,* Holt CJ held *"that the least touching of another in anger is battery."* To touch another person in anger, though in the slightest degree or under pretence of passing is a battery. If two or more persons meet in a narrow passage and without violence or design of harm one touches the other person gently, it is not battery. However, if any of them uses violence against the other to force his way in an inordinate manner or engages in any struggle about the passage to a degree as may do hurt, it will be a battery. .

Nash v. Sheen (1953) CL Y 3726

The plaintiff went to the defendant hair dresser and requested for a perm. Instead of a perm, the defendant gave the plaintiff an unwanted tone rinse or hair dye which caused rashes on the head of the plaintiff. It was held that the defendant was liable for battery.

R v Day (1845) 1 Cox CC 207

The defendant slit the complainant's clothes with a knife, and as the complainant tried to stop it by reaching for the knife, his hand was cut. Parke, B held that it was battery to use a knife to slit the clothes which a person was wearing and although the complainant's hand was cut in reaching for the knife, it was immaterial as this does not subtract from the offence. In other words, there were two acts of battery; the slitting of the clothes and the cut on the complainant's hand.

Involuntary Contact

As a general rule, involuntary contact, or infliction of force over which a person has no control is not battery and may therefore be excused from liability.

In *Gibbons v Pepper (1695) 91 ER 922,*

The defendant was riding his horse. The horse, in sudden fright ran away with him on it. He called to the plaintiff pedestrian to get out of the way and upon his failure to do so, the horse ran him over against the defendant's will. The plaintiff sued for assault and battery. The court held: *per curiam,* that the defendant was liable and judgment was given for the plaintiff. In the court's opinion; if I ride upon a horse and another person whips the horse so that he runs away with me and runs over any other person, he who whipped the horse is guilty and not me. But if I, by spurring the horse, was the cause of the accident, then I am guilty. In the same manner, if A takes the hand of B and with it strikes C; A is the true trespasser and not B. See *Leame v Bray (1803)" 102 ER 724.*

Battery Need Not Be A Hostile Act

Battery need not be a hostile act. Thus, it may amount to battery to carry out surgery without consent, emergency, or justification or to kiss a woman against her will.

Battery May Be Committed On An Unconscious Person

Battery may be committed on a person not only when the person is conscious, but also while a person is unconscious, such as, when a person is asleep, or unconscious during surgery.

An Omission May Amount To Battery

An omission, especially if it persists may be a battery. For instance, a motorist, who accidentally drove his car on to a police constable's foot while parking his car commits no battery, but he commits battery, if he ignores the constable's plea to 'get off my foot'.

See *Fagan v Metropolitan Police Commissioner (1968) 3 All ER 442*

The defendant appellant was reversing his car whilst the complainant police constable standing in his front indicated where he should park. He then drove the car onto the policeman's foot and stopped thereon. The constable told the appellant to get off his foot and received an abusive reply. The constable repeated his request several times and the appellant finally said *"Okay man, Okay"* and slowly reversed off the constable's foot. He was charged with assaulting a police officer in the execution of his duty. The court held that the appellant was liable and his appeal was dismissed. The appellant's conduct could not be regarded as mere omission or inactivity. There was an act of battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment, the intention was formed to produce the apprehension which flowed from the continuous act of being on the complainant's foot.

Battery Must Be Intentional, Reckless, or Negligent

An act of battery must be intentional, reckless or negligent. Thus, not all acts of contact or touch are battery. Contacts conforming with accepted practice or ordinary incidents of daily life are not battery and are not actionable. Thus, for instance, to jostle or push in a crowded bus or sports stadium is not battery. Consent is generally presumed. This is so because, a person is expected to put up with the ordinary hazards of daily life, such as stepping on another's foot, and elbowing when walking on the street. To succeed in a claim for battery in such circumstances, a plaintiff is usually required to prove a hostile intention or negligence. However, it may be battery, if a person uses violence to force his way through a crowd in a rude or inordinate manner. To touch a person to attract his attention is not battery.

In *Coward v Baddeley (1859) 157 ER 927, i*n the course of a fire incident, the plaintiff lay his hand on the defendant fire officer to attract his attention. Whereupon the defendant fireman assaulted and beat the plaintiff and gave him to a policeman and caused him to be imprisoned in a police station for a day and afterwards taken into custody after leading him along public streets before a magistrate. The court held that the defendant was liable for trespass to person. A person cannot justify taking another person into custody for merely laying a hand on him to draw his attention, if the touching was not done hostilely.

In *Holmes v Mather .(1875) LR 10 Exch 261 at 267,* the defendant's horses while being driven by his servant in a public highway were startled by the barking of a dog. The horses ran away in fright and became so unmanageable that the servant could not stop them, but he could to some extent, guide them. While trying to turn a corner safely, the servant guided them so that, without intending it, the horses knocked down and injured the plaintiff who was on the highway. The plaintiff sued for negligence. No negligence was disclosed on the part of the driver. It was held that in the absence of intention or negligence, the defendant was not liable. In this case, Branwell B made his famous dictum:

> *"For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."*

*In Stanley v Powell (1891) 1 QB 86, t*he defendant was a member of a shooting party who were hunting game. The defendant fired his gun and a pellet hit a tree and bounced off into the eye of the beater who was employed to drive birds to the shooting party. The court held: that in the absence of intention or negligence, the defendant was not liable to the plaintiff for battery.

In Fowler v Lanning (1959) 1 QB 426, the defendant shot the plaintiff with a gun. The plaintiff sued for personal injuries. The plaintiff did not allege that the shooting was intentional or negligent but simply averred that the defendant on a certain date and place shot him. The court held that the action must fail. An action for trespass to person does not lie if the trespass was neither intentional nor negligent.

Therefore, where trespass is alleged, the onus lies on he plaintiff to prove either:

1. Intention: or
2. Negligence.

Where the plaintiff fails to do either, the plaintiff's statement of claim will be regarded as disclosing no cause of action, and it will be dismissed. See the following cases:

In Benson v Sir Frederic Bart (1766) 97 ER 1130, the plaintiff was ordered to be beaten by the defendant noble man who was a colonel in the British army. Following the order,

the plaintiff was given numerous strokes of the cane by junior soldiers. The plaintiff sued for battery. The defendant was held liable. See further;

Mogaji v Board of Customs (1982) 31NCLR 552; Amakiri v Iwowari (1974) 1 RSLR 5; Shugaba v Minister of Internal Affairs (1981) 2 NCLR 459; and *Dele Giwa v IGP, Unrep. Suit No. M/44/83 of 30/7/84.*

In *Nwankwa v Ajaegbo (1978) 2 LRN 230,* a servant of the defendant acting on the defendant's instructions beat up the plaintiff. The plaintiff brought action. It was held that the defendant was liable for trespass to person.

In *Afisi v Aghakpe (1987) 1 QLRN 216,* the defendant policemen beat up the plaintiff. It was held that there was unlawful trespass to the plaintiff and they were liable for damages for assault and battery.

In Oyakhire v Obaseki (1986) 1 NWLR Pt. 19, p. 735 CA, the defendant/appellants policemen, in the course of investigating a crime, shot the plaintiff/respondent who was not the suspect they were looking for. The plaintiff sued claiming damages. It was held that the defendants were jointly and severally liable for damages for the accidental shooting of the plaintiff.

Also in Donnelly v Jackman (1970) 1 All ER 987, the defendant appellant was walking along a pavement, when the plaintiff respondent police officer in uniform who suspected him of having committed a certain offence, accosted him to ask him some questions. The appellant ignored the officer's repeated requests to stop and speak to him. At one stage the officer tapped the appellant on the shoulder. Shortly after, the appellant in return tapped the officer on the chest. It became apparent that the appellant had no intention of stopping. The officer then again touched the appellant on the shoulder with the intention of stopping him but without the intention to arrest the appellant. Thereupon the appellant struck the officer with some force. The appellant was charged with assaulting an officer in the execution of his duty and convicted. On appeal it was held that the touching of the appellant's shoulder by the police officer was a trivial interference with his liberty, which did not amount to a conduct outside the officer's duties. Accordingly the appeal was dismissed and the conviction for assaulting the police officer was affirmed.

4.0 CONCLUSION

Trespass is the unauthorized intervention with a person, his property or his possession. Where it is trespass to a person, it could take the form of battery assault or false imprisonment. Where it is to his property, it could take the form of trespass to land, detinue or conversion.

5.0 SUMMARY

This unit has taught the learners:

a. The basic concept of trespass in the Law of Torts

b. The tort of assault, elements of assault and essentially the purpose of the Law of assault.

6.0 TUTOR MARKED ASSIGNMENT

Battery must be intentional, negligent or reckless. Discuss.

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UNIT 3 FALSE IMPRISONMENT AND INTENTIONAL HARM TO THE PERSON

TABLE OF CONTENTS

1.0 INTRODUCTION

In this unit we shall consider the third type of trespass to the person which is false imprisonment.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) define false imprisonment;
(ii) explain the purpose of the tort of false imprisonment; and
(iii) enumerate the defences and remedies for trespass to the person.

3.0 MAIN CONTENT

3.1 Definition of false imprisonment

False imprisonment is denying a person freedom of movement or personal liberty without lawful justification. False imprisonment is the total restraint of a person without lawful justification. It is the unlawful bodily restraint, imprisonment or arrest of a person. It is also the restraint of another person without his consent and without lawful justification. Any detention, bodily restraint, denial of personal liberty, or freedom of movement of a person in any place and in any form without lawful justification amounts to false imprisonment.. Thus, any unlawful bodily restraint, or confinement of a person, however short the period of time is false imprisonment.

The imprisonment is false because it is not right. It is a wrong done to the person who is restrained. False imprisonment of a person is a breach of the fundamental right to personal liberty guaranteed in Chapter IV of the Nigerian Constitution and by the constitutions of many other countries. It includes detention by government as well as a detention by a private person or individual.

The act of false imprisonment must be direct, though it is immaterial whether it was done intentionally or negligently. Thus, any unlawful bodily restraint of a person in any place or from any place against his will may be false imprisonment. Like assault and battery, false imprisonment is actionable in itself without the plaintiff having to prove harm or damage. Imprisonment usually means locking up a person in jail but in this context, the term imprisonment has a much wider meaning and includes any physical restraint of a person in a locked or an open place such as in a street.

Lord Edward, Coke CJ in Inst. 2, Statutes of Westminster II, C. 48, clearly explained the law thus:

> *"Every restraint of the liberty of* a *free man is imprisonment although he be not within the walls of any common prison."*

Similarly, Sir William Blackstone (1723-1780) the eminent English jurist clearly stated the law thus:

> *"Every confinement of the person is an imprisonment, whether it be in* a *common prison,* or *in* a *private house,* or *in the stocks,* or *even by forcibly detaining one in the public streets".* (Blackstone. III p. 127)

Some of the characteristics of false imprisonment are;

1. Depriving another person of his right to personal liberty and freedom of movement without just cause.

2. Compelling a person to remain where he does not wish to remain or to go to where he does not wish to go.

3. Restraint need not be in any cell or prison but may be in the open street.

4. There need not be battery.

5. The use of authority, any influence, order, trick, or request is sufficient so long as the person is available to his captor.

6. The person need not be aware that he is being detained at the time. See *Meering v Graham White Aviation Co (1919)" 122 LT 44.*
7. The restraint must be total or complete. See *Bird v Jones (1845) 7 QB 742; 115 ER 668.*

Confinement Is Not Necessary

For there to be false imprisonment there need not be confinement in a prison or in a police cell. The mere holding of the arm of a person as when a police officer makes an arrest in the open street is sufficient. Thus, one may be confined or falsely imprisoned in a house, vehicle, cell, prison, mine, in a street, estate or in a specific locality, such as a district or province, so long as the restraint is complete and the person is made to remain where he does not want to remain or to go to where he does not want to go.

The Intention of the Tortfeasor Is Irrelevant

The state of mind, that is, the intention or malice of the tortfeasor is irrelevant. Once there is an act of false imprisonment, the tortfeasor is prima facie liable in the absence of a lawful excuse. Thus, where a tortfeasor recklessly or negligently locks a door or allows a door to lock against another person, he would be liable for false imprisonment even though he did not know that there was a person in the room or house. Thus, any unlawful restraint of personal liberty, freedom of movement or arrest of a person without legal authority is a false imprisonment. An arrest without lawful authority is a false arrest or false imprisonment because it restrains a person's liberty. Any person who takes away another person's liberty in these manners may be sued for this tort.

SELF ASSESSMENT EXERCISE 1

Define false imprisonment.

3.2 The Purpose of the Law of False Imprisonment

The purpose of the tort of false imprisonment is to protect the right to personal liberty and right to freedom of movement. Thus, the purpose of the tort of false imprisonment is to protect the fundamental right to personal liberty and freedom of movement from being taken away by government or any person. The presence of ill-will or malice is not a relevant element of this tort. However, where intention or malice is proved by a plaintiff, punitive damages may be awarded in addition to compensatory or nominal damages.

John Lewis & Co. Ltd v Timms (1952) AC 676 HL.

The plaintiff, a lady and her daughter were detained for sometime in a supermarket by its security men on suspicion of shop lifting. It was later discovered that she was innocent of the suspicion. The House of Lords held that there was false imprisonment and she was entitled to recover damages.

The following cases may also prove instructive on this topic.

Kuchenmeiser v Home Office (1958) 1 QB 496; Collins v Wilcock (1984) 3 All ER 374; Weldon v Home Office (1990) 3 All ER 672; Hague v D.G. of Parkhurst Prison (1991) 3 All ER 733 HL; and *R v Self (1992) 1 WLR 657 CA.*

In *Dumbell v Roberts (1944) 1 All ER 326,* the plaintiff was returning from work dressed in his uniform and carrying a bag of soap flakes when he was stopped and questioned by the defendant police officers. He was taken to the police station and charged with being in unlawful possession of soap flakes, which charge could not be substantiated and was dismissed by court. The plaintiff sued for false imprisonment. There was no evidence to suggest that the plaintiff had stolen the goods or that he had received them knowing them to be stolen. The court held that the police officers were liable for false imprisonment. When the two defendants arrested the plaintiff without a warrant and made no attempt to

ascertain the plaintiff's name and address, they failed to comply with the condition precedent to the exercise of their right to arrest him without warrant under the statute.

In *Burton v Davies (1953) QSR 26 Queensland, Austrialia,* the plaintiff was riding in a motor vehicle driven by the defendant. He prevented the plaintiff from coming down from the vehicle at a certain place by driving past in excessive speed. It was held that driving a motor vehicle past and preventing a passenger from alighting at his destination was false imprisonment.

In Onitiri v Ojomo (1954) 21 NLR 19, the defendant magistrate was presiding at a court where the plaintiff was a party in a certain proceedings. For an alleged contempt in the face of the court, the defendant ordered the plaintiff to be detained pending the plaintiff's trial for the contempt of the defendant's court. The plaintiff believing the detention to be wrongful sued the magistrate for damages for false imprisonment. De Commarmond S.P.J. in the High Court held that the defendant as a magistrate was not liable in damages for any act done or ordered to be done when acting in his judicial capacity. See also *Soji Omotunde v AG. Fed. The Guardian 17/12/97.;* and *Liversidge v Anderson (1942) AC 206 HL.*

In *Union Bank of Nigeria Ltd & Anor v Ajagu (1990) 1 NWLR Pt 126, p. 328 CA,* the plaintiff/respondent customer of the 1st defendant appellant bank, on a certain day went to the branch where he operated an account. When he was about leaving the premises, the 2nd defendant appellant an employee of the appellant bank locked the gate leading into and out of the bank premises inspite of the plaintiff's entreaties to be allowed to leave. The plaintiff spent sometime inside the bank's premises, after the conclusion of his financial transaction. The plaintiff sued for false imprisonment. The Court of Appeal held: that there was false imprisonment and the defendant appellant bank was vicariously liable for the false imprisonment of the plaintiff by its servant.

The Queen v Lambo Sokoto (1961) WNLR 27, the accused allegedly caught hold of a girl in a street, took her to his room, undressed her, forced her to kneel down naked, and placed a piece of cloth on her head and by means of a hypnotic trance she was unable to move or speak. He immobilised her until the girl's father and a policeman who were looking for her arrived at the scene. On request by the police officer, the accused promised to release the girl if he was treated gently, which he did by calling the name of the girl thrice and by speaking to her in a language unknown to the policeman. She was thereupon able to speak and move. On being charged to court, the evidence as to whether the accused had locked the door of the room where the girl was found was inconclusive.

Charles J in the High Court held that there was false imprisonment. The court found that the accused had no lawful excuse for confining the girl against her consent. In this case His Lordship stated the law thus: *"if one person immobilises another in* a *room by hypnotism, he confines that other in the room just as much as if he had locked the door of the room."* The accused had no lawful authority or excuse for confining the girl, who did not consent to the confinement.

In a charge for false imprisonment, it is unnecessary to prove that a person had exercised his powers of volition by deciding to leave a place of confinement but had been prevented from giving effect to that decision. It is sufficient to prove that he did not consent to the confinement. The onus of proving reasonable cause for the false imprisonment is on the defendant.

Restraint of the Person Is Necessary

Restraint of the person is necessary, for instance, preventing a person from leaving a place, restraint of movement, or confinement of the person, whether in a prison or in an open street, and so forth. Thus the offence or tort of false imprisonment is committed once, the free movement of a person is prevented by any act. Thus, false imprisonment is any act that prevents liberty or free movement without legal justification.

The Restraint Must Be Total

For there to be false imprisonment, the restraint of the plaintiff must be total. See *Bird v Jones (1848) 7 QB 742.* Where there is a reasonable route, exit or means of escape, there is no false imprisonment. See *Robinson v Balmain Ferry Co. (1910) AC 295 PC.* However, it is not a tort to prevent a person from leaving a premises when he has not fulfilled a reasonable condition on which he entered.

In Meering v Graham White Aviation Co. Ltd. (1920) 122 LT 44, the plaintiff was suspected of stealing some items from the defendant who was his employer. Two policemen who provided security to the defendant's office, asked him to accompany them to the company office for interrogation. The plaintiff who did not know what was his offence and was not aware that he was a suspect and agreed to the request. He remained in the office while the two policemen remained outside the room without the plaintiff's knowledge that they were there and with instructions to prevent him from leaving. He later sued for damages for false imprisonment. The court held that there was false imprisonment and he could claim. His lack of knowledge of the imprisonment at the material time was irrelevant.

The restraint of the plaintiff must be total or complete. Therefore, to bar a person from going in three directions, but leaving him free to go in a fourth direction is not false imprisonment as he has not been in a situation of total restraint.

In *Bird v Jones (1845) 7 QB 742; 115 ER 668,*

A bridge construction company lawfully stopped a public footpath on Hammersmith Bridge, London. A spectator of a boat race insisted on using the footpath but was stopped by two policemen who barred his entry. The plaintiff was told that he may proceed to another point around the obstruction but that he could not go forward. He declined to go

in the alternative direction and remained there for about half an hour and then sued. It was held that there was no false imprisonment since the plaintiff was free to go another way.

In *Wright v Wilson (1699) 91 ER 1394,* there was no false imprisonment where the plaintiff was able to escape from his confinement, after committing nominal act of trespass on a third party's property.

The means of escape must however be reasonable. Therefore, a means of escape which will endanger the life of the plaintiff will not excuse the defendant from a claim for false imprisonment. However, where a means of escape is available which will not endanger life, or cause a maim, there will be no false imprisonment.

If a person is on a premises or property and is denied exit or facility to leave, there is false imprisonment unless the restraint is an insistence on a reasonable conduct. Thus, as a general rule, it is false imprisonment to deny a person facility to leave a place without lawful justification.

Thus in Warner v Riddiford (1858) 140 ER 1052, the defendant terminated the employment of the plaintiff, his resident manager and locked his room upstairs so that the plaintiff could not collect his belongings and leave the premises. Held: There was false imprisonment, since locking up his personal effects placed an effective restraint on his mobility.

In *Herd v Weardale Steel, Coal & Coke Co. (1915) AC 67,*a miner went into a mine as usual with the understanding to work for the specific period of his shift before coming to the surface. A dispute arose between him and his employers in the mine pit and he demanded to return to the surface but the employer refused to grant him the use of the hoisting cage for him to come to the surface and he was stranded in the pit for about 20 minutes. It was held that there was no false imprisonment. The miner entered the pit of his own freewill and the employers were under no duty to bring him to the surface until the end of his shift.

Restraint for the Shortest Period of Time Is False Imprisonment

The shortest period of restraint or confinement is false imprisonment. See *Herd v Weardale Steel, Coal & Coke Co.* (Supra) and *Holden v Chief Constable of Lancashire (1986) 3 All ER 836.* Thus no fixed period of time is necessary. However, a false imprisonment that is for a very brief time may only attract nominal damages.

Contact and Use of Force Are Not Necessary

In committing false imprisonment, it is not necessary that force be used on the plaintiff by way of battery. There need not be any physical contact. A threat to use force on the plaintiff whereby the plaintiff is restrained by fear is sufficient. Therefore, an order such as "stay there or I'll shoot you" may be evidence of false imprisonment. The use of

authority, intimidation, threat, influence, order, trick, hypnotism, pronouncement of arrest, or request to follow the tortfeasor is enough. Therefore, where a police officer wrongfully orders a person to follow him to the police station, without giving him the option of refusing to go, and the person obeys, the police officer may be liable for false imprisonment though he never touched the plaintiff. See *Aigoro v Anebunwa (1966) NNLR 87*

In *Aigoro v Anebuwa (supra),* the plaintiff was at a train station and about to board a train when the defendant called on a policeman to assist him to prevent the plaintiff from leaving on the train. The policeman then invited the plaintiff to come with him to the police station. No physical force was used to restrain the plaintiff. The court held: that there was false imprisonment. The plaintiff by being asked to come to the police station was not doing what he wanted to do, nor acting of his own free will.

In *Clarke v Davis (1964) Gleaner LR 145*, the defendant police officers invited the plaintiff to accompany them to the police station. However, they assured him that he had the option not to come with them. The plaintiff went with them. The plaintiff later sued for false imprisonment. The court held that there was no false imprisonment. The plaintiff had an option to avoid the restraint. He acted of his own free will and could not turn around and complain.

Mere Words May Not Amount To False Imprisonment

Generally, mere words without more do not constitute false imprisonment.

In Genner v Sparkes (1704) 91 ER 74, the defendant/court bailiff informed the plaintiff that he had come to arrest him. The plaintiff who was holding a pitch fork used it to prevent the bailiff from reaching him, while he ran into his house. In a claim by the plaintiff, the court held: that there was no false imprisonment, as mere words in the absence of any other act, such as, attempt to hold, or immobilise the plaintiff, could not amount to false imprisonment. Mere words without more would not make a false imprisonment.

In Russen v Lucas (1824) 171 ER 930 and 1141, the defendant/Sheriff of Middlesex, England shouted to the plaintiff who was behind a door at a bar: '*I want you'*. The plaintiff then replied, *"wait for me outside the door, and I will come to you". The* plaintiff quickly escaped by another exit. On a claim for damages for false imprisonment, the issue was whether he was arrested and escaped from custody. Abbott C.J. held that there was no false imprisonment.

Mere words may not constitute arrest; and if an officer says "I arrest you" and the person runs away, it is no escape from custody but if the party acquiesces to the arrests, and goes with the officer, it will be a good arrest. The declaration of intention to restrain the plaintiff without actually restraining him was not enough. The defendant cannot be liable for escape from arrest.

Knowledge by the Plaintiff of the False Imprisonment at The Material Time Is Irrelevant

It is not necessary for the person who is restrained to know at the material time that he was detained, restrained, confined, or being prevented from leaving. It is sufficient if he is informed of the false imprisonment later. Thus, a person may be falsely imprisoned while unconscious, asleep, or otherwise unaware and so forth. The person need not be aware so long as the false imprisonment is a fact or complete. If he learns about it from another person, he is entitled to sue. See *Meering v Graham White Aviation Co (1920) 122 LT 44*; and *Murray v Minister of Defence (1988) 2 All ER 521*. Constrast with *Hering v Boyle (1834) 149 ER 1126.*

*In Dele Giwa v I.G.P Unrep Suit No. M/44/83 of 30/7/84, t*he plaintiff, who was a top flight journalist and columnist was arrested and detained by the police. He brought action for enforcement of his fundamental right to personal liberty and for damages. Jinadu J. held, that the defendants were liable. The plaintiff was entitled to his freedom and the sum of ₦l0,000.00 was awarded for the unlawful arrest and detention of the plaintiff being compensation for the false imprisonment resultant loss of liberty, and the indignity to which he was subjected. See also *Shugaba v Minister of Internal Affairs (1981) NCLR 459.*

*In C.O.P. Ondo State v Obolo (1989) 5 NWLR pt 120. p. 130 CA, t*he plaintiff respondent was routinely picked up as a suspect whenever there was a case of robbery. He applied and obtained leave of the High Court to enforce his fundamental rights against the police to show cause why his right to personal liberty should be breached by being unconstitutionally and unlawfully arrested and detained on diverse dates without being informed of the offence he had committed, charged or brought before a court of competent jurisdiction. On appeal, the Court of Appeal held that the fundamental rights of the respondent had been infringed without reasonable and probable cause. Damages of ₦17,500.00 was awarded for the unlawful arrests and detention of the respondent.

In this case SALAMI JCA as he then delivered the judgment of the Court of Appeal and stated the law that:

> *"The test as to what is reasonable belief that the respondent has committed an offence is objective. It is not what the appellant considered reasonable, but whether the facts within their knowledge at the time of arrest disclosed circumstances from which it could be easily inferred that the respondent committed the offence. See Oteri v Okorodudu (1970)* 1 *All NLR* 199. *The burden of proving the legality or constitutionality of the arrest and the imprisonment is on the appellants. This cannot be successfully done without disclosing to the trial court in their counter affidavit what the respondent did... The wrong assumption*

is that it was for the respondent to show that the arrest was unlawful... It is a matter for the courts to determine whether or not there is a good ground for the arrest and it cannot do *so if the party who knew the reasonable ground for arresting the respondent holds on to it."*

The test of what is a reasonable and probable ground was stated by LEWIS JSC in the Supreme Court in *Oteri v Okorodudu (1970) All NLR 199 at 205* thus:

"---------- the test to be applied with onus of proof on a defendant seeking to justify his conduct, was laid down in 1838 *by* TINDAL C.J. *in Allen v Wright (1838) 173 ER 602 where he said that 'it must be that of a reasonable person acting without passion and prejudice. The matter must be looked at objectivel, and in the light of facts known to the defendant at the time, not on subsequent facts that may come to light."*

An accused person or suspect is entitled to know the cause of his arrest, except when he is caught in the course of committing an offence or in the course of escaping therefrom. Unlawful arrest is a trespass to person which, unless it can be justified usually renders the tortfeasor liable. The courts will not allow the police to seek cover under the provisions of the Criminal Procedure Act when they derogate from the procedure laid down by the law in the arrest and prosecution of offenders. See *Ikonne v COP (1986) 4 NWLR Pt 36, p. 473 SC.* And *Enwere v COP (1993) 8 NWLR pt 299, p.333 CA* .

Who Is Liable: The Police Or The Caller Of Police?

A person may be liable for false imprisonment if he himself affected the arrest or in accordance with the general rule that he who instigates another person to commit a tort is a joint tortfeasor, for procuring or actively promoting the commission of a tort. When an arrest is wrongful, both the person who instigated the arrest and the person or the police officer who effected the arrest are joint-tortfeasors, except the arrest was entirely at the decision or discretion for the police. In deciding who may be sued for false imprisonment, the deciding factor is *"who was active in promoting and causing"* the arrest? Therefore, a person may be liable for false imprisonment by effecting the arrest or confinement personally, or by instigating another person to commit the tort. In that case, he will be seen as a joint tortfeasor for procuring or actively promoting the commission of a tort. When an arrest is wrongful, both the police and the person who instigated the arrest are joint tortfeasors, except the arrest was entirely at the discretion of the police.

3.3 Defences to Trespass To Person

The defence to an action for trespass to person includes:

1. Self-defence or Justification. See *Turner v MGM Pictures Ltd (1950) 1 All ER 449* and *Lane v Holloway (1968) 1 QB 379.*

Under common law, a person has a right of self-defence. The only requirement for a successful plea of self defence is that the self-defence should be reasonable or proportionate. This includes self-defence and or the defence of another person, especially, where a person is morally or legally obliged to protect another person. However, only reasonable force may be used in self-defence.

2. Defence of property; A person may commit commensurate or reasonable trespass to person, such as assault, battery or false imprisonment in order to protect his property or the property of another person which he has a moral or legal obligation to protect. In England the common law right of self-defence has been supplemented by statute law by section 3(1) of the Criminal Law Act 1967. See *Bird v Holbrock (1828) 130 ER 911; Hemmings v Stoke Poges Golf Club (1920) 1 KB 720* and *Hamson v Duke of Rutland (1893) 1 QB 142 CA.* Thus, reasonable measures may be taken or reasonable force may be used to eject or deter a trespasser from entering a property.

3. Consent of the plaintiff Express or implied consent is a complete defence. Consent is a defence when it is obtained freely in the absence of fraud, trick, deceit, force, duress or undue influence and so forth. Consent is deemed in sports. Accordingly, consent is often a defence for injuries suffered in sports events. As a general rule participants in sports are deemed to consent to reasonable contact within the rules of the game except where the act is unreasonable, involves considerable hostility or is deliberate. See *Condon v Basi (1985) 2 All ER 453.*

4. Medical Treatment: Medical Care and Medical Surgery: In medical care, a patient is usually deemed as having consented to the normal course of treatment for his ailment except where such treatment is outside the scope of the patient's express or implied consent. Thus, consent to medical care is consent to assault, battery and false imprisonment, but it is not consent to negligent medical treatment. As a result, treatment or surgical operation carried out in good faith with reasonable skill, knowledge and care for the benefit of a patient is a lawful excuse in a claim for trespass, because, these are contacts which are usually for the plaintiffs benefit.

Conscious adults who are about to undergo surgery may be required to sign a consent form, which are usually drafted in standard form. In a treatment, not involving surgery, a patient is deemed to give implied consent by consulting a medical doctor.

Adults who require emergency treatment, whether or not they are conscious are deemed to give implied consent to treatment because of the emergency and the need for the doctor to quickly intervene and save the patient from grievous harm or loss of life. A defence of necessity (See *F v West Berkshire HA (1989) 2 All ER 545;* and *Bolam v Friem Hospital (1957) 2 All ER 118)* may also avail a medical doctor in such an instance. For children under 16 years, the parents are required to give consent and the parents are deemed to give consent by bringing them to hospital or by signing a consent form. Generally, a child's capacity to give consent to medical treatment depends on the child's maturity, and

understanding of the nature of the treatment and what it involves. See *B (A Minor) Wardship, Re (1987) 2 All ER 206;* and *Gillick v East Norfolk HA (1985) 3 All ER 402.*

Where a patient claims that he did not consent to medical treatment, two possible legal claims may be brought:

(i) Where there was treatment against a patient's will or there was treatment of a different kind or there was assault and battery. A claim may be brought for trespass to person. See *Chatterton v Gerson (1981) 1 All ER 257;* and *C (Refusal of Medical Treatment), Re (1994) 1 WLR 290.*

(ii) Where the patient was aware of the nature of treatment, but the doctor failed to give sufficient details, or explanation of the risks and side effects, a claim may arise in negligence. A claim for medical negligence is usually more difficult to prove than a claim for trespass to person. See *Stubbings v Webb (1992) QB 197; Blythe v Bloomsbury HA (1985) AC 871;* and *Sidaway v Bethlehem Royal Hospital (1985) AC 871.*

A surgery operation carried out by a medical doctor in good faith with reasonable skill, knowledge and care for the benefit of the plaintiff is a defence. Accordingly, a surgeon who is operating in an emergency on an unconscious patient does not commit battery for several possible reasons which include:

(i) He is not acting hostilely to the patient;
(ii) There is implied consent by the patient; and
(iii) The defence of emergency or necessity is available to the surgeon; etc.

In *Cassidy v Ministry of Health (1951) 1 All ER 573,* the defendant employers were held liable where the medical staff made the plaintiff's hand useless due to paralysis, as a result of negligent post-operation treatment. See also *Roe v Minister of Health (1954) QB 66; Akerele v R (1943) 2 All ER 367;* and *R v Yaro Paki (1955) 21 NLR 63.*

Also consent is a defence to false imprisonment, for instance, when a person who visits a prison impliedly consents to be locked in confinement with the prisoner during the period of the visit. However, fraud, duress and so forth, usually vitiate consent. Furthermore, consent by a victim will not excuse a defendant from criminal responsibility, for instance, if he takes the life of a person who consents to the causing of his own death by killing him. Also where a medical doctor negligently certified a plaintiff as insane, whereupon she was detained in a mental hospital, he was held liable for causing her false imprisonment in an insane asylum. See *De Freville v Dill (1927) All ER 205.*

5. Inevitable Accident. See Module 4

6. Judicial Authority. See *Onitiri v Ojomo (1954) 21 NLR 19; Ajao v Alkali Amodu & Anor (1960) NNLR 8;* and *Egbe v Adefarasin (1985) 1.*

Under judicial authority, such as a court order, warrant of arrest, prison sentence and so forth, lawful arrest may be carried out. Detention may be ordered and punishment may be imposed according to law.

A judge or a magistrate acting within his judicial authority may grant a warrant of arrest and persons carrying out such an order of arrest may use reasonable force to detain the person named in the warrant. All convicts serving various terms of imprisonment are in jail pursuant to the judicial authority of judges and magistrates.

7. Lawful Arrest (See statutes such as the Criminal Code Act, Police Act, etc.), Detention, Stop and Search: All persons owe a duty not to disturb the public peace by committing crime or causing other breaches of peace and so forth. The police have powers under the Criminal Code Act, Police Act and other criminal statutes to arrest, detain, or stop and search a person in public where they reasonably suspect that a person has committed a crime, or maybe carrying a stolen, contraband or prohibited item, etc.

The police and other law enforcement agents and private citizens have powers to make arrest with or without a warrant as the case maybe. A lawful arrest, detention, or stop and search and so forth are defences to assault, battery and false imprisonment. See *Murray v Minister of Defence (1988) 2 All ER 421.* The requirements of a lawful arrest and stop and search are many and include:

1. An arrest must be within the powers granted by a relevant statute.

2. A reasonable suspicion on the part of the arrestor or person making the arrest.

3. Use of only reasonable or proportionate force (see Farrell *v Secretary of State for Defence (1980) Lloyds Rep. 437*) to that put up by the person arrested.

What amounts to reasonable suspicion is objective and it depends on the circumstances or facts of each case. (See *Holgate Mohammed v Duke (1984) 2 WLR 660*). In the course of criminal investigation, the police, especially, can with the consent of a suspect or the permission of a senior police officer, take body samples of a suspect, such as hair, finger nails, blood, body fluids, etc, for analysis in the course of criminal investigation.

Thus, the police have wide powers both at common law and statute to arrest persons they reasonably suspect of crime. Also, a private person or a group may effect arrest as provided under law in relevant circumstances and hand over the person to the police. A defendant who is acting under the criminal law is protected. A plea of reasonable and probable cause may be made. A policeman who mistakenly arrests an innocent person is not liable for wrongful arrest, so long as he had reasonable grounds for suspicion of the innocent person at the time of arrest. However, in false imprisonment, the defendant has

the burden of proving that there was reasonable cause for the arrest or detention of the plaintiff.

In Christie v Leachinsky (1943) AC 573, the defendant/appellant police officers without warrant arrested the plaintiff/respondent for unlawful possession of a number of bales of cloth. They had reasonable grounds for thinking that the cloths were stolen but they did not disclose to the appellant the reasons for arresting him as required by law. On appeal, the House of Lords held that the arrest was unlawful. See also *Brogan v UK (1989) II EHRR 117.*

However, a person who is authorised by law to use force may be personally liable for any excess, he committed in the course of duty depending on the nature and quality of the act. Also an erroneous belief in a power of arrest will not excuse an unlawful arrest. Damages for battery, false imprisonment and so forth will lie.

In Holder v Chief Constable of Lacanshire (1986) 3 All ER 836, the court held that there was false imprisonment of the plaintiff, as the police officer had no reasonable ground for suspicion of the plaintiff at the time of arrest.

8. Statutory or Lawful Authority

Trespass to person may be excused where it is committed in preservation of society (see (1999) Constitution, sections 33(2), 34(2), 35, 41, 44 & 45; *Liversdige v Anderson (1942) AC 206;* and *Brogan v UK, supra*), under any enabling statute for instance, under the Nigerian Constitution. Under the Nigerian Constitution, a person may be lawfully deprived of his personal liberty or his fundamental rights otherwise restricted in certain circumstances. These include;:

(i) In connection with a criminal case by lawful arrest or in execution of the order or sentence of a court;

(ii) In a connection with infectious disease, or unsoundness of mind;

(iii) In connection with immigration law;

(iv) In connection with the education and welfare of infants or apprentices who are minors, etc.

9. Reasonable Chastisement in Exercise of Parental or Other Authority.

As a matter of tradition and law, parents have right to administer reasonable punishment or chastisement as a discipline in order to ensure the propel upbringing of a child. However, the punishment of a naughty or rude child must be reasonable, otherwise the chastisement may amount to a tort or crime.

Nowadays, because of parental objection to smacking or caning of children, the practice is no longer permitted in schools whether public or private. However, the Parents and Teachers Association may permit teachers to administer reasonable chastisement of children and such do not amount to inhuman treatment of children and is not a breach of the fundamental right to dignity of human person at guaranteed in section 34 of the 1999 Constitution of Nigeria. See also *Ekeogu v Aliri (1991) 3 NWLR pt. 179, p. 258 SC*.

Thus, a parent or other person in *loco parentis* of a child, pupil or ward may in exercise of parental authority or similar authority administer lawful and reasonable chastisement, and punish or discipline a child in order to correct him. The amount of punishment administered must however be reasonable in the circumstances and short of the criminal offence of cruelty to a child and short of breach of his human rights under the Nigerian Constitution and the Child Rights Act 2003.

A teacher may in exercise of authority, administer lawful and reasonable chastisement to bring up pupils as disciplined, responsible and law abiding citizens. This authority was normally implied by the mere sending of a child to school. However, nowadays the authority of a teacher to discipline a child depends more on the position of government policy and society.

The captain of a ship or an aircraft is responsible to maintain order for the safety of the trip. He may, therefore, exercise such authority as is necessary to preserve life and property in the course of the journey.

In *Hook v Cunard Steamship Co. Ltd. (1953) 1 All ER 1021*, the plaintiff was a steward in the defendant company's cruise line. Following a complaint by the parents of a child on board the ship, the captain of the ship had the plaintiff confined for a night in a cabin and thereafter restricted his movement on the ship. He was later sacked and fully paid off. The said complaints made by the parents were inconsistent and uncorroborated. There was ground for casting the slightest aspersion on the plaintiff's character. The plaintiff sued for false imprisonment. The court held that the defendant company was liable for false imprisonment and aggravated damages were awarded to him.

This is so for false imprisonment does not merely affect a person's liberty it also affects his reputation. The damage to the plaintiff continues until it is caused to cease by a declaration that the imprisonment was false. Therefore, the general principle of law is that damage is recoverable up to the date of judgement, and also any evidence which tends to aggravate the damage to reputation is admissible up to the moment when damages are assessed by court.

9. Necessity

This is a rare defence. A defendant may show that he committed the trespass to person to avoid a greater harm, such as forcefully feeding a person to preserve the person's life. This was the situation in *Leigh v Gladstone (1909) 26 TLR 139,* where prison warders out of necessity forcefully fed the defendant who was on hunger strike whilst in custody in order to save her from dying from hunger.

3.4 The Remedies for Trespass to Person

A plaintiff in a claim for trespass is entitled to a number of remedies. These include:

1. A declaratory judgement, declaring the rights of the plaintiff to enjoy the fundamental right to dignity of human person, right to personal liberty, right to freedom of movement and so forth as guaranteed under the Nigerian Constitution. See the following cases: *Shugaba v Minister of Internal Affairs (1981) 2 NCLR 459; COP v Obolo (1989) 5 NWLR pt 120, p. 130 CA,; Iyere v Duro (1986) 5 NWLR pt 44, p. 665 CA..; Amakiri v Iwowari (1974) 1 RSLR 5; Alaboh v Boyes (1984) 5 NCLR 830; Dele Giwa v IGP, Unrep Suit No. M/44/ 83 of 30/7/84;* and *Soji Omotunde v AG. Federation, The Guardian 17/12/97.*

2. Injunction

3. Binding over to keep the peace for a specified period

4. Award of damages

5. Writ of habeas corpus. See *Agbaje v COP (1969) 1 NMLR 137 HC; 1 NMLR 176 CA.* and *Tai Solarin v IGP, Unrep. Suit No. M/55/84.*

When action is filed in court for the release of a detained person and a writ of habeas corpus is claimed, upon establishing a prima *facie* case that the person has been unlawfully detained, a writ of habeas corpus may be issued by court, commanding the captors or custodians to bring the prisoner to court, and then proceed to examine whether there is any legal ground for the detention of the prisoner and in the absence of any lawful ground for his detention set him free.

6. Apology. See *Dele Giwa v IGP, supra*.

Where an apology is also claimed for unwarranted and unlawful trespass to person, especially a false imprisonment, a court may order that apology be made by the defendant to the plaintiff. Such apology is usually tendered to the plaintiff in the mode directed by the court, such as writing a letter of apology to the plaintiff and also publicising it on radio, television, newspaper and so forth.

7. Escape from unlawful custody or kidnap

8. Self-Defence;

4.0 CONCLUSION

There are three main forms of trespass to a person, namely; Battery, Assault and false Imprisonment. Battery, assault and false imprisonment fall under the tort which were formerly dealt with by the writ of trespass. These torts are therefore actionable per se. Salomon J. defines Battery as the application of force to the person of another without lawful participation. Also in Cote v Turner, Holt C. J said the least touching of another in anger is a battery.

5.0 SUMMARY

At the end of this unit you should have been able to identify the following :
1. Definition of false imprisonment.
2. The purpose of the law of false imprisonment
3. Trespass to a person
4. Differences to trespass to the person
5. Remedies for trespass to the person.

6.0 TUTOR MARKED ASSIGNMENT

Write short notes on five defences to trespass to the person.

7.0 REFERENCES

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
2. Fidelis Nwadalo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
3. John G. Fleming: The Law of Torts (1977), The Law Books Co. Ltd publisher, London. Sweet & Maxwell.
4. A. Street: The Law of Torts Sweet & Maxwell (1977), London
5. G. KODILINYE & Oluwole Aluko: Nigeria Law of Torts. Spectrum Law Publishers, 1999.
6. The Criminal Procedure Code f the Northern States of Nigeria.

UNIT 4 TRESPASS TO CHATTELS

TABLE OF CONTENTS

1.0 INTRODUCTION

In the law of tort, trespass to property is of two kinds. These are:

1. Trespass to personal property, better known as trespass to chattel, or trespass to goods; and

2. Trespass to land.

In this unit, we shall examine trespass to chattel.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) Define chattel;
(ii) Outline the differences between trespass to chattel, conversion and detinue;
(iii) Explain the elements of trespass to chattel;
(iv) List the persons who may sue for trespass to chattel; and
(v) Enumerate the remedies for trespass to chattel.

3.0 MAIN CONTENT

3.1 Definition of A Chattel

A chattel is any property other than land and immovable property. A chattel is any moveable property. The word "chattel" means any article, goods, or personal property, other than land and immoveable property. Examples of chattel or goods are innumerable.

A chattel is any moveable thing which is capable of being owned, possessed, or controlled other than a human being, land and immoveable property. Examples of chattel include cars, furniture, animal, vessel, aircraft, sea craft, and anything whatsoever which is moveable and capable of being owned. Indeed, the list of chattels cannot be exhausted.

The Purpose of the Tort of Trespass to Chattel

The tort of trespass to chattels protects all the chattel, goods, or personal properties of a person who has title or possession by prohibiting all interference without legal justification. The tort of trespass to chattel protects the rights of ownership or possession of a chattel from all wrongful interferences. Thus, the tort of trespass to chattel protects the chattels, goods, and all personal properties of a person who has title, possession, or right to immediate possession against meddling, damage, destruction, diminution, conversion, detinue, or any interference whatsoever, by any other person without lawful justification.

Trespass to Chattel Is Actionable Per Se

The three forms of trespass to chattel are each actionable per se upon commission or occurrence without the plaintiff having to prove damage. Explaining the law that trespass to chattel is actionable per se without prove of damage Adefarasin J., as he then was, in *Davies v Lagos City Council (1973) 10 CCHCJ 151 at 154*, held that:

> *"The plaintiff is entitled to succeed... in trespass...*
> *there may be a trespass without the infliction of any*
> *material damage by a mere taking or transportation.*
> *In my view, the seizure of the plaintiff's vehicle without*
> *just cause... is a wrongful act, on account of which all the*
> *defendants taking part in it are jointly and severally liable."*

Although, trespass to chattel is actionable per se, however it is not a strict liability tort. Furthermore, where a specific damages has been done to a chattel, a plaintiff is entitled to prove it and recover damage for it as the case may be.

3.2 Trespass To Chattel in Nigeria

In Nigeria, the tort of trespass to chattel is made up of three types of torts. These are:

1. Trespass to chattels *per se,* without a conversion or a detinue of the chattel in question;

2. Conversion; and

3. Detinue.

We shall examine conversion and detinue in the following units.

Trespass to chattel is any direct and unlawful interference with a chattel in the possession of another person. It is the intentional or negligent interference with the possession of the chattel of another person. In other words, trespass to chattel is any direct interference with a personal property in the possession of another person without lawful justification. The interference must be direct and wrongful. Thus, the mere touching of a chattel without causing any harm to it may in appropriate circumstances, be actionable and entitle the plaintiff to get nominal damages.

Trespass to chattel is designed to protect the following interests in personal property;
1. Right of retaining one's chattel;
2. Protection of the physical condition of the chattel; and
3. Protection of the chattel against unlawful interference or meddling.

The tort of trespass to chattel is designed to protect possession, that is, the right of immediate possession of a chattel, as distinct from ownership. It protects the right of a person to the control, possession, retention or custody of a chattel against interference by another person without lawful justification. In other words it prohibits a person from any unlawful interference with a chattel that is under the control, possession or custody of another person. The strongest way to regain ownership of goods such as when one's property is stolen is perhaps through criminal law. To maintain an action for trespass, the plaintiff must show that he had possession at the time of the trespass or is entitled to immediate possession of the chattel. Thus, a borrower, hirer, or a bailee of goods, possesses the goods lent, hired or bailed and therefore he may maintain an action against any person who wrongfully interferes with the goods. Similarly, a person who has wrongfully acquired possession may also maintain action against all persons except the owner or agent of the owner of the chattel.

Essentially, trespass to chattel is:

1. Any wrong against a chattel, goods or personalty
2. In the possession or control of another person.

In this tort, injury or wrong is done to the chattel while it is in the possession of the person claiming damages for the injury. The chattel is usually not taken from his possession as we have in conversion or detinue.

In *Erivo v Obi (1993) 9 NWLR pt 316, p. 60 CA,* the defendant respondent closed the door of the plaintiff appellant's car and the side windscreen got broken. The appellant sued inter alia for damage to the windscreen and the loss he incurred in hiring another car to attend to his business. The defendant respondent alternatively pleaded inevitable accident. On appeal, the Court of Appeal held that the defendant respondent was not liable. He did not use excessive force but only normal force in closing the door of the car. He did not break the windscreen intentionally or negligently. It was an inevitable accident which the exercise of reasonable care and the normal force used by the respondent could not avert.

In this case, the Court of Appeal restated the position of the law that, trespass to chattel is actionable *per se,* that is, without proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of a chattel, even though no harm has been done to the chattel. Therefore, for trespass to chattel to be actionable, it must have been done by the wrongdoer:

1. Intentionally; or
2. Negligently.

Thus, in the wider context, the tort of trespass to chattel is closely related to any tort or law which has to do with the protection of interest in personal property, such as:

1. Negligence;
2. Malicious damage such as arson; and
3. Other damage to property or interest in property.

Examples of Trespass to Chattel

Trespass to chattel may be committed in many different ways. However, the trespass must be intentional or negligent. Trespass may be committed by mere removal or any damage and it can be committed when there is no intention to deprive the owner, possessor or custodian permanently of the chattel. Examples of trespass to chattel include:

1. Taking a chattel away

2. Throwing another person's property away, such as in annoyance

3. Mere moving of the goods from one place to another, that is, mere asportation. See *Kirk v Gregory (1878) 1 Ex D 55.*

4. Scratching or making marks on the body of the chattel, or writing with finger in the dust on the body of a motor vehicle

5. Killing another person's animal, feeding poison to it or beating it. See *Shieldrick v Abery (1793) 170 ER 278; Cresswell v girl (1948) 1 KB 241;* and *Uwabia v Atu (1975) 5 ECSLR 139.*

6. Destruction, or any act of harm or damage
7. Touching, that is, mere touching, for instance, touching a precious work of art which could be damaged by mere touch

8. Use, that is, mere using without permission

9. Driving another person's car without permission

10. Filling another person's bottle with anything. See *Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204 at 214-215.*

11. Throwing something at the chattel

12. Damaging or causing any harm to a chattel, by any bodily or indirect contact, such as, running one's car into another person's car.

3.3 Differences between Trespass to Chattel, Conversion and Detinue

In the tort of trespass to goods, there is no taking away, stealing, conversion, detention or detinue of the goods from the owner; or person entitled to possession. This is the main difference between it and the torts of conversion, and detinue. However, in the tort of trespass to chattel there must be some act of interference, meddling, harm, injury, damage or destruction of the goods, against the desire of the owner, possessor, custodian or caretaker. Thus, the tort of trespass to chattel includes any interference, meddling, harm, injury, damage or destruction of goods against the desire of the person who has right to it.

The following cases will give clear illustrations of trespass to chattel. There circumstances vary but they are all on chattels.

In *Davies v Lagos City Council (1973) 10CCHCJ 151,* the defendant city council granted a hackney permit to the plaintiff to operate a taxi cab, which permit was meant for the exclusive use of the plaintiff. The plaintiff transferred the permit to a third party, whereupon the defendant council seized and detained the plaintiff‘s taxi cab. In an action for trespass to property, Adefarasin J. as he then was in the Lagos High Court held that although the defendant council was entitled to revoke the permit for non-compliance with regulations, however, it was not entitled to seize nor take possession of the plaintiffs vehicle. The defendant was therefore liable for trespass to chattel by seizing the plaintiff’s car.

In Fouldes v Willoughby (1841) 151 ER 1153, the defendant was the manager of a ferry boat. The plaintiff who was a passenger entered the boat with his horses. The defendant and the plaintiff had a dispute and in order to induce the plaintiff to leave the boat, the defendant disembarked the horses of the plaintiff from the ferry. The plaintiff who was not ruffled remained on the boat and crossed over to the other side of the river. The plaintiff then sued the defendant for trespass to the horses. The court held: that the defendant was liable for trespass to the horses, by moving them ashore. It was also held that there was no conversion as the plaintiff still had title.

In Kirk v Gregory (1878) 1 EX D 55, the movement of a deceased person's rings from one room in his house to another was held to be a trespass to chattel and nominal damages was awarded against the defendant.

In Haydon v Smith (1610) 123 ER 970, it was held to be a trespass for the defendant to cut and carry away the plaintiffs trees.

Also in G.W.K v Dunlop Rubber Co. (1926) 42 TLR 376, removing a tyre from a car, and replacing it with another tyre was held to be a trespass.

In Slater v Swann (1730) 93 ER 906, beating the plaintiff's animal was held to be a trespass to chattel.

In Leame v Bray (1803) 102 ER 724, this was an accident between two horse drawn carriages. The defendant negligently drove his carriage and collided with the carriage of the plaintiff. The court held that the accident was a trespass to chattel and the defendant was liable in damages to the plaintiff for the damage done to the coach of the plaintiff.

Elements of Trespass to Chattel: What a Plaintiff Must Prove To Succeed

To succeed, a plaintiff must establish that the act of trespass was:

1. Intentional; or

2. Negligent. See *National Coal Board v Evans & Co. (1951) 2 KB 861* and *Gaylor & Pope v Davies & Sons (1924) 2 KB 75.*

As a general rule, proving intention or negligence is very important as trespass to chattel is not a strict liability tort. However, accident, intentional or negligent trespass do not automatically give rise to liability per se, as an appropriate defence, may be pleaded to avoid liability.

The Persons Who May Sue For Trespass to Chattel

Anyone who has possession or caretakership of a chattel may sue any other person who meddles with the chattel. This is so for the object of the tort of trespass is to protect possession, or the right to immediate possession. In other words, anyone who has possession or right to immediate possession can sue. Accordingly, some persons who do not have legal right are deemed by law to have possession, so that they will be able to protect chattels left under their care. For instance, an employee to whom an employer has given custody of goods, a repairer, caretaker, personal representatives of a deceased and so forth. Therefore, the persons who may sue for trespass to chattel, provided they have possession at the material time of the interference include:

1. Owners
2. Bailees
3. Lenders
4. Assignees
5. Trustees

6. Finders
7. Custodians
8. Caretakers
9. Adverse possessors, because mere possession gives a right to sue to retain possession
10. Executors
11. Administrators of estates; etc.

In *National Coal Board v Evans & Co. (supra),* the defendant contractors were employed by a county council to work on land owned by the defendant council. A trench had to be dug, which the defendants employed a sub-contractor to do. An electric cable passed under the land, but neither the council, nor Evan & Co. who were head contractors, nor the sub-contractors knew this, and the cable was not marked on any available map. During excavation, a mechanical digger damaged the cable and water seeped into it causing an explosion, and thereby cutting off electricity supply to the plaintiff's coal mine. The plaintiff sued claiming damages for trespass to the electricity cable. The court held that in the absence of establishing negligence on the part of the defendant contractors, there was no fault and there was no trespass by the defendants. The damage was an inevitable accident.

SELF ASSESSMENT EXERCISE 1

Who may sue for trespass to chattel?

The Defences for Trespass to Chattel

In an action for trespass to chattel, the defences a defendant may plead include:

1. Inevitable accident

2. Jus tertii, that is, the title, or better right of a third party, provided that he has the authority of such third party. See *C.O.P. v Oguntayo (1993) 6 NWLR pt. 299, p. 259 SC.*

3. Subsisting lien.

4. Subsisting bailment

5. Limitation of time, as a result of the expiration of time specified for legal action.

6. Honest conversion, or acting honestly, etc.

The Remedies for Trespass to Chattel

The remedies available to a person whose chattel has been meddled with, short of conversion or detinue are:

1. Payment of damages
2. Replacement of the chattel
3. Payment of the market price of the chattel
4. Repair of the damage.

A frequent demonstration of these remedies is in motor accident cases. Where one vehicle runs into another, damages may be paid, or the parts of the vehicle that are affected may be replaced or repaired.

4.0 CONCLUSION

There will be trespass to chattel whenever there is a physical and intentional interference with goods of which the right of possession lies in a plaintiff. The intervention must be direct, physical and intentional and the plaintiff must have possession

5.0 SUMMARY

In this unit we discussed

1. the definition of chattel
2. outline the differences between trespass to chattel conversion and detinue.
3. Explain the elements of trespass to chattels
4. Enumerates the remedies for trespass to chattels.

6.0 TUTOR MARKED ASSIGNMENT

With the aid of decided cases, explain the differences between trespass to chattel, conversion and detinue.

7.0 REFERENCES

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
2. Fidelis Nwadalo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
3. John G. Fleming: The Law of Torts (1977), The Law Books Co. Ltd publisher, London. Sweet & Maxwell.
4. A. Street: The Law of Torts Sweet & Maxwell (1977), London
5. G. Kodilinye & Oluwole Aluko: Nigeria Law of Torts. Spectrum Law Publishers, 1999.
6. The Criminal Procedure of the Northern States of Nigeria.

UNIT 5 CONVERSION

TABLE OF CONTENTS

1.0 INTRODUCTION

The tort of detinue which is the wrongful detention of goods is also a part of the tort of conversion, where it is known as conversion of goods by detention. However, in the United Kingdom the Torts (Interference with Goods) Act 1977 has abolished the tort of detinue and merged it with the tort of conversion. This, however, is not the position in Nigeria as conversion and detinue are still separate torts, although a party may claim for both torts in a single action. In this unit, we shall consider conversion.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) Define conversion;
(ii) Differentiate between conversion and trespass; and
(iii) Enumerate the defences and remedies for conversion.

3.0 MAIN CONTENT

3.1 What is Conversion?

According to Sir John Salmond, in his book the *Law of Tort,* 21st ed. (1996) p. 97-98:

"A conversion is an act... of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it". See also *Ihenacho v Uzochukwu (1997) 2 NWLR pt 487. p. 257 SC.*

Conversion is any inteference, possession or disposition of the property of another person, as if it is one's own without legal justification. In other words, conversion is dealing with another person's property as if it is one's own. Conversion is any dealing which denies a person of the title, possession, or use of his chattel. It is the assertion of a right that is inconsistent with the rights of the person who has title, possession or right to use the chattel.

It is dealing with a chattel which belongs to another person in a manner that is i inconsistent with the rights of the person. In other words, conversion is any intentional interference with another person's chattel which unlawfully deprives the person of title, possession or use of it. Conversion includes wrongful taking, wrongful detention, and or wrongful disposition of the property of another person. Therefore, conversion includes denying a person of the title or possession, or use of his chattel. It is not necessary to prove that the defendant had intention to deal with the goods. It is enough to prove that the defendant interfered with the goods. It is immaterial that the defendant does not know that the chattel belongs to another person, for instance, if he innocently bought the goods from a thief. See *Lewis v Avery (1972) 1 QB 198.* In criminal law, conversion is known as stealing or theft.

Essentially, conversion is:

1. Any inconsistent dealing with a chattel
2. To which another person is entitled to immediate possession
3. Whereby the person is denied the use
4. Possession; or
5. Title to it.

Thus, an owner can sue for conversion. Likewise, a person who has mere custody, temporary possession or caretakership can sue any third party who tries to detain, dispose, steal or otherwise convert such chattel.

In *North Central Wagon & Finance Co. Ltd v Graham (1950) 1 All ER 780,* the defendant hire purchaser sold the car in contravention of the terms of the hire purchase agreement. In the circumstances the court held that the plaintiff finance company was entitled to terminate the hire purchase agreement and sue the selling hire purchaser in the tort of conversion, for recovery of the car.

See also the following cases:
Chubb Cash v Crillery (1983) 1 WLR 599; Wilson v Lombank Ltd. (1963) 1 All ER 740; Greenwood v Bennet (1973) QB 195 CA; and *Union Transport Finance v British Car Auctions (1978) 2 All ER 385 CA*.

3.2 Differences between Conversion and Trespass

Conversion is different from trespass to chattels in two main respects. These are:

1. In conversion, the conduct of the defendant must deprive the owners of the possession of the chattel, or amount to a denial or dispute of the title of the owner. Conversion is known as stealing or theft in criminal law .Therefore, mere touching or moving of a chattel and so forth, only amount to trespass. See *Fouldes v Willoughby (1841) 151 ER 1153.*

2. To maintain an action in conversion, the plaintiff need not be in actual possession of the chattel at the time of the interference. It is enough if the plaintiff has right to immediate possession of the chattel, that is, the right to demand for immediate possession of the chattel.

Ashby v Tolhurst (1937) 2 KB 242.

The defendant car park attendant who negligently allowed a car thief to drive away the plaintiff's car from a car park under his watch was held: not liable in conversion. The driver had possession of the car which he had parked, for he has right to immediate possession. The defendant car park attendant is a bailee who only guarantees the safety of the car that is bailed in the car park as a bailee. The claimant should have sued in the tort of negligence for the loss of the car.

City Motor Properties Ltd v Southern Aerial Service (1961) CLR 477.

An owner of a chattel was held liable in conversion for dispossessing the plaintiff bailee of it, during the subsistence of the bailment, which was not unilaterally determinable at will by the plaintiff owner.

Youl v Harbottle (1791) 170 ER 81.

The defendant carrier of goods by mistake delivered the plaintiffs goods to a wrong person. He was held liable in conversion, for the loss of the goods. Therefore, it follows that, if an act of interference with a chattel is intentional or willful, it is not a defence, that the tort was done by mistake, even if the mistake is honest, that is, in good faith or innocently. See also *Perry v BRB (1980) 1 WLR 1375.*

Consolidated Co. Ltd v Curtis & Son (1892) 1 QB 495.

A certain client instructed an auctioneer to sell goods which did not belong to him, and which he has no right to instruct the auctioneer to sell. Upon sale of the goods the true owner of the goods sued the auctioneer for conversion, the court held: that the auctioneer was liable to the owner of the goods for conversion. The court further held that the auctioneer was entitled to be indemnified by the client who instructed him for the damages he suffered at the suit of the owner of the goods. See also *Jerome v Bentley &. Co (1952) 2 All ER 114.*

Adamson v Jarvis (1827) 130 ER 693.

An auctioneer was held entitled to be indemnified by a client who had instructed him to sell goods, to which as it was later discovered the client had no title.

In *Hollins v Fowler (1875) LR 7 HL 757,*

A cotton broker acting on behalf of a client, for whom he often made purchases, bought cotton from a fraudster who had no title to the cotton. The broker then sold it to his client and received only his commission. At the suit of the true owner for conversion sale, and loss of the goods, the court held: that the broker was liable in conversion for the full value of the goods.

Examples of Conversion

Conversion of a chattel, belonging to another person may be committed in many different ways. Examples of conversion include:

1. Taking
2. Using
3. Alteration
4. Consumption
5. Damaging, or destroying it
6. Receiving
7. Detention
8. Wrongfully refusing to return a chattel
9. Wrongful delivery
10. Wrongful sale or disposition and so forth.
11. Wrongful sale, etc.

We shall examine these briefly.

1. Taking

Where a defendant takes a plaintiffs chattel out of the plaintiff s possession without lawful justification with the intent of exercising dominion over the goods permanently or even temporarily, there is conversion. Constrast this proposition with the decisions in the cases of *Fouldes v Willoughby (supra)* and *Davies v Lagos City Council (supra)*. On the other hand, a defendant may not be liable; if he merely moves the goods without denying the plaintiff of title.

2. Using

Using a plaintiff's chattels as if it is one's own, such as, by wearing the plaintiff's jewellery, as in the case of *Petre v Heneage (1701) 88 ER 149,* or using the plaintiff's

bottle to store wine as was the case in *Penfolds Wine Ltd v Elliot (supra)* is a conversion of such chattel.

3. Alteration: By changing its form howsoever.

4. Consumption: By eating or using it up.

5. Destruction: By damaging or obliterating it.

Mere damage of a chattel is not sufficient to make one liable for conversion. As a general rule of law, mere damage or destruction of a chattel without more, is a trespass to chattel in tort and also a malicious damage in criminal law. See *Simmons v Lillystone (1853) 155 ER 1417.*

6. Receiving

Involuntary receipt of goods is not conversion. However, the receiver must not willfully damage or destroy the goods unless the goods constitute a nuisance. Receiving a chattel from a third party who is not the owner is a conversion. This is wrongful, for it is an act of assisting the other person in the conversion of the chattel, or the receiving of stolen goods.

7. By Detention

Armory v Delamirie (1722) 93 ER 664.

A chimney sweep's boy found a jewel and gave it to a jeweler for valuation. The jeweler knowing the circumstances, took the jewel, detained and refused to return it to the boy. They boy then sued the jeweler for conversion and for an order for return of the jewellery to him. The court held: that the jeweler was liable for conversion. A finder of a property has a good title, and he has a right or interest, to keep it against all persons, except the rightful owner of the property or his agent. See also *Moorgate Mercantile Co v Finch (1962) 1 QB 701.*

However, a temporary reasonable refusal by the finder or custodian of a property to hand it over to a claimant, in order to verify the authenticity of the title of the claimant. is not actionable, except where the refusal is adverse to the owner's better title. .

8. By Wrongful Delivery

Wrongfully delivery of a person's chattel to another person who does not have title or right to possession without legal justification is a conversion.

9. Purchase:

At common law, conversion is committed by a person who bought and took delivery of goods from a seller who has no title to the chattel nor right to sell them. Such as when a thief, steals and sells a chattel. A buyer in such a situation takes possession at his own risk, in accordance with the rule of law that acts of ownership are exercised at the owner's peril.

10. By Wrongful Disposition: Such as by sale, transfer of title or other wrongful disposition.

In *Chukwuka v C.F .A.O. Motors Ltd (1967) FNLR 168 at 170,*

The plaintiff sent his car to the defendant motor company for repairs. Thereafter, he failed to claim the car. Nine months later the defendants sold the car to a third party who re-registered it in his own name. The plaintiff sued for conversion. The High Court held: that the defendant was liable to the plaintiff for conversion of the car. See also *The Arpad (1934) p. 189 at 234* and *Hollins v Fowler (1875) LR 7 HL 757.*

SELF ASSESSMENT EXERCISE 1

List the examples of conversion.

Innocent Receipt or Delivery Is Not Conversion

Generally, innocent delivery, or innocent receipt are not torts, nor criminal offences. Thus, innocent delivery is not conversion. Therefore, where an innocent holder of goods, such as, a carrier, or warehouseman, receives goods in good faith from a person he believes to have lawful possession of them, and he delivers them, on the person's instructions to a third party in good faith, there would be no conversion. Similarly, innocent receipt of goods is not conversion. However the receiver must not willfully damage or destroy the goods unless the goods constitute a nuisance.

Unipetrol v Prima Tankers Ltd (1986) 5 NWLR pt 42 p. 532 CA.

The defendant oil tanker owners had a contract to carry Unipetrol's cargo of fuel from Port Harcourt. The captain of the vessel allegedly went elsewhere with the cargo of fuel. The plaintiff appellant Unipetrol sued for the conversion and loss of the cargo. The Court of Appeal held: that the respondents were liable in conversion. The word "loss" is wide enough to include a claim for conversion against a carrier. It is elementary law that in a claim for conversion, the claimant is entitled to the return of the article seized, missing, or in the possession of the other party, or reimbursement for its value. See also *FHA v Sommer (1986) 5 NWLR pt 17, p. 533 CA.*

In *Owena Bank Nig. Ltd v Nigerian Sweets & Confectionery Co. Ltd (1993) 4 NWLR pt. 290, p. 698 CA,*

The 1st respondent was granted an import licence by the Federal Ministry of Trade to import granulated sugar. However, the 2nd respondent opened a letter of credit and imported the sugar. The 1st respondent sued for damages for the wrongful conversion of the import licence. On appeal by the bank, the Court of Appeal held: That the defendants were liable for conversion of the import licence papers.

Thus, an action for conversion will lie in conversion for any corporeal personal property, including papers and title deeds.

Conversion is any dealing with a chattel in a manner inconsistent with another person's right whereby the other is deprived of the use and possession of it. To be liable, the defendant need not intend to question or deny the right of the plaintiff. It is enough that his conduct is inconsistent with the rights of the person who has title, or right to possession, or use of it. Conversion is an injury to the plaintiff's possessory rights in the chattel converted. Whether an act amounts to conversion or not depends on the facts of each case, and the courts have a degree of discretion in deciding whether certain acts amount to a sufficient deprivation of possessory or ownership rights as to constitute conversion.

In conversion, negligence or intention is not relevant, and once the dealing with the chattel of another person is in such a circumstance that the owner is deprived of its use and possession, the tort of committed.

Possession Is Title against a Wrongdoer or Stranger

At common law, mere de facto possession is sufficient title to support an action for conversion against a wrongdoer.

C.O.P v Oguntayo (1993) 6 NWLR pt 299, p. 259 SC.

The plaintiff respondent brought action against the defendant appellant police, for the wrongful detention and conversion of his Mitsubishi van, which he drove to a police station on a personal visit to a police officer. The police impounded the vehicle on the allegation that it was a lost but found vehicle. The respondent asserted that he brought the van from a third party who was now deceased. The respondent sued the police claiming for the return of the van. On appeal, the Supreme Court held: that the plaintiff respondent was entitled to the release of the vehicle to him.

To establish conversion, the law is that what is required is proof of *de facto* possession and not proof of ownership. In the instant case, the impounding of the vehicle by the appellants police was unlawful and their failure to deliver it to the plaintiff respondent after demands for it constituted a conversion. The plea of *jus tertii* that is, the plea of the

better title of a third party to, was not open to the police as it was not proved. In this case, the court approved the statement of the law as to possession made by LORD CAMBELL CJ in *Jeffries v Great Western Ry Co. (1856) 119 ER 680 at 681:*

> *"The law is that a person possessed of goods as his property has a good title against every stranger, and that one, who take them from him ~ having no title in himself is a wrongdoer, and cannot defend himself by showing that there was title in some third party. For against a wrongdoer, possession is title."*

In *Danjuma v Union Bank Nig. Ltd (1995) 5 NWLR pt 395, p. 318 CA,*

The plaintiff appellant sued the defendant respondent bank claiming for an injunction restraining the defendant from conversion of the plaintiffs share certificates and dividends or from the wrongful seizure of same. On appeal the Court of Appeal held: that right of action does not lie as it had not been established that the action of the respondent bank amounted to the tort of conversion. The respondent bank did not deny the appellant's right to take his share certificates, or the dividends on the share certificates and the appellant did not at any time demand the return of the certificate and the respondent refused. There is no evidence that the respondent without authority took possession of the certificates with the intention of asserting a right inconsistent with the rights of the plaintiff appellant. See also *Bute v BarcIays Bank (1955) 1 QB 202;* and *International Factors Ltd v Rodriguez (1979) 1 QB 351 CA.*

The Rules Regarding Finding Lost Property

The rules of law applicable to finding a lost property were authoritatively settled by the English Court of Appeal in the case of *Parker v British Airways (1982) 1 AllER 834 CA*. However, the rules are not often easy to apply. The rules applicable to finding lost property may be summarized as follows: -

1. A finder of a chattel acquires no rights over it, unless it has been abandoned, or lost, and he takes it into his care and control. He acquires a right to keep it against all persons, except the true owner; or a person who can assert a prior right to keep the chattel, which was subsisting at the time when the finder took the chattel into his care and control.

2. Any servant, or agent who finds a lost property in the course his employment, does so on behalf of his employer, who by law acquires the rights of a finder.

3. An occupier of land or a building has superior rights to those of a finder, over property or goods in, or attached to the land, or building. Based on this rule, rings found in the mud of a pool in the case of *South Staffordshire Water Co. v Sharman (1896) 2 QB 44* and a pre-historic boat discovered six feed below the

surface were held as belonging to the land owner in the case of *Elwes v Briggs Gas (1886) 33 Ch D 562.*

4. However, an occupier of premises does not have superior rights to those of a finder in respect of goods found on or in the premises, except before the finding, the occupier has manifested an intention to exercise control over the premises, and things on it.

In *Parker v British Airways (supra),*

The plaintiff was waiting in the defendant airways lounge at Heathrow Airport, London, England when he found a bracelet on the floor. He handed it to the employees of the defendant, together with his name and address, and a request that it should be returned to him if it was unclaimed. It was not claimed by anybody and the defendants failed to return it to the finder and sold it. The English Court of Appeal held: that the proceeds of sale belonged to the plaintiff who found it. See also *South Staffordshire Water Co v Sharman (1896) 2 QB 44* and *Waverley Borough Council v Fletcher (1995) 3 WLR 772 CA.*

Bridges v Hawkesworth (1851) 21 LJ QB 75.

The plaintiff finder of a packet of bank notes lying on the floor, in the public part of a shop was held entitled to the money instead of the shop owner, upon the failure of the rightful owner to come forward to claim the money. See also *Hannah v Peel (1945) KB 509* and *Moffatt v Kazana (1969) 2 QB 153.*

As a general rule of law, anybody who has a finder's right over a lost property, has an obligation in law to take reasonable steps to trace the true owner of the lost property, before he may lawfully exercise the rights of an owner over the property he found.

Who May Sue For Conversion?

The tort of conversion, like other trespass to chattel, is mainly an interference with possession. Those who may sue in the tort of conversion include:

1. Owners

An owner in possession, or who has right to immediate possession may sue another person for conversion.

2. Bailees

A bailee of a chattel may sue another person for conversion of a chattel or goods bailed with him. However, a bailor at will has title to immediate possession of a chattel he has deposited with a bailee and can maintain action against a bailee for conversion.

See *The Winkfield (1902) P. 42 at 60.*

The Winkfield, a ship ran into another ship, a mailship which sank. The Post-Master General though not the owner of the mails in the ship that sank was held entitled to sue the owners of the Winkfield, as a bailee in possession for the value of the mails that were lost in the sunk ship. COLLINS MR in the English Court of Appeal held: that the owners of the Winkfield were liable and that *"As between a bailee and a stranger, possession gives title"*. See also *Kahler v Midland Bank Ltd (1950) AC 24 at 59* and *Cooper v Willomatt (1843-60) All ER 556.*

Other persons who may have right to immediate possession and therefore, may be able to sue another person for conversion of a chattel include:

3. **Holders of lien and pledge**
4. **Finders, see *Armory v Delamirie (1722) 93 ER 664; London Corp v Appleyard (1963) 2 All ER 834* and *Hannah v Peel (1945) KB 509.***
5. **Buyers**
6. **Assignees**
7. **Licensees**
8. **Trustees**

3.3 Defences for Conversion of A Chattel

In an action for conversion of a chattel, the defendant may plead:

1. Jus tertii, that is, the title or better right of a third party

2. Subsisting bailment

3. Subsisting lien

4. Temporary retention; to enable steps to be taken to check the title of the claimant. A defendant may temporarily, refuse to give up goods, while steps are taken to verify the title of the plaintiff who is claiming title before the chattel is handed over to the plaintiff if he is found to be the owner, or has right to immediate possession.

5. Limitation of time.

Who May Plead Jus Tertii?

Jus tertii is the right of a third party. It is the title or better right of a third party to the chattel, goods, or property in dispute. As a general rule, a defendant cannot plead that a plaintiff is not entitled to possession as against him, because a third party is the true owner of the chattel. A defendant can only plead jus tertii, that is, the better right of the

true owner or third party only when he is acting with the authority of the true owner. In *C.O.P v Oguntayo (supra at 271)*, OGBUEGBU JSC stated the law clearly that:

> *"A person cannot plead jus tertii of a third party, unless the person is defending on behalf of, or on the authority of the true owner. In the instant case, the appellant claims title on behalf of an unknown owner, but as the third party is not discoverable and the respondent has made out a good prima facie case of title by possession, the respondent has title as against all other persons including the appellants."*

Therefore, for a defendant to successful plead jus tertii, that is, the better right of a third party who has right to immediate possession, the identity of such true owner, or third party must be disclosed, his title or better right to immediate possession must be established, and the defendant must be claiming for, on behalf, or under the title. of the alleged true owner, or third party who has a better right to immediate possession.

3.4 The Remedies for Conversion

In a claim for the conversion of a chattel several remedies are available to a plaintiff. The court in its judgment may order any, or a combination of any of the following reliefs:

1. Order for delivery, return or specific restitution of the goods; or

2. Alternative order for payment of the current market value of the chattel.

3. An order for payment of any consequential damages. However, allowance may be made for any improvement in the goods, such as, where a person honestly in good faith buys and improves a stolen car and is sued by the true owner; the damages may be reduced to reflect the improvements.

4. Recovery of special and general damages. Special damage is recoverable by a plaintiff for any specific loss proved.

5. General Damages: Furthermore, where for instance, a plaintiff whose working equipment or tools are converted by another person, a plaintiff may sue for the loss of profit, or existing contract or wages for the period of the conversion of the work tools or equipments.

4.0 CONCLUSION

Conversion in tort, the central thought of this is the wrongful appropriation of the goods of another as ones own, or wrongful depriving the other of the use and possession of the good permanently or for a substantial time by destroying them or changing their quality.

Conversion can be by taking by disposing, by detention, by using, by destruction or by alteration of the quality of a given chattel.

5.0 SUMMARY

In this unit, we discussed:

a. What is conversion
b. The difference between conversion and
c. The differences trespass and remedies for conversion

6.0 TUTOR MARKED ASSIGNMENT

Account for the differences between Conversion and Trespass.

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UNIT 6 DETINUE

TABLE OF CONTENTS

1.0 INTRODUCTION

In this unit, we consider the tort of detinue.

2.0 OBJECTIVES

By the end of this unit you should be able to:

(i) define detinue; and
(ii) explain the differences between conversion and detinue.

3.0 MAIN CONTENT

3.1 Definition of Detinue

The tort of detinue is the wrongful detention of the chattel of another person, the immediate possession of which the person entitled. Detinue is a claim for the specific return, delivery, or surrender of a chattel to the plaintiff who is entitled to it. Detinue is the wrongful detention or retention of a chattel whereby the person entitled to it is denied the possession or use of it. As a general rule, to successfully sue in detinue, a plaintiff must have possession before the detention, or have right to immediate possession of the chattel.

Essentially, the tort of detinue is:

1. The wrongful detention of the chattel of another person
2. The immediate possession of which the person is entitled.

An action in detinue is a claim for the specific return of a chattel wrongfully retained, or for payment of its current market value and any consequential damages. Anybody who wrong fully takes, detains, or retains a chattel, and after a proper demand for it, refuses, or fails to return it to the claimant without lawful excuse may be sued in detinue to recover it or its value. In the United Kingdom, the Torts (Interference with Goods) Act 1977 has abolished the tort of detinue as a separate tort, and merged it with the tort of conversion where it is now known as conversion by detinue or detention.

In Nigeria, it still exists as a separate tort. Examples of detinue, that is, detention or retention of goods are many and include the following:

1. A lends his chairs and tables to B for a one day party, and B neglects, refuses or fails to return the furniture at the end of the day as agreed or after the expiration of a reasonable period of time. .

2. C gives his radio set to D and pays him to repair it, and D fails or refuses to release or return it after a demand has been made on him for its return. In each of these circumstances, there is a right of action to sue for detinue of the chattel.

3.2 When to Sue for Detinue

A plaintiff can only maintain action for the tort of detinue after satisfying two conditions which are:

1. The plaintiff must have title that is ownership or right to immediate possession of the chattel.

2. The defendant who is in actual possession of the chattel must have failed, and or refused to deliver the chattel to the plaintiff after the plaintiff has made a proper demand for the return of the chattel, without lawful excuse. Thus, there must have been a demand by the plaintiff for the return of the chattel and a refusal or a failure to return them. This making of a demand by the plaintiff on the defendant is a condition precedent which the plaintiff must establish to succeed in his claim for detinue.

In *Kosile v Folarin (1989) 3 NWLR pt 107, p. 1 SC,*

The defendant motor dealer seized and detained the motor vehicle he had sold to the plaintiff on credit terms, upon delay by the plaintiff to fully pay up. The plaintiff buyer sued for detinue claiming damages. The Supreme Court held: *inter alia* that the seizure and detention of the vehicle by the defendant was wrong. The plaintiff was entitled to the return of the vehicle or its value and for loss of the use of the vehicle until the date of judgment at the rate of N20 per day.

In the above case, the Supreme Court emphasised the requirement that in an action for detinue, there must have been a demand by the plaintiff on the defendant to return the chattel, and if the defendant persists in keeping the chattel, he is liable for detinue. See also *lhenacho v Uzochukwu (1997) 2 NWLR pt 487, p. 257 SC.*

In *West Mrica Examinations Council v Koroye (1977) 2 SC 45; 11 NSCC 61,*

The plaintiff sat for an examination conducted by the defendant council. The defendant neglected and or refused to release his certificate. The plaintiff successfully claimed in detinue for his certificate and was award damages in lieu of the release of the certificate by the Supreme Court.

In *Davies v Lagos City Council (supra at 155),*

The defendant city council wrongfully seized and detained the plaintiff's taxi cab. The plaintiff sued claiming damages. The Lagos High Court held that: The plaintiff was entitled to a return of the vehicle and loss of earnings on the vehicle as a result of the unlawful detention. In this case ADEFARASIN J as he then was stated that a plaintiff is entitled to loss of earnings on his chattel which he uses for work or business, thus:

> *"This is not a case in which the plaintiff is entitled to the value of the vehicle. He is, however, entitled to the losses caused to him as a result of the unlawful detention. He is entitled to the loss of earning on the vehicle."*

In *Steyr Nig. Ltd v Gadzama (1995) 7 NWLR pt 407. p. 305 CA*,

At the end of their services, the plaintiff appellant company sued the defendant respondents who were former employees of the appellant for detaining official cars and household items which were in their use as top management staff of the company. The Court of Appeal held: that the respondents were to pay reasonable prices for the items in lieu of returning the chattels.

Stitch v A.G. Federation (1986) 5 NWLR pt 47, p. 1007 SC.

The plaintiff appellant imported a car from overseas. It was detained by the Board of Customs and Excise at the sea port. The Customs then sold it to the fourth defendant who started cannibalizing and selling its parts. The plaintiff appellant sued the defendants for return of the car. On appeal the Supreme Court held: that the appellant was entitled to possession of the car, but as it was virtually a wreck due to cannibalism, the court will order that the trial court should take evidence as to what a fairly used car similar to that of the appellant's car will cost and award the purchase price as damages to the appellant in lieu of the return of the car. See also *Ordia v Piedmont Nig. Ltd (1995) 2 NWLR pt 379. p. 516 SC.*

Ajikawo v Ansaldo Nig. Ltd (1991) 2 NWLR pt 173. p. 359 CA.

The plaintiff appellant bought a generator from its owner who asked him to collect it from the defendant respondent company who had custody of it. The respondent indicated interest to buy it and refused to release it to the appellant buyer. The appellant sued for the unlawful detention of the generator. The Court of Appeal held: that the appellant buyer was entitled to the generator, or its value and also to damages for the period of detinue till it was delivered up, or it value paid, for detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods, and continues until delivery up of the goods or judgment in the suit, or payment of its value. See also *Kalu v Mbuko (1988) 3 NLWR Pt BO. p. 86 CA.*

Ogiugo & Sons Ltd v C.O.P (1991) 3 NWLRpt177, p.46 CA.

The lorry of the plaintiff appellant transporter was carrying a customer's goods, when the police intercepted and seized the vehicle on suspicion that the goods were contraband. Representations for its release failed to yield result. The appellant claimed for detinue of the vehicle. The Court of Appeal held: that the appellant was entitled to the immediate release of the vehicle and damages for its unlawful detention. The plaintiff must have title or right to immediate possession to be able to sue successfully for detinue.

Shuwa v Chad Basin Development Authority (1991) 7 NWLR pt 205, p. 550 CA.

A third party sold a bulldozer which they had no authority to sell to the plaintiff appellant. The bulldozer was in the custody of the defendant respondent authority who had a lien on it. The respondent authority refused to release it to the appellant unless the third party seller paid the money due on it to the respondent authority. The third party who was the owner of the bulldozer had forfeited it to the authority under the terms of an unfulfilled contract. The appellant buyer sued for the detention of the bulldozer. The Court of Appeal held: that the action of the plaintiff appellant must fail. The third party had no authority to sell to the plaintiff as they no longer had title. The plaintiff in a claim for detinue must establish that he is the owner or that he has right to immediate possession of the thing the recovery of which he is seeking. See also *Sodimu v NPA (1975) All NLR 151.*

As a general rule, where there is a subsisting lien on a property, a claim for detinue will not succeed as was held in *Shuwa v Chad Basin Development Authority (supra).*

In *Otubu v Omotayo (1995) 6 NWLR pt 400, p. 247 CA,*

The plaintiff respondent kept his title deeds with a third party who subsequently deposited the deeds with the defendant appellant as collateral to secure a loan. The plaintiff respondent sued the defendant appellant for return of the title deeds. The Court of Appeal held: that an action cannot succeed where there is a subsisting lien on the chattel. Where there has been an equitable mortgage by deposit of title deeds as collateral to secure a loan, by a third party who does not own the deeds, but had custody of the deeds, an action

for detinue cannot be maintained for return of the deeds or chattel, prior to payment of the amount due on it, or redemption of any outstanding obligation. See also *Udechukwu v Okwuka (1956) SCNLR 189 at 191.*

3.3 The Differences between Conversion and Detinue

Detinue covers the same ground as the tort of conversion by detention. However, some differences are to be noted which include the following:

1. The refusal to surrender or return a chattel on demand is the essence of detinue, or detention. There must have been a demand for return of the chattel.

2. Detinue is the proper remedy where the plaintiff wants a return of the specific goods in question, and not merely an assessed market value. However, where specific return of the chattel or a replacement will not be possible, an award of the current market value of the chattel is usually made to the plaintiff.

Before the Common Law Procedure Act 1854, was enacted a defendant had a choice to either restore the actual chattel or pay the market value. However, since the enactment of the Act, a court has discretion to order specific restitution, or award the market value of the chattel to the plaintiff or it may award damages alone if the goods can be replaced easily.

The Defences for Detinue

In an action for detinue, a defendant may plead that:

1. He has mere possession of the goods

2. That the plaintiff has insufficient title as compared to himself

3. The defendant may plead *jus tertii,* that is, a third party person has a better title, provided the defendant is the agent, or has the authority of the third party, or is claiming under the third party.

Jus tertii, is the better title of a third party. *Jus tertii* is a defence, that is, based on ownership by a third party, and it is not pleaded, except the defendant is defending under the right of such third party who has ownership, or paramount title, that will enable him to establish a better title, and the right to possession, than the plaintiff. Otherwise, as CLEASBY BJ said in *Fowler v Hollins (1872) LR 7 QB 616 at 639*:

> *"Persons deal with the property in chattels,* or *exercise acts of ownership over them at their peril".*

4. Innocent delivery

5. Subsisting bailment

6. Subsisting lien on the chattel. See *Otubu v Omotayo (supra)*

7. Temporary retention of the chattel to enable steps to be taken to check the title of the plaintiff

8. Inevitable accident, see *National Coal Board v Evans (1951) 2 KB 816.*

9. Reasonable defence of a person or property, such as when one beats or injures a dog that was attacking him or another person.

10. Enforcement of a court order or other legal process, such as levying of execution of property under a writ of fifa, or the police taking away goods they believe to have been stolen for the purpose of use as exhibit in evidence before court, etc.

The Remedies for Detinue

When a person's chattel is detained by another person, the person who is denied possession or use of such chattel, has several remedies open to him which include:

1. Claim for return of the specific chattel
2. Claim for replacement of the chattel
3. Claim for the current market value of the chattel
4. Recapture or self help to recover the goods.
5. Replevin, that is release on bond pending determination of ownership.
6. Damages

We shall briefly examine these remedies.

1. Claim for Return of the Chattel:

This is a claim for the return of the specific chattel, especially, if the chattel has not changed its character, content, and it has not been damaged nor destroyed during its detention.

2. Replacement of the Chattel:

Where possible or appropriate, a defendant may be ordered to replacement the chattel by supplying an identical or similar chattel. This is possible for instance in the case of manufacturers of products, who can easily replace the goods by supplying an identical or similar product.

3. Claim for the Market Value of Chattel:

This is a claim for the current market value of the chattel as may be assessed. The measure of damage in detinue is usually the market value of the goods as proved at the time of judgment. The onus is on the plaintiff to prove the market value. Therefore, where there is default of restitution a plaintiff may claim for payment of the value of the chattel. This option appears to be the best form of action, where the chattel has otherwise been removed from jurisdiction, or hidden, damaged, destroyed or otherwise not found. In such circumstances there is no alternative than to claim for the market value of the chattel as assessed, plus any specific and general damages for its detention.

4. Recapture or Self help:

A person who is entitled to possession of goods of which he has been wrongfully deprived may resort to self-help and retake the goods from the custody of the person detaining it, using only reasonable force after he has made a demand for their return. However, he may not treapass through the land of an innocent party to retake the goods. He may only go on such land with permission. However, recapture as a remedy is usually frowned upon by court for the breach of peace and other offences it may occasion. This is because self help is an instance of taking the laws into one's hand. See *Agbai v Okogbue (1991) 7 NWLR pt 204, p. 391 SC.* Therefore, a person may not resort to the option of recapture or self help except it is safe, expected, and reasonable or if it will not be resisted by the defendant and or persons acting for him.

5. Replevin or Release on Bond:

This is a return of the goods on security, pending the determination of the ownership of the chattel. When a third party's goods have been wrongfully taken in the course of levying execution or distress of the movable property of another person or judgment debtor, such third party claiming ownership may recover them by means of an interpleader summons determining their ownership. The registrar will then issue a warrant for the restoration of the goods, to such third party or claimant on bond. Therefore, Replevin is the re-delivery to an owner of goods which were wrongfully seized, the action for such re-delivery, and for any specific and general damages suffered by him as the result of the detention.

6. Damages:

When a defendant has been found liable in detinue, he cannot deprive the plaintiff of his right to damages for detention of the chattel, simply because he has not been using it, nor earning anything .from its use. Also, if the wrongdoer has been making use of the goods for his own purpose, then he must pay a reasonable hire for chattel to the plaintiff. The reasonable hire usually includes the wear and tear of the goods. Therefore, as the courts have often affirmed the remedies available for the tort of detinue are an order for specific return of the chattel, or in default, an order for payment of the value and also damages that

were suffered due to loss of use by the defendant up to the date of judgment or re-delivery of the chattel to the plaintiff. Also general damages may be awarded as may be assessed by the court. General damages are usually presumed in this action, especially for the loss of the use of the chattel. As in claims in other areas of law, general damages may be awarded at least to cover part of the cost of the legal action.

4.0 CONCLUSION

In this unit we learnt that Detinue is the keeping of another persons goods after there has been an unqualified and unjustifiable refusal to deliver them following a demand by or on behalf of the true owner. If there was no demand, there can't be detinue. If there was demand which was refused with some justification or qualification, then an action in detinue cannot be maintained. The person who brings an action in detinue must be able to show in court that he has the right of possession and property in the goods detained.

5.0 SUMMARY

In this unit we discussed

a. the definition of Detinue
b. when action for Detinue is ripe
c. the differences between Detinue and Conversion.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the remedies for detinue.

7.0 REFERENCES

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
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MODULE 3

UNIT 1: TORT OF NEGLIGENCE

CONTENT

1.0 INTRODUCTION

Negligence in torts means omission to do something which a reasonable man would do or do something which a reasonable man wouldn't do. Negligence is the breach of a legal duty to take care which result in damage underserved by the defendant to the plaintiff. This unlike intentional tort where the defendant desired the consequences. Here it is undeserved damage to the plaintiff.

2.0 OBJECTIVES

The purpose of this unit is to enable the student to know;

a. The definition of Negligence and to establish Negligence if he must proof the duty of care.
b. The consequences of the breach of duty of care
c. The question of damage resulting form the duty of care.

3.0 MAIN CONTENT

Duty of Care

The development of this tort is categorized into 3 phases. The first phase was when negligence was merely a component of other torts.

The second phase when Negligence develop into action on the cases and this saw the beginning of negligence as an independence tort.

The third phase was from the decision of Donovhe v Stephenson (1932) Ap 562. In this case, Negligence was fully recognized as an independent tort capable of extention into new category.

To establish Negligence the plaintiff must proof three things;

1. He must prove the existence of duty of care
2. He must proof the breach of that duty of care
3. He must proof damage resulting from the breach.

Whether a legal duty exists or not depend on reasonable forceability of the injury. This test was propounded by Lord Atkin in Donohue v Stephenson: Lord Atkin said "You must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbor and as to who is your neighbor, Lord Atkin said "your neighbor in Law include those persons who are so closely and directly affected by your acts, that you ought reasonably to have them in contemplation as being so affected when you are directing your mind to the act of omission that are called to question". So your neighbor does not mean those closer or nearest to you but those who you foresee likely to be affected by carelessness on your part.

In Donochue v Stephenson (19832) AP 532 a manufacturer of Ginger Beer sold his product to a retailer, the retailer resold it to a lady who bought it for a friend of her's who was the plaintiff in ht case. The plaintiff had consume most of the ginger beer when she noticed the decomposed remains of a snail in the beer. She became so sick that she had to be hospitalized and sued the manufacturer for damages in respect of her injury. The manufacturer claimed that there was no contractual relationship between it and the consumer and for that reason the plaintiff is not entitled to an action.

It was held by the Court that it is true that the plaintiff does not have contractual relationship with the manufacturer but the plaintiff nonetheless is entitled to an action in tort because his action was not based on contract.

SELF ASSESSMENT EXERCISE

Discuss the Negligence principle as laid down in Donoghue v. Stephenson.

The neighbor principle contained to expand to cover different category, the court is saying that when there is a reasonable foreseability of injury, the defendant owes the plaintiff a duty of care to ensure the plaintiff does not suffer such injury. However, there are exceptions to the rule which the court based on justification, valid explanation or policy reasons and because of this, the court may negative or reduce or limit the scope of duty owned by the defendant to the plaintiff.

Osemobor V Niger Biscuit (1973) 1 CCHC J At 71. In this case the plaintiff was eating some biscuit which he bought form a shop when he felt a hard object, he then found a decay tooth embedded in the biscuit, the plaintiff became ill and sue the manufacturer. The court applied the principle in Donoghue v Stephenson and held that the manufacturer owe a duty to ensure that the plaintiff does not suffer harm as a result of using the defendants goods.

Also in case of Nigeria Bottling Co. v. Constant Ngonadi (1985) 1 NWLR 739 SC. The plaintiff action appears to be based on negligence and breach of warrantee of fitness. Under the provision of section 15(a) of the former Bendel State of Nigeria Sales of Goods Law. In that case Maidol j in the High Court addressed himself to two issues;

1. Whether the defendant known for what purpose the plaintiff bargain for and bought the fridge

2. Whether the defendant gave the plaintiff an oral warrantee of fitness of the fridge for the purpose of which it was bought.

What happened was that the plaintiff bought a refrigerator from the defendant company and the plaintiff complained that the refrigerator was not working properly. The defendants men carried the refrigerator and carry out repairs before returning it back to the plaintiff. Some few weeks after they returned it, the refrigerator exploded giving the plaintiff extensive burns. The plaintiff then brought an action alleging negligence on the part of the defendant and breach of warrantee of fitness for the purpose under the Sales of Goods Law.

The trial judge held that the defendant knows for what purpose the plaintiff required the refrigerator and was satisfied that the defendant guaranteed that the refrigerator would serve the plaintiff purpose. The judge therefore said that the defendant cannot assert that they merely sell the refrigerator and not manufacture it.

The judge said that the defendant gave the condition that the goods was reasonably fit for the purpose of for which it was bought and that they owe a duty of care to the plaintiff. The plaintiff was awarded damages for Negligence. The defendant appealed to the Supreme Court, the Supreme Court upheld the judgment of the high court saying that the defendant was negligent in supplying a defective refrigerator to the plaintiff.

The Supreme Court said interalia, where as in this case, a warrantee was implied by statute and the plaintiff action was based on the breach of that warrantee in order words, the warrantee forms the basis of the action in Negligence, the onus was still on the plaintiff/respondent to proof the special relationship out of which arose the duty of care and what amounted to a breach of that duty.

SELF ASSESSMENT EXERCISE

High Court and Supreme Court in the case of Nigeria Bottling Company v Ngodagi could be criticized on the strength that it was based on contract and not tort. Discuss.

3.2 Breach of Duty of Care

For an action in Negligence to succeed, it must be proved that the defendant has breached his duty of care; in other words that he has not done what he ought to have done in the way he ought to have done it or has done what he ought to have done negligently.

In White v Bassey (1966) 1 NWLR 26: a motorist was driving along the street on a rainy day. It was proved that he did not speed and was not careless. A five year old boy dashed along the road and was knocked down by the car. It was held that the motorist had a duty of care all right along a highway particularly on a raining day not to speed and to be mindful of other road users. But in this particular case, since he had done what was expected of him under the circumstances he had not breach the duty. A defendant would breach a duty if he acted below the standard of a reasonable man.

In deciding what a reasonable man would have done in the circumstance, and in assessing the standard of care expected of the defendant the court may take into account the "Ruk Factor". This has four elements.

3.3 The Likelihood of Harm

The greater the likelihood that the defendant conducts will cause harm, the greater the amount of caution required of him. In the Lord Wrights words in Northwestern Utilities Ltd v London Guarantee and Accident Co. Ltd (1936) A 108 at P. 126. "The degree of care which the duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled.

3.4 The Seriousness of the Injury that is risked

The gravity of the consequences if an accident were to occur must be taken into account. The classic example is Paris V. Stepney Borough Council (1951) AC 367: Here the defendant employed the plaintiff as a mechanic in their maintenance department. Although they knew that he had only one good eye, they did not provide him with goggles for his work. While he was attempting to re move a pair from underneath a vehicle, a piece of metal flew into his good eyes and he was blinded it was held that the defendant had been negligence in not providing this particular workman with goggles, since they must have been aware of the gravity of the consequences if he were to suffer an injury to his one good eye.

3.5 The importance of Utility of the defendant Activity

The seriousness of the risk created by the defendant activity and where the defendant could not has great social values; he may be justified in exposing others to risk which would not otherwise be justifiable. In all cases, one must balance the risk against the end to be achieved and the commercial and to make a profit is very differently form the human and to save life or limb.

3.6 The Cost and Practicability of Measures to Avoid the Harm

Another relevant question is how costly and practicable it would have been for the defendant to have taken precautions to eliminate or minimize risk. It is a matter of balancing risk against the measures necessary to eliminate and "a reasonable man would only neglect……. Risk of small magnitude if he had some valid considerable expense to eliminate the risk. In Latiner v A.E.C. Ltd. (1952) 2 Q. B. 701 where the court held that: where a factory floor had become slippery after, and the occupiers did everything possible to make the floor safe but nevertheless a workman slipped on it and sustained injuries, the court held that the occupier had not seen negligent. The only other possible stop they could have taken would have been to close the factory, a position which will be too drastic.

4.0 CONCLUSION

It has been established that a reasonable man is an adult of normal presence who exhibits average intelligence and common sense in every day matters, or, beyond this. If the defendant is a medical doctor the standard of an average qualified medical doctor would be ascribed to him in ordinary Doctor-patient relationship.

It follows from this that if a patient rather than go to a qualified doctor chooses a quack and suffers injury from the treatment, he cannot expect the standard of a qualified doctor from the quack; whether there has been a breach or not is a question of facts to be established from the case in court.

5.0 SUMMARY

In this Unit you learnt about the essential element to establish to succeed in an action of Negligence:

7. The existence of a duty of care by the defendant.

8. The breach of the duty of care by the defendant.

9. Damages suffered by the plaintiff as a result of the breach by the defendant of that duty of care.

6.0 TUTOR MARKED ASSIGNMENT

1. What are the elements of negligence and how are these established

2. Critically examine the standard of care required of the defendant in the care of Negligence.

7.0 REFERENCES/FURHTHER READINGS

1. Bodunde Bankole: Torts: Law of Wrongful Conducts (1998) Libriservice Press, Lagos
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UNIT 2: STANDARD OF CARE

CONTENT

1.0 INTRODUCTION

Negligence is conduct falling below the standard established for the protection of others against unreasonable risk or harm. This standard of conduct is ordinarily prudence would do in the circumstances.

The general standard of conduct required by Law is a necessary complement of the legal concept of 'duty'. There is not only the question 'did the defendant owe a duty to be careful? But also what precisely was required of him to discharge it, it is for the court to determine the existence of a duty relationship and to lay down in general terms the standard of care by which to measure the defendant conduct.

Thus, if at issue is the supervision of school children during midday break, a court would ordinarily be content with the fact that the duty of the school is that of a reasonably careful parent.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

(i) define the term Reasonable Man;
(ii) discuss Moral Qualities and Knowledge;
(iii) state what Skills
(iv) explain Need for Expert
(v) discuss Age and Lunacy
(vi) list and discuss Physical, Intellectual, and Emotional Characteristics

3.0 MAIN CONTENT

9.1 The Reasonable Man

The reasonable man of ordinary prudence is the central figure in the formula traditionally employed in passing the negligence issue for adjudication. In order to objectify the Laws abstractions, like 'care, reasonableness or foreseability, the man of ordinary prudence was invented as a model of the standard to which all men are required to confirm. He is the embodiment of all the qualities which we demand of the good citizen; and if not exactly a model of perfection. On the whole, the law has chosen external objective standards of conduct. When men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary for the general welfare. If the standard were relaxed for defendants, who cannot obtain the normal, the burden of accidents losses resulting from the extra hazard created by society dangerous group of accident-prone individual would be thrown on the innocent victims of sub-standard behavior.

Although the legal "standard of foresight of the reasonable man eliminate the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Negligence consists in failure to do what the reasonable man would have done under the same or similar circumstances and the latitude of that expression in effect makes some allowance not only for external facts, but also for man of the personal characteristics of the actor himself.

9.2 Moral Qualities and Knowledge

A man is expected to have that degree of common sense or knowledge of everyday things which normal adult would posses. For instance, a reasonable person knows that petrol is highly inflammable, that solid objects sink in water and that gas is poisonous when inhaled. Furthermore, where the defendant holds a particular position, he will be expected to show the degree of knowledge normally expected of a person in that position. Thus, for example, in the Wagon Mound (No.2) (1967) 1 AC 617, the privy council took the view that shipowners were liable for a fine caused by discharging oil from the ship into Sydney Harbour, because their chief enquire ought to have known that there was a real risk of oil catching fire. Again, it is clear that an employer is required to know more about the dangers of unfenced machinery than his workman.

With regards to facts and circumstances surrounding him, the defendant is expected to have observed that a reasonable man would notice. The occupier of premises, for example, will be negligent of the fails to notice that the stair are in dangerous state of disrepair, or that a septic tank in the garden has become dangerously exposed, so that lawful visitors to his property are put at risk. Moreover, a reasonable occupier is expected to employ experts to check those installations which he cannot through his lack of technical knowledge, check himself such as electrical wiring, or a lift.

9.3 Skills

A person who holds himself out as having a certain skill either in relation to the public generally (e.g. a care driver) or in relation to a person for whom he is performing a service (e.g. a doctor) will be expected to show the average amount of competence normally possessed by person doing that kind of work and he will be liable in negligence if he falls short of such standard. Thus, for example s surgeon performing an operation is expected to display the amount of care and skill usually expected of a normal competent member of his profession. See Whiteford V Hunter (1950) W N 553.

9.4 Intelligence

In determining whether the defendant in his action came up to the standard of a reasonable man, the court will measure those actions against the conduct expected of a person of normal intelligence and the defendant will not be excused for having noted "to the best of his own judgment" if his "best" is below that to be expected of a man of ordinary intelligence.

9.5 Age and Lunacy

In the case of children, the Law has made considerable concession to the subjective standard most of the decision have been with contributing negligence where there is greater temptation to take an indulgent view and give added with to exculpatory considerations, but there is no doubt that a child whether as plaintiff or defendant, is only expected to confirm to the standard appropriate for normal children of similar age and experience. This governs alike the child capacity to perceive the risk as well as his sense of judgment and behaviour. Thus it was held not negligent for a boy of 8 years to be striking matches in a barn and for a 5 years old to be shooting with an arrows.

Moreover, a minor who engages in dangerous adult activities such as driving a car or handling industrial equipment, must confirm to the standard of the reasonable prudent adult.

Corresponding allowance has always being made in Law to the aged whose Mental and Physical faculties have become impaired. The position of lunaties remains controversial. Some courts hae been prepared to excuse defendants whose lunacy was so extreme as to preclude them from appreciating their duty to take care on the ground that negligence presupposes an ability for rational choice. But the weight of authority support the contrary view that it would be unfairly prejudicial to accident victims if any allowance were made for a defendant mental abnormality.

3.6 Continuation of Tort of Negligence

Rules of Professional Conduct for Medical and Dental Practitioners Revised Edition 1995 that "In an agency for instance, at a scene of a car accident the doctor passing by is under

no inherent duty to stop and render first aid to the victims; but if he decides to stop and render care he is bound by the ethics to exercise a degree of reasonable care. That is to do everything that a competent doctor would do in the circumstances".

It is worthy of note that the neighbour test was originally narrowed to care where physical damage was caused to the by the negligence but of society changes so rapidly, this area of law is never static. Lord Macmillan in Donoghue vs. Stevenson stated that the categories of negligence are never close because courts are ready to examine new situations and determine whether they call for a new duty of care.
Examples of duty of care;

1. It is the duty of all road users, at all times to keep a look out so as to avoid colliding with other road users. It has been stated in Ngilasi V. Motorcap Ltd 2000 12CNJ 105 that it is the duty of those driving when it is dark at such a speed and in a way that they are able to stop within the range of visibility.

2. In Okonkwo V.medical and Dental Practitioners' Disciplinary Committee (1999) 9 NWLR Pt 617 pg 5, it was that as the relation ship of patients and doctors is always a special one, the patient having put his health and life in the doctor's hand, the use of reasonable care is required of the doctor and as the reasonable care can be presumed by Law

3. In Owena Bank V. Emok (2001) 41 WRN Pg 119 at 130 Sanusi JCA stated that "a banker is vicariously liable to its customers where he fails or neglects to adhere strictly to its customers instruction or where it fails to observe banking rules and regulations and such non compliance to customer's instruction or banking rules and regulations led to the customer incurring any loss, damage or injuries". A legal practitioner shall not be immured from liability for damage attributed to his negligence when acting in his capacity, any person purporting to limit or exclude his liability in any contract shall be void. See S.9 of the LOA 1975 now LFN 1990. In Hedly Bryne and Co. Ltd V Heller and Partners Ltd 1964 AC 465, the House of Lord's allowed in principle a duty of care not to make statements that would cause economic loss to persons who reasonably relied on them. The court rejected the neighbour principle arguing that it gives rise to potentially too wide a liability and stated that there had to be some factors apart from reasonable foreseability that would be taken into consideration to determine duty of care. Thus in Hanns V Metchon Lord on Bourough 1978 AC 728 it was stated that a duty of care and to whom it is given has to be approached in 2 stages:

    (a) one has to ask whether in between the wrong doer and the person who has suffered damage, there is relationship of proximity or neighbourhood or reasonable foresee ability such that in the reasonable contemplation of the former, carelessness on the part of may likely cause damage to the latter in which case a prima facie duty of care arises.

(b) if the foregoing question is answered (reason able foresee ability) affirmatively, it is expedient to consider whether there are other factors or considerations which ought to negate or to reduce or limit the scope of the duty.

These tests were adopted in the Nigerian case of Tecno Mech Nig.Ltd V. Ogunbayo 2000 14NWLR Pt639 Pg 153. The considerations which may reduce or negate the scope of the duty are:

Whether it is just and reasonable to impose a duty on public policy. In Mclulghlin V. O'brien 1983, it was stated that "at the margin, the boundaries of a man's responsibilities for acts of negligence have to be fixed as a matter of policy". In Aston V. Turner 1980 3 ALL ER 870, two mooned in on an act of burglary while they were fleeing from the scene of the incident in the getaway car, one of them was seriously injured by the careless driving of his friend. E. W. Bang .J based his decision on public policy and concluded that the defendant will not be held liable. In Rondell V. Wosley 1969 AC 191, it was held that a barrister when acting in the course of judicial proceedings enjoins complete immunity from action of negligence, in respect of any act done or spoken in the course of these proceedings. See section 9(2) of the LPA. Similarly, liability for negligence by legal practitioner under 59(1) of LPA does not extend to where the services were rendered without reward either by way of fees imbursement or otherwise.

It seems, however, that the liability of medical practitioners in negligence, without prejudice to the defences is very strict and absolute. Lord Denning has stated that, "if a man goes to the doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment and this is so whether the doctor has been paid for his services or not". See Lord Denning principles of Law pg233. Thus in Cassidi V. Minister of Health (1951) 2QB243. Cassidi sued the minister of health for negligence of doctors who performed an operation on him. Before the operation, Cassidy had two stiff fingers but after the operation he had four stiff fingers. It was held that the hospital authority was vicariously liable for negligence of its servants and there was liability whether the doctors did the act for reward or not.

3.7 Breach of a Duty

Having established that a duty of care is by the defendant to the plaintiff in particular circumstances; the next ingredient to determine is to discover whether the defendant is in breach of that duty. The standard of care expected of a particular defendant is usually set by law and it is a standard of the reasonable man i.e. an objective test. In "street on Torts", it is illustrated that, "if A owes B a duty of care, A must attain a standard of a reasonable person i.e. reasonable man". However, in driving at reasonable standard of a defendant, the court must be guided by the following factors;

(1) Magnitude of the Risk. This deals with the likelihood that the injury would occur and the serious of the injury that is risked. The greater of risk to the plaintiff, means

greater precautions than normal that must be taken by the defendant. In PARIS V. STEPHY BOUROUGH Council 1951 AC 367, the plaintiff who had one eye was employed as a mechanic in the defendant's garage. Part of his job includes welding. It was not normal to put on goggle in such a job. In the cause of his work a piece of metal flew into the plaintiff's eyes, as a result he becomes completely blind. He then sued the defendant. The defendant was held liable. Although he would not have been liable to a person with normal sight.

(2) The Skill the Defendant Posses or Holds Himself out as such. Where a person posses special skill or pose himself as possessing or holding such skills it shall be his duty to exercise such care as a normal skillful member of his trade or profession, he is reasonably expected to exercise. Where such a skillful person is alleged to have committed negligence, in so exercising such care, his performance shall be judged in the normal standard, reasonably expected of an ordinary person with requisite skill in a similar profession or bisiness. The maxim is imperatia culpas ad numeratiu. See section 24 of the tort law of Anambra state, rule 10 for the rules of medical professional conduct for the Medical and Dental Practitioners revised edition 1995, see also UBA Ltd V Nkene Dilichukwu 1999 12 NWLR pt 629pg 132.

(3) T he Cost or Practicability of Avoiding the Harm. The risk must be balanced against the measures necessary to eliminate it and the practical measures which the defendant would have taken to avoid the harm woul be taken into consideration. In Latimar v. a.e.c. 1952 2QB pg 700 and 711, a factory floor became slippery as a result of flood. The occupants of the factory did everything possible to get rid of effects of the floor. Nevertheless, the plaintiff was injured and then sought to establish that the occupiers would have closed down the factory. The House of Lords per Lord Denning held that the risk of injury created by the slippery floor was not so great as to justify the closure of the factory. The defendants were thus not held liable.

4.0 CONCLUSION

The standard of care is that of the ordinary man of average intelligence in the position of the defendant or the actor. Extraordinary intelligence or foresight is not expected except where the defendant holds himself out to have such. A defendant is expected to be able to perceive the need of the "Neighbour" in carrying out his act. Paris v Stepney B. C. T., National Coal Board V J. E. Evans & Co. (1957). The greater the risk, the higher the standard of care which is expected of the defendant.

If no duty was owed, then there would be no breach. Duty of Care would not be owned if the plaintiff is not a "neighbor' that is somebody within reasonable contemplation.

5.0 SUMMARY

In this unit, you have learnt

1. The standard of Care
2. Skills of a reasonable person
3. Intelligence of a reasonable person.
4. The standard of conduct of a reasonable person.

6.0 TUTOR MARKED ASSIGNMENT

1. Critically examine the standard of a care required of the defendant in a case of Negligence.
2. Explain the Neighborhood principle enacted in Donoghue v Stephenson
3. The standard of a reasonable man is based on subjective criteria. Discuss.

7.0 REFERENCES/FURTHER READINGS

1. Bodunde Bankole: Torts: Law of Wrongful Conducts (1998) Libriservice Press, Lagos
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UNIT 3: PROOF OF NEGLIGENCE

CONTENT

1.0 INTRODUCTION

Negligence must be proved by whoever alleges it, if there is a duty and a breach of it but no injury or damage can be proved, an action in negligence would fail. If there is damages, it must be traceable to the breach. It must be a damage foreseeable to a reasonable man as likely to arise form the breach. The damage must not be too remote.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

a. Explain the circumstances of negligence act
b. Know the plea Res Ipsa Ioquitor
c. Know the appropriate condition under which Res ipsa loquitor will apply.

3.0 MAIN CONTENT

Proof of Damages

There are causation in fact and Causation Law. That of fact if first consider before that of Law.

You must prove that the breach of duty of care is the cause of damages. There is causation fact and Causation in Law. You must decide the issue of causation in fact before that of Law. Causation is concerned whether the breach of duty was a matter in fact the cause of the plaintiff damage. The remoteness of damages is concerned with the fact as a matter of Law; the breach of duty is the cause of the plaintiffs damage. The plaintiff is unable to prove that the defendant breach in actual fact causes his damage he will fail. The Court apply the "But for" test. If the plaintiff prove that but for the defendant negligence his damage wounding have occurred. He will succeed eg. Barnet v Chelsea & Kessigton Hospital Management (1969) 1 OB 428. In this case the deceased came to hospital complaining of vomiting after taking some tea. The nurse on duty phoned the doctor. But instead of the doctor coming he told the deceased to see his own general practitioner. Late in the day he died, it was found that he died of food poison. In an action by the wife against the hospital for the negligence of the

doctor. It was held that the doctor was actually in breach of his duty of care. And that breach was not the cause of the deceased death.

It was argued however, that even if the doctor treated him effectively he would still have died. He was not liable. See also Culther v Bedford Motors (1971) 1 OB 418.
Note that sometimes they may be more than one cause. Where the causes caused different types of damages each person will be liable for the consequences of his own act. Problem may however arise where the cause are merged. E.g. Parker v Willoughby (1970) A.C. 467. In this case the plaintiff was injured in his leg by the defendant negligence that caused him to be disabled and therefore unable to maintain his former job. He has to take on a lower paid job, a place where robbers attacked him and shot the already wounded leg and the leg had to be amputated. This happened before trial. The defendant argued that his negligence action was not the cause of the amputation and that the second injury had obtained his own injury. The court had that the defendant was still liable to the plaintiff since the only result of the robbers action was the amputation of an already damaged leg and therefore the defendant action was still the cause of the plaintiff loss.

More important than causation in fact is causation in law. It is evidence that a plaintiff cannot be made answerable for all the consequences of his actions without end. There must be a line drawn with regards to the consequences in which the defendant won't be too remote for . The question of causation in law is quite complex and sometimes the court had resorted to common sense and policy criteria rather than scientific criteria the case of the Munnity of war transport (1942) AC 127 where Lord Wright said that Causation can only be understand as the man in the street would understand it. And therefore the choice of the real or effective from out of a whole complex of factors must be made to apply to common sense of standard.

A similar view was expressed in another case where the judge said that the court will apply public policy experience, and a rough sense of justice in deciding the question of causation in Law.

It should be noted that this does not imply that the judges are to act as arbitrary because there are certain laid down principles which should guide the judges when making their decision. In fact what the judges are saying is that there must be a link between the defendant's action and the plaintiffs damage and such a link must not be disturbed by any other event or by the act of a 3rd party. Once there is intervention of a new course thereby making the link, the defendant ceases to be liable. There are two cases which compete against each other with regards to remoteness of damages. The first one is the direct consequences "Best" established by the case of Re-Polems (1921) 3 KB 560 that case states that the defendant is liable for all the consequences whether foreseeable or not which can be directly traced to his act.

The second application is to be found in the case of the wagon mand (1961) AC 388 which rest the "Reasonable foresight test". That text state that all consequences which could not reasonably be foreseen are too remote whether or not the flow directly from the defendant acts.

Re-Polems was decided by the house of Lords in England while wagon Mand by Privy Council. But Wagon Mand has in fact over rule Re-Polemis.

RE-POLEMIS case (1921). In this case, the charterer of a ship employed Stevedove to off-load a ship. Among the cargo in the ship were tins of Benzine some of which had leaked during the voyage and therefore a lot of petrol vapor has collected in the hold of the ship. The af's servant negligently dropped a plank on the hold which has leaked. This caused a spark which ignited the Benzines. And a fire which eschewed damage the ship. The arbitrator before whom the parties appeared held inter alia that the fire was caused by the spark from falling plank which came into content with petrol vapour. They also found that the spark itself could not reasonably have been anticipated by the falling of the plank even though some damages to the ship was foreseeable. Despite the findings of the arbitration, the court had the af was liable because of the fact that the ptfs damage was a direct resort of the af's negligence action. The court said that duty of care was me thing and that damage was another and that different tests apply to both issues.

Several years later the privy Council had the opportunity to decide on a similar issue in the case of the Wagon Mlaud. In this case a company O. T. Ltd had chartered a ship known as the Wagon Mound. The ship was anchored of a wharf belonging to C. Oil Coy for the purpose taking fule. The servant of O.T. Ltd Negligently split a large amount of oil on water and this quickly spread to outside of the Labour and onto the wharlf which belong to M.B. Ltd, where some wielding work was being carried out on a ship. Upon noticing the present of oil in the water the manager of M.B. Ltd ordered wedding work to stop the approaching the manager of C. Oil Coy as to the safety of continuing wedding work in view of /Oil on water at the wharlf. C. Oil Coy assured him that there was no fear and coupled with his own knowledge that it is not normal for water and oil to unite. He order4ed work to continue but with precautions. Some few days later the oil caught fire and caused extensive damage to M.D. Wharlf. M.S. sued the af for negligence. It was found as a fact that it was foreseeable for oil on water to catch fire. It was also found that some damages were caused to M.D. Wharlf. The trial Court held the af was liable on the decision of re-polmis and held the af liable. The privy council however held that the af was not liable because it was not reasonably foreseeable that such a damage will occur. The damage for fire was not reasonable foreseeable. The privy council mentioned that the RE-Polimis was no longer good law. And prompted out that it will be illogical to apply different tests to the issue of duty of care and that of remoteness of damage.

When this test is applied it is evidence that the differences will only be liable for such damages that can be foreseen. The wagon mould case had been applied in various cases.

Hughes v Lord Advocate (1963) AC 838. A man hole in Edinburg Street was opened under statutory powers for the purpose of manetiaing underground telephone equipment. It was covered with a flut and in the evening, left by the workman unguarded but surrounded by warning paraffin . an 8 years old boy entered the tent and knocked and towered one the the lamp into the hole. Na explosion occurred amusing him to fall into the hole and severely burnt.

Held: that the workman were a breach of duty of care to safe-guard the boy against the type of occurrence which arising from a known source of danger. The lamp was reasonably foreseeable that source of danger acted man unpredictable way.

Doughty v Turner Manufacturing Coy. (1964) 1 QB 508. The af placed over a heat treatment bath containing cover sodium cyaride as a were hot molten liquid. The def employee carelessly dislodged this cover so that it showered his bath. The molten liquid exploded, emptied from the bath and damaged the pf workman nearly. Although it was foreseeable that damage by splashing would require soft from dislodging the cover. It was not foreseeable what an explosion would ensued Held: the afs were held liable, even though the kind of harm, damage by burning was foreseeable. They would have been liable for damage by splashing; the risk of damage by explosion was not foreseeable.

See Tremain v. Pike (1969) 3 A.E. R 1303. Here the damage suffered by the fp was unforseable. The pf suffered wills disease which was contacted through rat urine. The pf therefore escaped liability.

There is one area which however was not effected by the Wagon Mound, that area is the “Eggs Shells Skulls Personality” i.e. where a person suffered an unusual kind of peculiar weakness. The E-Polemis case is the only one that can apply. In this case the court will not apply the reasonable foresight test. This means that you take your victim as you find it.

See Smith V. Leech Brain & Co. (1962)2 QB 405. The Judge in the case say that it was obvious that the Privy Council could not have intended their decision in the wagon mound to apply to the decision in Egg Shell Cases and that this area is still governed by Re-Polimis decision. Here a Burn was negligently inflicted on the pf lips. This developed into cancer and killed the man 2 years later. It was found that the man’s lip before the burn was already in a pre-malgnant state, but the burn merely made the cancer to develop quicker, the pf were nontheless held liable because according to the law he must take his victim as he found him Malcom v Broad (1970) 3 A. E. R 508

Robbinson v Post Office(1974) 1 WLR 1176. The pf was injured by the negligence of the df. The pf was taken to a hospital were anti-tatanus syrup was administered to him by a Doctor. Unfortunately, the pf was allegic to that injection and suffered brain damage. He still sued the df for that damage and the question was that whether the af was liable offered other people takes it without any problem. It was held that the af was liable. He must take his victim as he find him, since it was his action that brought the pf into that state and he will be liable for any reaction by the pf. In Smith and Each Brain Co. it was held that the privy Council did not mean that the wagon mound case affects egg shell skull personality, when they said Re-Polemis is no longer a good law.

Novus Causa

The inter: The principle states that the df were not be liable for damages resulting from intervening factor. The handling of Nova Causa under the direct consequences test lead to the definition being liable for all the direct consequences of the df action until a new intervening event breads the chair of causation. The handling of the nova causa include the wagon mound posses the question whether it intervening event was foreseeable, if it was, it follows that the chair of causation is not broken and the df were still be liable for the damage. The effect of a successful plea of nova causa is to render the df not liable for the alleged damage. Where however the pleas fail, the df will continue to be liable for the injury. Stansaby v Trowunmi (1948) 2 KB 48.

Wieland v Cereals Lord Carpet (1969) 3 All ER 1006. The pf was injured by the negligence of the df as a result of the injury the pf had to wear a collar all the time and this made it difficult for her to adjust his spectacle, she had a fail and substained further injuries and sued the df for this first injury. The df argued that the fall was an intervening force for which he should not be held responsible but the Co not had that the fall and injury was attribute to the original negligence of the df and the this was a foreseeable consequence of the former injury and therefore there has not been an intervening event breaking the chain of causation contrast. See Melon v Holland (1969) 3 AER 62

The pf was injured by the df negligence as a result of the injury his left leg sometimes gave way. He went to view a home with his wife, brother-in-law and like daughter. He tried to descend stairs without hand rails and holding his little daughter and jumped to avoid a fall and thereby badly fracturing his ankle. He claimed damages from the df for this further injury but the Court held that the pf's action was unreasonable in that knowing his condition his condition he failed to seek the assistance of his wife and brother-in-law while desending. Consequently, there has been a new intervention breaking the chain of causation and the df will not be liable. See Crossley v Rawlingson (1981) 3 AER 674

The df was driving a lorry when the tarpaulin in his lorry caught fire. He stopped about a two yards from a petrol house. A petrol man picked a fire-extinguisher and ran towards the lorry and was injured before he got there. His action against the df failed because although the df foresaw that people will come and rescue, he did not foresee injury on the way and consequently the claiming of causation is broken and the df will not be liable for injury. See Knightly v. John (1982) 1 AER 351

Accident happened near the exit of a tunnel carrying one way traffic. The Policeman on duty realizing that he had forgotten to close the turnel to incoming traffic ordered two inspector to go and close the turnel. The two officers that rode back against the outcoming traffic. Both the inspectore and the pf acted contrary to laid down police standing order in ordering and carrying out the order. The pf claimed demages from the df. It was held inter alia the not df the imspectore and the chief constable. The accepted negligence but claimed that also John Manga v Drew . (1970) NNLR 62
Held: the amputation of the pf leg was necessitated by the infection picked up during the interval into the pf self discharge from hospital against expert medical advice and his readmission into another hospital and therefore the df will not be liable for eht injury which be come not reasonably have foreseen, there was a break in the chain of causation

Ekwo v Enechuchkwu 14 WACA 512
Held:- The Chair of Causation was not broken when the pf refused to be taken to a regular doctor where but demanded to be taken to a native doctor where he picked up an infection resulting into amputation of his finger, this was because of the wide spread belief in native doctors in Nigeria especially in mending broken bones and where the person is an illiterate.

PROOF OF NEGLIGENCE: RES IPSA LOQUITOR

Scott v London and st Katherine Cockes (1855) 3 H of L 596. The pf a custom officer was passing through the door of the df warehouse when 6 bags of sugar fell on him. The judge of first instance directed a discharge verdict for the df on the ground of lack of negligence, the court of Appeal ordered a retrial and if was in that case that the rule “res ipsa loquitor was formulated.

Earl C. J state as follows:
The Appeal Court ordered a retrial and it was that case that the maxim or rule Res Ipasa loquitor was formulated. Earl C. J, Stated as follows:
There must be reasonable evidence of negligence but where the thing is shown to be under the management of the servant and the accident in such as in the ordinary course of thing does not happen if those who have the mearging use proper care, it afford reasonable evidence in the absence of explanation by the df that the accident arose from the wants of care. The statement above two problem;
(1) When does the doctrine applies

(2) What is the effect when it is applied

Regarding the first one it appears that 3 condition must be fortified for res ipsa loquitor to apply. The facts relating to the accident must not be known, there must be amasement of explanation of the accident. Once the of the accident are known then res ipsa loquitor fail or thing the pf have to prove his care as in the ordinary care of negligence. See Barkway v SmithWales Transport Co. Ltd (1950) 1 All ER 392.

In that care the pf was in a vehicle managed by the df when the namely would to the wrong side and fail over and the pf was injured. It was found that there was a defect in one of the tyres and they if the df had co-operated a proper system of checking vehicle that defect might whether res ipsa loquitor apply. The Court held it does not be the facts are known. See Anichebe v Oyekwe (1985) NWLR 100. There a lorry being driven by the df crushed the brother of the pf. The df claimed that the accident happen the ilbrat in lorry was loose and therefore broken and that he was unable to help the accident from occurring to avoid the accident that happened. Although the Court held that there was an explanation. By the df it was not sufficient to or ra the inference of negligence raised by the happen of the accident therefore res ipasa loquitor apply and the df was held liable. See Okeke v. Obidife (1985) 1 All NLR 50.

Oliya v. Osasami (1969-71) WNLR 264
The pf was there injured when a Grand being operated by the several of the df fail on him. The df offered no explanation as to why the train fail without negligence on their path and it was held that res ipsa loquitor apply. They were held liable.

Jacob Akintola (1974) 6 CACJ 601. It was held that res ipsa loquitore apply. The pf wife was killed in a motor accident. The pf was not at the scene of accident to narrate what happen and no witness were called to say what happen. The Court held tht the doctrine apply only where there is some evidence from which negligence may be inferred. Consequently where there is no evidence from which negligence may be presume. Res ipsa loquitor will not apply. The pf was driving his care on one side of a dual carriage road at Agodi Ibadan. The tyre of a bus driven on the other side of the road brushed and he collided with the care of the pf on the other side of the road. The driver of the bus plead inevitability of accident but this could not obviate the doctrine of res ipsa loquitor as he was held liable.

Kuti V Gbodo (1962) N MLR 419. The pf was injured when the lorry in which he was travelling from Oloto to Ijebu-ode skidded on a wet road, crushed into a pillar of a bridge and overturned. The judge held that rtes ipsa loquitor applies this was affirmed by the Supreme Court.

Esan v. London & North Eastern Railway ((1944) 2 KB 421. A child, aged 4 years fell down in the carrier of the train belonging to the df while the train was in

motion and injured and was injured. There being no evidence how the door was opened. Held, the mere fact that the door was opened was not of itself prima facie evidence of negligence against the Railway Co. The trial Justice said it is impossible to say the door of the train are continuous.

4.0 CONCLUSION

Negligence must be proof by whoever the three elements i.e. Duty of Care, Breach of Duty of Care and Damages (Injury) must be established. In the course of trial, however the burden of proof may shift to the defendant either to prove that the was not negligent or that the bore no duty.

Sometimes, the facts are over-whelming against the defendant he alone can explain the circumstances of the negligent act. In such a situation the plea of Res Ipsa Ioquitor "the thing speaks for itself" – will be made.

5.0 SUMMARY

In this unit, we learnt about

d. Duty of care
e. Breach of the duty of care
f. Standard of Care
g. Damage (injury) resulting from the breach of duty of care and the consequences that flows from the breach of the duty of care.

6.0 TUTOR MARKED ASSIGNMENT

What are the elements of negligence how are they established

7.0. REFERENCES/FURTHER READINGS

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UNIT 4: DEFENCES TO THE TORT OF NEGLIGENCE CONTRIBUTORY NEGLIGENCE AND VOLENTI NON FIT INJURIA

CONTENT

1.0 INTRODUCTION

In the last unit you learnt about Negligence and Consequences of Negligence action. There are two principal defences to negligence action.

Defences to the Tort of Negligence

1. Contributory Negligence
2. Volenti non fit injuria – defence of consent.

Civil liability of mescelaneous law provision. The Lagos State Edict for the Northern State S.5 Civil liability miscellaneous provision law No 20 1957 West/Midwest S.8 tort law at 122 19.

Esteem tort Law S. 7 (1962)
The effect of these laws which are similar in content is that the court now have power to apportion liability between pf and df. A df who is sued for negligence may raise the effect of contributory negligence on the part of the pf. Even though the pf may be guilty of contributory negligence the court can still go ahead to award part of the damages to be shared by the df. But the pf still share in the brunt. See Appah v E. A. Constain (1994) 1 All NWLR 235.

See Evans V S. B. Bakare (1974) NWLR 78. Collision between motorist and cyclist at road junction. The df was accused of not keeping proper lookout and of driving at fast speed. Demand of negligence by df alledging that the pf made sudden emerge into the road. Trial judge accepting df version of how accident happened and exonerating him from blame for the accident subsequent find of negligence against of one pf however, held mor to blame. The pf sued the df for the negligence driving of his motor car at Apapa wharf on 20/3/67 and the running into his motor car. The df denied negligence of any kind and alleged that it was the fault of the pf.. he judge reasoned with him but found him liable as far the collision between his care and pf the df appealed. The onus of proving his chain resorted on the pf as it is obvious that trial judge found the pf responsible for the accident for which he was claim damages.

Abraham Adegoke v CFAO. The deceased was injured by the df negligence during the cause of treatment he developed neumonia and subsequently die. The df pleaded that the death of the pf was not caused by the accident since there was a nova causa, the nemonia. The pf rejected this arguing because therwe was an appropriate causa connction between the df negligence and the Nemonia. Set in and there was no break in the chain of causation, the df was therefore liable for her diseased death.

Read the defence of Consent

Contributory Negligence

We mean the conduct of the pf which falls below what a reasonable man could observe for his non safety. When a pf sues a df for negligence, the df will accept negligence at will also blame the pf for his own fault and content that the pf should share in the loss. At common Law, the rule was very harsh because if there was any indication that the pf was partly responsible for the damage, he will loss all his claim. In other to mitigate this hardship the court introduced the lat opportunity rule i.e. that the df should be responsible because he had the last opportunity to avoid the damage and vice versa before the introduction of the civil liability Miscellaneous Act(1961) and Lagos State applicable laws Edict (1989) S. 11 for the Northern State S. 5 Civil liability miscellaneous provision law N0 2 (1957) for former west and mid-west N08 Torts Law Cap 122 (1959) Edition. East Torts Law Cap 122 1959 Edition. East Tort Law No 7 1962 S.3.

The present position under this law is that the Court now avoid fixed rules and there are provision for apportioning blames on the parties as a result of this law the pf will no longer fail because he was partly responsible but they will both pay for their part of the blame. The last apportunity rule was also abolished.

In any case you cannot hold a df liable for contributory negligence if the blame is entering on the pf.

Evans V S.B. Bakare (1974) NWLR 78.

The evidence as found and accepted by the trial judge was that the pf was negligently riding his motorcycle, emerged into the road and collided with the df's vechicle. The pf was entirely to blame for the accident but the trial judge erroneously applied the principle of contributory negligence. This was however offset by the court of appeal. See also Okuwodu V Alli (1957) WRNLR 195.

Held:- the pf who rested his arm on the window of his vehicle while it ws in motion was not contributory negligence while the df driving negligently brushed to arm. The af tried to plea that the pf was contributory negligence but the court rejected this contention and held the df wholly responsible. If appears that failure on the part of a motor-cyclist or his passenger to, wear crash-helmet is contributory negligence or their part for head injuries. See O Connel v Jackson (1972) 1 QB 270.

Contributory negligence was applied here were a motorcyclist failed to wear his crash helmet and was severely wounded because the injury would have been less severe if he had his crash helmet on.

Pasternack v Poulton (1973) 1 WLR 476.
The pf was being given a lift in the df car, when failed to strap on the seat belt: she did not care about it and the dfs himself did not ask her to put it on. The dfs car crashed and the pf was injured. She shed the df and the accepted negligence driving but contended that the pf was partly negligence for failing to use her seat-belt. An expert gave evidence that if she had warn her eat-belt, the injury wouldn't have been that severe. The court held her contributory negligence but for only 5%. See also Froom v Butcher (1974) 3 AER 520.

The pf did not wear the set belt while he was driving the df negligence crashed into the pfs car. In an action against the df the pf pleaded contributory negligence because the pf did not wear his seat belt because according to him people get trapped in a wreckage of an accident if he was seat belt but the court rejected his contention. It is for the df who alleges contributory negligence to prove it. With regard to adult it is easier but it may be more difficult in relation to children.

With respect to drunken drivers and passengers, it is held that a person is liable for contributory negligence if he travels in a car with a drivers who he knew has consumed enough alcohol as to impair his ability to drive safely.
Daun v Hamilton (1939) 1 KB 509.
The plea of volenti non fit injuria failed because he knew that the person giving him a lift was drunk but held that the pf was only contributory negligent.

Defence of Consent
Implies that the pf by his own free will and with the full appreciation of the danger has absolved the df from liability. The effect of this defance where it succeed means that the pf will not recover anything at all. The consent under this defence must be gentle. There must be no pressure or collusion of any sort e.g. Economic pressue may lead the pf to do what he would normally not do. There are some risky jobs undertaken by people because of economic pressure. Such a person who sues for injury as a result of such job will not be faced by the defance of volenti non fit injuria. See Smith v Baker (1891) A.C. 325.

The workman were working in a quarry. A crane was carrying heavy stones moving to and fro above them and they knew. The stone fell and injured the df. In an action against the df, they pleaded volenti not fit injuria but it failed.

Similarly, there must be no legal or moral kinds of pressure eg. In rescue cases – A person who goes but to rescue another person by reason of the negligence by another person will not have this defence against him as there is moral pressure.
Note: However, that the pf's action must be reasonable in the circumstances where it is a hopeless venture and where it will be clear to a reasonable man that it is risky then the defence will succeed but it will be difficult for the court to come to such a conclusion.

Note: that the injury in question must be within the risk assumed eg. Certain games involve certain injuries that the player should expect eg. A football game-player and spectator, but there is difference where a footballer deliberately kicks a football to hit a spectator or a player giving another player a punch. See Simms v Leigh Football Club (1969) 2 QER 923.

Woolridge v Summer (1962) 2 AER 978

In relation to drunken driver, it now appears that contributory negligence may succeed against a pf who discovers that the driver is drunk then decide to follow the driver.

Miller V Dacker
A plan of Volenti non fit injuria was allowed for a pf who followed a drunken driver but it was decided on its own merit.

UNIT 5: **OCCUPIER'S LIABILITY**

CONTENT

1.0 INTRODUCTION
2.0 OBJECTIVES
3.0 MAIN CONTENT

LAW REFORM TORTS LAW OF 1965

Section 7, 8, and 9 of the Law Reform (Torts) applies only to Lagos. With regard to the rest to the country there is no law. In Rivers State, a law similar to this is in the process of being enacted. In other states of the Federation, it is till the common law that governs the liability of the occupier.

Section 7(1) of that Law, provides that as far as Lagos is concerned, the provision of the law has replaced the common law with regard to the occupiers liability to visitors. The statutory provision does not apply to trespassers and also with regards to the state and condition of the land and the activities carried out on the land as well as things omitted to be done on the land. It is possible for the occupier to restrict, extend or modify his duty towards visitors that come upon his land. It is also possible for him to place volenti non fit injuria against the visitor where the visitor himself has accented to the injury or consent.

Section 8 contains the nature of the duty owned by the occupier to the visitor. It is regarded or refers to as the common duty of care and this common duty is the duty to ensure a visitor who comes upon the land is reasonably save.

Section 8 (3) (b) also requires an addition to the common duty of care owed to all visitors. An occupier must be prepared for children to be less careful than adult.

Section 8(3)(b) relates to independent contractors. An independent contractor who is employed by the occupier to work on his land is expected to appreciate such danger that arises from his calling. An occupier is not supposed to warn an independent contractor of such dangers. However, if there is a hidden danger like an exposed wire, known to the occupier he is expected to warn the contractors.

In Roles v Nathern (2963) 2 All ER 908, two chimmy sweepers were employed by the occupier to sweep out his chimmy. They went into the boiler to clean it while it was

being fired by coal. The two of them were choked to death form the carbon-monoxide which was emitted into the boiler. The occupier was sued in respect of damages for their death. It was held that the occupier was not liable because the normal danger arising form the calling of those sweepers and it was not the occupiers that should warn them but they should know and guard against it.

It should be noted that there can be two occupiers at the same time. For example, a landlord lends out his premises to a tenant but reserves sufficient right as to be regarded as having control over the premises. If a visitor is injured both the landlord and the tenant may be sued jointly and severely.

An occupier is a person in control of premises or in control of something on land. A binding machinery may be on land and the person who operates the machinery is said to be in control of such machinery.
As Lord Denny said in Wheat v Leoen (1966) A.C. 552, if a person has any degree of control of premises he is an occupier. See also Fisher v Chit (1965) 1 WLR 393 or 2 All ER 601.

As far as the dangers protected by the action are concerned, the dangers arising from the state and condition of the land are covered by the Act and also danger arising form activities going on in the land. This includes Machinery and other potential dangers contemplated by the Act against which the visitors enjoy protection.

Duty Owed to Visitors

The warning must be sufficient to inform the visitors. As far as Children are concerned the occupier must ensure a high standard of care enough to protect the children from injury. In Glasgow Corporation v Taylor (1922) 1 AC 44, there was a botanical garden which was open to visitor to view. In this garden was a tree that had fruits that looked like cherry; a boy of 7 years who was a visitor in the botanical garden plucked the fruit, ate it and died. His next of kin sued the corporation. The Corporation was held liable. They argued that the boy was a trespasser who was allowed to admire the garden but not to pick fruit. The fruit was in fact poisonous and nothing was done to prevent children from moving near that tree.

It is stated that where a visitor gets injured despute the warning and with full knowledge of the danger, the occupier is not automatically exonerated. In this situation, court will still question whether, despite the warning and with full appreciation of the danger, the visitor reasonably incurred the injury. The duty of the occupier towards a visitor extends to the property of visitors.

OCCUPIERS LIABILITY
The relationship between the occupier and trespasser is still governed by common Law. Tresspassers are persons who force themselves into a relationship with the occupier. A trespasser is a person whose presence is unknown to the occupier and if it is known, it

will be objected to. A trespasser hardly enjoys any protection at Common Law. The only duty the occupier owes then is not to inflict injury on them or to act in reckless disregard of the safety of the trespasser.

In Addy v Dumbreche (1929) AC 358, a 4 year old was crushed by a trashing machine. manipulated by the defendant agent. The question was whether the injury was inflicted intentionally or otherwise. It was held that the injury was not inflicted intentionally and there was no liability.

While the occupier has the right to protect his property from a trespasser, he is not allowed to create restributory danger for that purpose like setting traps for the purpose of injuring trespasser.

In Bird v Halbrook, an occupier planted spring guns in order to protect his flower in his garden. A child who pursued a fowl into the garden was injured and he was held liable. It is difficult when a trespasser is aware of the danger and gets injured, an occupier will not be liable. Several attempts to bring about improvement in the position of the trespasser to that of the occupier failed. They tried to use the principle in Donoghue v Stephenson. The House of Lords rejected Lord Denning's position. It was not until the case in Brighton v British Rly Coy (1972) AC.

The occupier is not supposed to check his compound to make sure there is no trespasser. The case is different when dangerous activities are carried out in the premises. In that case, there is a higher duty of care.

The occupier is to give notice only of dangers he knows about or which a reasonable man ought to know to his trespasser.
The trespasser is to take the occupier as he finds him. An occupier who is not well to do is not under a duty to put high fence – warning will be enough. But there are exceptions as was laid down in Herringtons care covering children. There is still the distinction between children which is governed by the Law Reform (Torts) and the trespassing children which is governed by the common law. This rule is mainly for people who use their premises for extra ordinary purpose.

Palnmebt V MC Guines (1972) 2 QB 559. The def were demolishing a warehouse positioned near a public park for children and adult they set the building on fire and set 3 men to guard the premises. A child of 5 years approached the fire when the 3 men were absent from their post and while playing he fell into the fine and was badly burnt. The child had been wonderer of the premises before. In an action against the Co (df) they were held liable for the negligence of the 3 men who absconded their post. The court took according of the proximity of the park, the time at which the child was injured and also that the def should have known if about the attractiveness of fire by children. They were held liable for the injury sustained by the child.

Occupiers liability to children.

The law maintained a distinction between children visitors and trespassers. Child trespassers are owned the duty of common humanity. A child visitor is one who is in the premises by invitation, license or permission such a child is owned a common duty of care which recognizes that the characteristics of children should be taken into account when deciding the liability of occupier, reason being that children have a strong disposition onstery according to Lord Haminton in Lathern v R Johnson (1913) 1 KB 398 at 415 he said "The occupier must appreciate that in the case of infants there are moral as well a physical traps and accordingly there is a duty towards infants not to dig pit falls for their or land them into templation" this means that the occupier should not leave unattended situations or objects which may constitute an ailment to the child.

Glasgon Coprp v Taylor (Supra)
In the case of Goldman v Harrlyn (1943) KB 664. A boy who was on a threshing machine and was crushed when the workers started the machine. The court held that the df had left a dangerous machine in the land without taken precaution against children. Occupier were not be liable where there is no allurement or dangerous objects on the land. Latern v R. Johnson. There was a heap of stone on the occupier's premises. The kind was playing on the heaps when he was injured. In an action against the occupier held: The stones were not allurement neither were they dangerous, so the occupier will not be liable for children playing in his premises.

It is the court that decide whether a given object is an allurement. An allurement may seems to be not where it is reasonably guarded in order to prevent access of children. Similarly where there is adequate warning that is even obvious to a child. It was however said obiter that unguarded water will artificial or nature can never constitute an allurement. (No conclusive decision on this matter) Little v Torks Country Council (1934) 2 KB 101. An occupier was carrying out construction in his premises and left a heap of sand in his premises. A 7 year old boy was able to gain access through the sand to the well as he tried to balance on the well to demonstrate to his friends how he fly, he fell and got injured. In an action the court held that the heap of sand were not constitute an allurement.

With regard to very young children it appears from the Act tht in deciding the liability of the occupier all the circumstances of thee case must be taken into consideration or account. This evidently includes what is expected from the parent of such very young children as they ought to monitor where the children goes to or do. See Plubbs v Rochuster Corp (1955) 1 QB 450 it was indicated that with respect to very young children the occupier is not expected to make his premises as safe as nursery and that parent has a responsibility to ensure that places where they allow children to go are reasonable foreseeable.

4.0 CONCLUSION
There are three main difences are available in an action for negligence

1. Contributory Negligence
2. Invitable Accident and

3. Violenti non fit injuria

5.0 SUMMARY

In this unit we discussed the three main defences to the action of negligence namely volenti non fit injuria, inevitable accident and contributory negligence.

6.0 TUTOR MARKED ASSIGNMENT

1. What are the defences available in an action for negligence
2. What are the conditions for establishing the plea of Res Ipsa Ioquitor.

7.0 REFERENCES/FURTREHT READING

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
2. Fidelis Nwadalo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
3. John G. Fleming: The Law of Torts (1977), The Law Books Co. Ltd publisher, London. Sweet & Maxwell.
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MODULE FOUR

UNIT 1 DEFENCES TO THE TORT OF NEGLIGENCE

Table of Contents

1.0 INTRODUCTION

Voluntary assumption of risk as a defence to negligence corresponds to the plea of 'consent' in action for intended harm. No wrong is done to one who consents: Volenti non fit injuria. The basic idea is that the plaintiff by agreeing to assume the risk himself absolves the defendant from all responsibility for it.

2.0 OBJECTIVES

The purpose of this unit is to enable you to:

(i) understand the concept of voluntary assumption of risk;
(ii) define and discuss the meaning of volenti non fit injuria;
(iii) comprehend the implication of volenti non fit injuria on a plaintiff and the defendant;
(iv) understand the different ways under which a plaintiff can voluntarily assume risk.

3.0 MAIN CONTENT

There are two basic defences to negligence action i.e. Volenti non fit injuria and contributory negligence.

3.1 Express terms
3.2 Implied assumption of Risk
3.3 Restricted Risk

3.4 Volenti Non Fit Injuria

The phrase Volenti non fit injuria means no injury is done to one who consents. No person can enforce the right when he has voluntarily advised or abandoned that right. The maxi applies when the plaintiff voluntarily agree to undertake the legal risk of harm at his own expense. See the case of Ndubusi v. Olowoke (1997) 1 NWLR Pt. 429 CA 62. The defence of volenti is a very strong and complete defence and therefore where it is upheld it exonerates the defendant from liability completely. However, in order to succeed in the pleading of volenti non fit injuria, the following ingredients must be established:

(a) Voluntary: The plaintiff must have the new …… of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in the position to choose freely; this includes the absence from ….. mind …….. so that nothing shall interfere with the freedom of his will.

(b) Agreement: The maxim applies, where the parties have reached an express agreement that the plaintiff will voluntarily assume the risk of harm. The agreement must be made before the negligence act. See the case of Ndubusi supra.

In limited cases, the court will be prepared to imply the agreement to run with the risk. Example, where the plaintiff accepts a lift from a driver whom he knows to be so intoxicated as to be incapable of driving safely. He would be deemed to have consented to any negligence to the driver's part. In Morris v. Murray (1990) 3 All ER 801, the plaintiff went for a ride in a private plane piloted by the defendant despite the fact that he knew that the defendant was drunk. The plane crashed and the plaintiff was injured. It was held that the pilot's drunkenness was so extreme and obvious that participating in the flight was like engaging in an intrically and dangerous occupation. Defence of volenti succeeded.

3.5 Contributory Negligence

Contributory negligence applies where the damage the plaintiff has suffered was partly by his own fault and partly by the fault of the defendant. Open JCA in Sheun v. Afere (1998) NWLR Pt. 546 CA 119 said:

> "….contributory negligence means that the party charged is primarily liable but that the party charging him contributed by his own negligence to what eventually happened. A party having admitted primarily liability of negligence has a duty to establish that the other party contributed to what happened".

From the foregoing judicial authority, in order to succeed in the defence of contributory negligence, the defendant must prove that the plaintiff has failed to take reasonable care of his own safety and this failure was a cause of his damage.

The old common law rule was that if the harm done to the plaintiff was due partly to his own fault, he would recover nothing from the defendant. The rule imported hardship to the plaintiff and therefore it was replaced by Section 1 (1) of the Law Reform (Contributory) Negligence Act

1945. The Act makes the defence of contributory negligence the mitigating factor and not a complete defence.

Various torts law in Nigeria have incorporated the provision of the Section 1 (1) of the Law Reform (Contributory) Negligence Act 1945 above. Then in National Bank of Nigeria v. T.A.F.A. (1996) 8 NWLR Pt. 468, it was clearly stated that:

> "where any person suffers damage as a result of partly his own fault and partly as a result of the fault of any other person, the claim in respect of that damage shall not be defeated by reason of the fault of the person suffering damage. But a damage recoverable in respect thereof shall be deduced from such extent as the court deems fit".

Contributory negligence is based on the failure of the plaintiff to take reasonable care of himself in his own safety. See the case of D. Connell v. Samsung.

Under the defence of volenti non fit injuria, contributory negligence if ….. succeed the plaintiff will have his damages reduced by the court in proportion to his fault. It is therefore a mitigating factor and not a complete defence.

4.0 CONCLUSION

"A volunteer cannot complain of injury". If a man consents to an act either expressly or impliedly, he cannot be heard to complain of any injury he suffers as a result of the act. Thus, a footballer may be taken to have consented to any injury he suffers during a football match.

5.0 SUMMARY

In this unit, you learnt about the principles of:

(i) volenti non fit injuria;
(j) the implication of voluntary assuming a risk;
(k) the distinction between volenti non fit injuria and the duty of care; and
(l) the ways risk could be assumed by a plaintiff.

6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the term 'volenti non fit injuria'.
2. Discuss the implication of voluntary assumption of risk on a plaintiff and a defendant.

7.0 REFERENCES AND FURTHER READINGS

Bodunde, Bankole (1998). Torts, Law of Wrongful Conduct. Lagos: Libriservices Press.

Kohdiye, G. and Aluko, O. (1999). Nigeria Law of Torts. Ibadan: Spectrum Publishers.

Fleming, John G. (1997). The Law of Torts. London. The Lawbook Copublishers.

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UNIT 2: MISTAKE

1. Introduction
2. Objective
3. Main Content
   3.1 Mistake
   3.2 Defences to the tort of Mistake
4. Conclusion
5. Summary
6. Tutor Marked Assignment
7. References/Further Readings

1.0 INTRODUCTION

Aperson who has intentionally invaded another interest so that ordinarily liability will ensure may yet be excused because his conduct is priviledge in the particular circumstance. As the early common Law attached liability to trespass on mere proof of direct causation it became necessary after the later admission if exculpatory consideration for the defendant to "justify" or "excuse" his conduct by specially pleading and proving the circumstances which destroyed its actionable quality. This justification became an affirmative defence.

2.0 OBJECTIVES

At the end of this unit, you should be able to;

a. Define the Concept Mistake
b. Explain the term Mistake
c. Explain under the circumstances where the defence of Mistake can avail a defendant.
d. Explain when a defendant can held for Responsible for avoidable mistake.

3.0 MAIN CONTENT

Mistake, the consequences of an act is often intended but the error consist in that such result does not constitute an invasion of another's legally protected interest Beals V Hayward(1960) N.ZLI. 131 where a gun was fired arronously his direction, erroneously believing that it contained only a blank catridge. To illustrate this

further one who cuts down a tree in the vicinity of his boundary in such a manner that it will in all probability fall on his own land commits but an accidental trespass if it crashes unto his neighbor's. the unauthorized entry, which is the injurious effect of his activity, was neither intended nor reasonably to be anticipated and he is consequently absolved now that such an accidental trespass is no longer actionable. On the other hand, if he had thought that he owned all the lands on which the tree would possibly fall and intentionally cut it so that it would come down on land which turns out to be his neighbors, he has committed an intentional trespass under mistake. Such a mistake, even if one which a reasonable man might have made, is not as a general rule admitted as an excuse to civil liability.

3.1 Mistake

A person who does or omit to do an act under an honest and reasonable but mistaken belief in the existence of any state of thing is not criminally responsible for the act or omission to any greater extent than if real state of things has been such as he believe to exist. The operation of this rule may be excluded by the express or implied provision of the law relating to the subject.

Although the strictly liability of the early law of trespass has today been replaced by necessity of proving fault, defendants continues as a general rule, to be held responsible for unavoidance mistakes. The distinction between accident and mistakes calls for explanation. Intention, negligence and accident have reference to the consequences produced by conduct and not to the conduct itself because otherwise almost all torts would be intentional in the sense that the actions bodily activities was intended. An intentional tort, property so called, is one in which the wrong doer either desires to bring about a result which is an injury to another or believes that the result is substantially certain to follow from what he does. A negligent tort is one where the defendant as a reasonable person, should have foreseen that his conduct involves a foreseeable risk though falling short of substantial certainty that such a result would ensue. Inevitable accident finally, refers to cases where the particular consequences was neither intended nor so probable as to make it negligent. By contrast, in cases of mistake the consequences was neither intended nor probable as to make it negligent. By contrast, in case of mistake the consequences is often

intended and the error consists in thinking that such a result does not constitute an invasion of another's legally protected interests. An example is one who cuts down a tree in the vicinity of his boundary in such a manner that it will in all probability fall on his own land commits but an accidental trespass, if it crashes unto his neighbours. The unauthorized entry, which is the injurious effect of his action was neither intended nor reasonably to be anticipated and he is consequently absolved now that such an accidental trespass is no longer actionable. On the other hand, if he had thought that he owned all the land on which the tree would possibly fall and intentionally cut it so that it would come down on land which turns out to be his neighbor, he has committed an intentional trespass under mistake, the actual result which has come to pass was intended under the erroneous notion that it would not violate another's rights. Such a mistake, even if one which a reasonabl3e man might have made, is not as a general rule admitted as an excuse to civil liability.

Self Assessment Exercise
Discuss the Raito in Ogwu v R. (1969) NRLR

3.2 Defence of Mistake

A person who does or omit to do an act under an honest and reasonable but mistaken belief in the existence of any state of thing is not criminally responsible for the act or omission to any greater extent than if real state of things has been such as he believe to exist. The operation of this rule may be excluded by the express or implied provision of the Law relating to the subject. Note. Before the defence of mistake can avail it must be a mistake of fact and not of Law.

In Ogwu v R. (1960) NRLSLR. 60 one of the accused said that he did not know that it was contrary to Law to pay a bribe in order to induce to appoint as village headman and tax collector. The Federal Supreme Court in reversing the judgment of the trial court rejected the defence of mistake as treated here for the court believe ignorance of the law is no excuse for criminal liability.

Note: it has been argued by Okonkwo Naish in their book "Criminal Law" that it there is evidence of the Law it may be strong evidence

that the accused could not have intended or had a guilty mind which the prosecution must proof.
In the case of IGPNEmeoso (1957) NRNLR 213.
The accuse had demanded money from another man alledging that he had committed adultery with the accused wife and that if he did not pay he would sue for compensation under native law and custom, as he would entitled against an adulterer. The magistrate not believing that adultery had in fact being committed convicted him under section 406 of the criminal code: Thomas j allowed the appeal even though in actual adultery had been committed with respect than this decision is erroneous – there is no property involved in this case, there demand made is as relating to adultery and not relating to property.

Self Assessment Exercise
Discuss how the level of literacy in a society can affect capability in the Law of Tort (RV Guardian).

It is also suggested that in a predominantly illiterate society wher access to the law is near nil and there is inadequate public awareness of position of the Law, ignorance of the Law ought to be considered in the accessment of criminal responsibility. This approach is similar to the position adopted in some scandernavian countries.

Furthermore, the mistake belief under S.25 must relate to the existence of a state of thing and not as to the result. If the accused is fully aware of all the circumstances i.e. where a man intending to steal form a house may be mistaken as to the fact that he was entering into a house by day where as the entry was by might.

R v Gouid (1960) QLR 293
The accused introduced glycerine, detol and surf into a female virginal in an attempt to abort her pregnancy the defence of mistake was rejected on the ground that the mistake was not the mistake as to the existence of the state of things but rather as a mistake as to what consequence which flows form an act.

Moreover, the mistake to be relied upon must not only be honest but reasonable, this is where the Nigeria code differ form the defence of mistake in England where as established in Morgan V

DPP (Supra) that it is sufficient it the mistake is honest but need not be reasonable.

Note: Why the requirement of honesty is essential a subjective test which will depend on the circumstances of the case and the situation in which the accuse find himself. The unsettled question is as to the scope of the requirement of reasonableness.

Gadam V R 14 WACA 442.

The WACA rejected the defence of mistake of fact by reason of which the accused believed that the miscarriage and mental illness of his wife was caused by a woman by reason of which he killed the woman. The Court said " it could be a dangerous precedent to recognize that because of a superstition which may lead to such a terrible result as is disclosed by the fact of this case is generally prevalent among the community is therefore reasonable. The courts must think in this regard before holding of such belief unreasonable.

Note: Okonkwo and Naish critised this judgement in their own opinion the test of reasonableness should not be according to the perception of a literate person rather the prevalent view in a community, the degree of the accused litracy should be the circumstances from which the court will come to a conclusion on such matter.

4.0 CONCLUSION

A trespasser who honestly believes that he is the owner or has his authority or merely mistakes the boundary is nonetheless responsible under the entery rule. For example some mistakes negative intent as when, digging a trench, it pierces the plaintiff's pipeline not knowing it was there. N.C.B. V Evans (1951) 2 KB 861. One who misappropriate another property does not escape responsibility own. An auctioner who sells and deliver goods on behalf that he has title, is nevertheless liable to the true owner for conversion.

5.0 SUMMARY

This unit has revealed the fact that:

a. Mistake of fact rather that mistake of Law is actionable per se.
b. Ignorance of the Law is no excuse
c. The defences to the concept of mistake.

6.0 TUTOR MARKED ASSIGNMENT

Gadan V. R Case was decided on the principle of a highly litrate society. But in view of the predominantly illiterate society we have in Nigeria can Gadan V R still be a good Law to be followed by other courts? Discuss.

7.0 REFERENCES/FURTHER READINGS

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
2. Fidelis Nwadalo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
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UNIT 3 OCCUPIERS LIABILITY

Table of Contents

1.0 INTRODUCTION

Occupiers' liability is the liability of the owners of premises or occupiers of premises. That liability is a compound of negligence, nuisance and the rule in Rylands v. Fletcher. The liability is also governed by statute particularly under the Law Reform (Tort) Law of Lagos State.

An occupier under the common law indicates a person who has some degree of control associated with and arising from his presence in and use of or activities in the premises. The liability of occupiers under the common law which applies in all parts of Nigeria apart from Lagos depends on the reason for the plaintiff's coming to the premises. He may come as a contracting party, as an invitee or hearse or as a trespasser.

2.0 OBJECTIVES

The purpose of this unit is to enable you to:

(i) define the concept occupier's liability;
(ii) understand the meaning of the term occupier's liability;
(iii) identify the law (tort) or statute that governed occupier's liability in Lagos and in other parts of Nigeria;
(iv) understand the liability of a plaintiff to:
  (a) a trespasser;
  (b) a contracting party;
  (c) an invitee; and
  (d) a licensee.

3.0 MAIN CONTENT

4.0 CONCLUSION

Liability is strict in those cases where the defendant is liable for damage caused by his act, irrespective of any fault on his part. "Where a man acts at his peril and is responsible for accidental harm independently of the existence of either wrongful intent or negligence". An occupier under the common law indicates a person who has some degree of control associated with and arising from his presence in and use of or activities in the premises.

5.0 SUMMARY

Generally, in this unit, you learnt about:

(a) whether the common law is applicable to occupier's liability in all States of the Federation;
(b) the position of law as it relates to Lagos State of Nigeria;
(c) the statutory provision under Law Reform (Tort) Laws of Lagos State of 2004 and we learnt about liability also is dependent on the reasons for the plaintiff's coming to the premises.

6.0 TUTOR MARKED ASSIGNMENT

1. What is the extent of an occupier's duty to:
   (i) invitee;
   (ii) a licensee;
   (iii) a trespasser.

2. Examine the nature of a duty which an occupier owes a child.

3. What is the import of the rule in Rylands v. Fletcher? Give instances when the rule may become applicable.

7.0 REFERENCES AND FURTHER READINGS

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
2. Fidelis Nwadalo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
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UNIT 4 DAMAGES

Table of Contents

1.0 INTRODUCTION

This is the third leg of proof required to establish negligence. If there is a duty and a breach of it but no injury or damage can be proved, an action in negligence will fail. If there is damage, it must be traceable to the breach. The connection between the defendant's conduct and the plaintiff's injury raises a congeries of problems which are conventionally canvassed in terms of remoteness of "damage" or proximate cause.

The other issue is to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. There must be a reasonable connection between the harm threatened and the harm done.

2.0 OBJECTIVES

The purpose of this unit is to enable you to:

(i) understand the term cause-in-fact i.e. whether the defendant's culpable conduct was a causally relevant factor;
(ii) the 'But for' Test;
(iii) multiple causes;
(iv) successive injuries;
(v) proximate cause;
(vi) direct consequences test.

3.0 MAIN CONTENT

After establishing that a duty of care is owed to him and there was a breach of same, the plaintiff must further establish and prove that he suffered damage which was not too remote as a result of the breach.

Damage constitutes consensus in fact and causation in law (i.e. remoteness).

3.1 Causation of Fact

This deal with the question whether it is a matter of fact that the damage was caused by the breach of duty. The approach mostly accepted by the court for assessing whether the defendant breach of duty is a factual cause of the plaintiff's damage is (BUT FOR) test i.e. whether the damage suffered by the plaintiff would not have happened or occurred "but for" the breach of duty.

In Benett v. Chelsa and Kersington Hospital Management Committee (1969) 1QB 429, the plaintiff's husband after taking tea complained of vomiting for 3 hours, he later in the night went to the defendant's hospital where the nurse on duty consulted the doctor on telephone. The latter informed the plaintiff to go and consult his own doctor the next morning. The plaintiff's husband later on the same day died of arsenical poisoning.

In an action for negligence brought against the hospital for the act of its servant, it was held that in failing to examine the deceased, the doctor was guilty of breach of duty of care, but this duty was, however, held not to be the cause of the death. This breach was not held to be the cause of the death because even if the deceased was examined, it could have been impossible to save his life. Thus, it could not be said that:

> "….. but for the doctor's negligence, the deceased would have lived"

3.2 Remoteness of Damage

This is known as concession in law. The question of remoteness arises only after concluding the question in fact. The essence of concession in law is to avoid the situation where the defendant liable ad infinitum (indefinitely); for all the consequences of the wrongful conduct. In certain cases, consequences of the defendant's tortuous conduct would be considered too remote if his wrongdoing to impose on him responsibilities for those consequences. The court, therefore, imposes the cut-off point beyond which the damage is said to be too remote.

An independent event which occurred after breach of duty and which contributed to the plaintiff's damage may break the chain of causation, so as to make the defendant not liable to any damage that occurs beyond this point. Where this occurs, the event is void to be novus actus intervenes.

In Monye v. Diurie (1970) NMOR 62, the plaintiff was knocked down as a result of careless driving of a lorry by the defendant. He suffered injury to his leg and was rushed to the hospital almost immediately. However, before completion of his treatment and against the doctor's medical advice, he discharged himself only to return after two days. The leg was infected and consequently it was amputated.

A claim for the loss of the leg brought against the defendant by the plaintiff failed because, though, it was forceable that the plaintiff would as a result of the accident sustained injury. It was not foreseeable that the defendant would against medical advice leave the hospital for two days leading to infection that necessitated the amputation of his leg. This was held to be too remote and the defendant was not held liable.

3.3 Damages

As we have seen, the primary remedy for a tort is damages, the purpose of which is normally to compensate the plaintiff for the harm he has suffered as a result of the defendant's tortuous conduct. This unit is concerned principally with the measure (or assessment) of damages, i.e. with the methods by which the court calculates the amount (the *quantum*) of compensation to which the plaintiff is entitled in a given case (Okafor v. Okitiakpe (1973) 2 S.C. 49, at p. 56; (1973) 3 E.C.S.L.R. 379, at pp. 382, 383, Dumez (Nig.) Ltd. V. Ogboli (1972) 3 S.C. 196 at pp. 204, 205: (1973) 3 U.I.L.R. 306 at p. 366).

Since the mode of assessment of damages differs from one tort to another, and according to whether the action is for personal injuries or damage to property, it will be necessary to consider the applicable principles of law with respect to each tort separately. First, however, the different kinds of damages must be stated briefly.

1. Compensatory Damages

This is the normal kind of damages awarded. Its purpose is to compensate the victim of a tort for the injury he has suffered, and it seeks to put him as far as possible in the position he would have been in had the tort not been committed. (Anumba v. Shohet (1965) 2 All N.L.R. 183, at p. 186).

2. Nominal Damages

Nominal damage are awarded in those cases where the plaintiff establishes a violation of his rights by the defendant, but he is unable to show that he suffered any actual damage as a result of the defendant's tort. Nominal damages are, therefore, most often awarded for those torts which are actionable *per se*, such as trespass and libel, and where the plaintiff can show no actual damage. (McGregor, Damages para. 308).

Nominal damages may also be awarded where the fact of damage is proved, but no evidence is given as to its extent, so that the assessment of compensatory damages is virtually impossible. (Akano v. National Electric Power Authority (1977) 3 CCHCJ 479).

1. Exemplary (or punitive) Damages

This class of damages is intended not to compensate the plaintiff but rather "to punish the defendant and to deter him from similar behaviour in the future". Exemplary damages is punitive damages and it is awarded where a party to the suit can show or establish by evidence that the injury or loss he has suffered is due to the malicious act of the party against whom he is claiming the exemplary damages.

In order to justify the award of exemplary damages, it is not sufficient to show merely that the defendant has committed a wrongful act. The conduct of the defendant must be high-handed, insolent, vindictive or malicious showing a contempt of the plaintiff's right or disregard of every principle which actuates the conduct of a gentleman. See J.M. Johnson vs. Mobil (1959) WNLR page 128 at 134 and William vs. Daily Times (1990) 1 NWLR part 124 page 31. Winfield and Jolowicz , op. cit. p. 593.

It is now established that exemplary damages may be awarded only in the following three circumstances:

(a) where the plaintiff has suffered from oppressive, arbitrary or unconstitutional action by a servant of the government (Rookes v. Barnard (1964) A.C. 1129, at p. 1226, per Lord Devlin; Garba v. Lagos City Council (1974) 3 CCHCJ 297, at p. 309; Oguche v. Iliyasu (1971) N.N.L.R. 157, at p. 167;

(b) where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and

(c) where statute so provides. (Ibid. at pp. 1226, 1227, See e.g. Drane v. Evangelou (1978) 1 W.L.R. 455 Cassell & Co. Ltd. V. Broome (1972) A.C. 1027.

2. Aggravated Damages

These may be awarded where the defendant's motives and conduct were such as to aggravate the injury to the plaintiff. They are a species of compensatory damages in that their purpose is to compensate the plaintiff for the injury to his feelings of dignity and pride, e.g. in cases of insolent and high-handed trespass to land (Dosunmu v. Lagos City Council (1966) L.L.R. 63) or to the person. (Nwankwa v. Ajaegbu (1978) 2 L.R.N. 230).

3. Contemptuous Damages

This type of damages may be awarded where the plaintiff establishes his right, but in the court's opinion the action should never have been brought, e.g., because of the triviality of the claim. Contemptuous damages are derisory e.g. 1k. Where contemptuous damages are awarded, the plaintiff may be deprived of his costs. (Winfield and Jolowicz, op. cit. p. 592).

4. General and Special Damages

Both of these are species of compensatory damages. "General damage" is such damage as the law will presume to have resulted from the defendant's tortuous conduct (e.g. the damage to reputation which is presumed in all cases of libel), and which does not have to be expressly pleaded by the plaintiff. "Special damages" is damage which the law does not presume, and which must therefore be specifically pleaded and proved (e.g. the loss of employment caused by a libel). In Bowen L.J's words: (Ratcliffe v. Evans (1892) 2 Q.B. 524 at p. 528).

> Special damage is the particular damage (beyond the general damage) which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.

In Dumez (Nig.) Ltd. V. Ogboli, the Supreme Court emphasised that:

> it is axiomatic that special damages must be strictly proved and (unlike general damages, where, if the plaintiff establishes in principle his legal entitlement to them, a trial judge must make his own assessment of the quantum of such general damages)… so far as special damages are concerned, a trial judge cannot make his own individual assessment but must act strictly on the

evidence before him which he accepts as establishing the amount to be awarded. 12a (1973) 3 U.I.L.R. 306, at p. 311, (1973) 3 S.C. 196, at pp. 204, 205.

Somewhat confusingly, in actions for personal injuries the terms "general" and "special" damages are used in a secondary sense. There, general damages are awarded for those items of damage which cannot be precisely calculated in money terms, such as pain and suffering, loss of amenities, loss of future earnings and loss of expectation of life; whilst special damages refer to those items of loss which are capable of precise calculation, such as damage to clothing, medical expenses already incurred and loss of earnings up to the date of judgement. (see p. 256, post).

4.0 CONCLUSION

As we have seen, the primary remedy for a tort is damages, the purpose of which is normally to compensate the plaintiff for the harm he suffered as a result of the defendant's tortuous conduct. This unit is concerned with the proximate cause of a tortuous act which can lead to damages.

5.0 SUMMARY

In this unit, you learnt:

(a) about the causally relevant factors i.e. cause in fact of a tortuous act;
(b) the "But for" test;
(c) multiple cause;
(d) proximate cause etc.

6.0 TUTOR MARKED ASSIGNMENT

1. What are the three elements of negligence and how are these established?

2. Explain the "But for test" with decided cases.

3. Explain the term cause-in-fact as it relates to tortuous act.

7.0 REFERENCES AND FURTHER READINGS

1. Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
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: The Criminal Procedure of the Northern States of Nigeria

UNIT 5 ASSESSMENT OF DAMAGES

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1.0 INTRODUCTION

The primary remedy for a tort is damages, the purpose of which is normally to compensate the plaintiff for the harm he has suffered as a result of the defendant's tortuous conduct. This unit is concerned principally with the measure (assessment) of damages i.e. with the methods by which the court calculates the amount (quantum) of compensation to which the plaintiff is entitled in a given case.

2.0 OBJECTIVES

The purpose of this unit is to enable you to:

(i) understand the term "quantum of damages' in which a plaintiff is entitled to in a given case;
(ii) understand that the mode of assessment of damages differs from one tort to another;
(iii) identify whether an action is for personal injuries or damage to property;
(iv) learn about the applicable principle of law with respect to each tort separately.

3.0 MAIN CONTENT

3.1 Compensating Damage
3.2 Nominal Damage
3.3 Exemplary (or Punitive) Damages
3.4 Aggravated Damages
3.5 Contemptuous Damages
3.6 General and Special Damages
3.7 Assessment of Damages in Particular Tort (a) Negligence, (b) Personal Injuries, and (c) Special Damages

3.7.1 Negligence

Damages in this tort fall under three main headings, namely:

(a) personal injuries
(b) fatal accidents, and
(c) damage to property.

Each of these must be considered in turn.

(a) Personal Injuries

(i) *Special damage*

As we have seen, special damage in actions for personal injuries includes loss and expenses incurred between the date of the accident and the date of judgement. Each item must be specifically pleaded and proved. Examples of special damage are: damage to clothing, damage to a vehicle, medical expenses, nursing fees, taxi fares to and from hospital, and loss of earnings during the period. (See p. 256, post). Under medical and nursing expenses, the plaintiff is entitled to claim the cost of treatment and care which he reasonably incurs as a result of his injuries. (See, e.g. Okolo v. Umoro (1973) W.S.C.A. 145, at pp. 147 – 152). Where the victim is nursed by a member of his family or a friend, he is entitled to the reasonable cost of such nursing services, even though he is not under any legal or moral obligation to pay the person who gives the services. (Cunningham v. Harrison (1975) Q. B. 942). In addition, a husband or father who incurs medical expenses on behalf of his injured wife or child, as the case may be, can himself recover those expenses from the tortfeasor. (Donnelly v. Joyce (1974) Q.B. 454).

(ii) *General damage*

This represents the loss to the plaintiff which cannot be precisely quantified. It includes all non-financial loss (past and future) and future financial loss. Items of general damage need not and should not be specifically pleaded, but some evidence of such damage is required. Heads of general damage are:

(a) pain and suffering
(b) loss of amenities
(c) loss of expectation of life
(d) future loss of earnings or earnings capacity
(e) future expenses.

In assessing general damages, a judge is not bound to refer to the established head of damage, and he may simply make a global award which takes into account the various items of loss or injury but which does not specify how much is being awarded under each head. Moreover, as Akibo Savage J. pointed out in Okuneye v. Lagos City Council (1973) 2 CCHCJ 39, at p. 43:

> "Turning now to general damages, the settled principle to be applied is that where injury is to be compensated by damages, the court should, as nearly as possible, get at that sum of money which will put the party who has been injured (or who has suffered) in the same position as he would have been in if he had not sustained or suffered the injury for which he is now to get compensation. In the case in hand, I ought to take into account the pain that the plaintiff suffered, the injury to his leg, and the handicap which he now suffers, in calculating the damages which, as far as money can do it, he should be paid for the loss he has suffered as the natural result of the wrong which has been done to him. In this respect, I have considered the fact that the plaintiff suffered a fracture of the left femur, as a result of which he was hospitalized for nearly three months, during which period he suffered pain…. I have also taken into consideration the fact that the plaintiff still suffers pain and that it is not advisable for him to drive his own car. The burden now rests on the plaintiff to procure the services of a professional driver. The plaintiff told me that he used to swim, play tennis and football. He said he could no longer do these things for reason of the injury to and shortening of his left leg.
>
> Counsel on either side had referred me to several decided cases in which varying sums of money have been awarded in cases of injury of different classes of claimants. These cases can only serve as a guide. (Ejisun v. Ajao (1975) N.M.L.R. 4, at p. 7). I think the plaintiff here must be given a compensation which, so far as money can do it, will make up for his loss, proportionate to his injury, and such as will be a fair assessment in the opinion of the reasonable man.

3.7.2 Methods of Assessment of Damages

A "convenient starting point in the consideration of the quantum of damages" (Osholake v. Lagos City Council (1972) 12 CCHCJ 56, at p. 63, per Kazeem J.) in Fatal Accident claims which has frequently been taken by the Nigerian courts (Nwafor v. Nduka (1972) 4 S.C. 2, at p. 6; Owolo v. Olise (1967) F.N.L.R. 179, at p. 187, Osholake v. Lagos City Council, supra) is the following passage from the judgement of Lord Wright in Davies v. Powell Duffryn Associated Colleries Ltd. (1942) A.C. 601, at p. 617:

> There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or a basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however has to be taxed down by having due regard

> to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt.

The principles of assessment were further explained and illustrated by Begho J. in Owolo v. Olise (Supra) case in which a 50-year-old man was knocked off his bicycle and killed by a negligent motorist, leaving a widow and eight children (Ibid, at p. 188):

> The number of years' purchase is the multiplier. To get the lump sum, the number of years' purchase is used in multiplying the annual value of the dependency. The annual value of dependency is arrived at by subtracting from the annual income and the annual amount required for the deceased's personal upkeep, such as feeding and clothing expenses and money spent on things like drinks and cigarettes, etc. Tax on the income or wages should also be subtracted.
>
> The number of years' purchase, or multiplier, is affected by many factors. Usually, most important factor is the age and expectation of life or working life of the deceased himself. He is the source of the dependency, which could not in any event have continued beyond the span of his life or working life. Another important factor is the possibility of remarriage in the case of a dependant widow. If she is young and attractive, the court may consider her marriage to be a strong possibility. If the widow is elderly as in this case (now 52 years old), or is of unattractive appearance of disposition, or suffers from some disability, or is encumbered with a large number of young children, the court may consider her chances by increasing the multiplier. So too the fact that there is no retiring age in the deceased's job and that the job is not hazardous may increase the multiplier. (The job of a solicitor's clerk is not hazardous and is one which a man may do till his death.) The future prospects of the deceased, if he had not been killed, will also affect the multiplier. If the deceased had good prospects of attaining a much greater wage or salary, or of achieving promotion to a much better position, the court will apply a higher multiplier. However, in the present case before me, there is no evidence that the deceased had good prospects of promotion or attaining a much greater wage or salary.

Thus, as in actions for personal injuries, the 'multiplier' approach is employed. However, one difference is that in personal injuries cases, the muplticand is an estimation of the plaintiff's annual loss or earnings, (see pp. 260, 261, ante) whereas in fatal accident claims it is an estimation of the annual value of the dependency, (Osholake v. Lagos City Council (1972) 12 CCHCJ 56, at p. 64, per Kazeem J.) i.e. of the amount which the deceased would have spent on his family. (See Ibolukwu v. Onoharigho (1964) 1 All N.L.R. 215, at p. 217 where the Supreme Court reduced the multiplicand because the trial judge had erroneously calculated it by reference to the total income of the deceased, whereas "the evidence did not support the view that she spent her whole income on maintaining her husband and children, and nothing on herself"). Thus, the multiplicand in a fatal accident claim is likely to be lower than in a personal injury claim. Furthermore, in choosing the appropriate multiplier in fatal accident claims, the age and health of the dependants and the uncertainties as to their future should be taken into account in addition to

the age, health and future prospects of the deceased. (Ibid, Owolo v. Olise, supra, at p. 268). The multiplier also is therefore likely to be lower than in personal injury cases.

In Owolo's case (1967) F.N.L.R. 179, the deceased was a law clerk of about 60 years of age. His widow was 52 and his surviving children were of between 10 and 32 years of age. Begho J. said (at p. 192):

> The job of a law clerk is not a strenuous one, at least the job cannot be regarded as a hazardous one, even bearing in mind the uncertainties of life. I therefore put the expectation of life at 14. Taking into consideration the expectation of life of the wife and the children, and also the fact that the wife's chances on the 'marriage mart' are very slim, if not nil, and also the fact that there is no retiring age for a law clerk, I think the number of years' purchase (or multiplier) should remain at 14.

In Osholake v. Lagos City Council (1972) 12 CCHCJ 56), the deceased was a 33-year-old assistant sales manager in a stationery supply company. His annual salary at the time of his death was £720. Kazeem J. accepted the plaintiff's evidence that the deceased had been the sole breadwinner of his family, and that out of the £720 earnings he was spending £500 for the maintenance of his wife and two children. The learned judge continued (at p. 64):

> The calculation of the multiplier is based on a number of factors, such as the life of the deceased himself, as he is the source of the dependency. But one must also consider the expectation of life of the dependants and in particular, where a husband is killed, of his widow. Another factor is the possibility of remarriage in the case of a dependant widow. If she is young and attractive, the court may consider her remarriage to be a strong probability. The future prospects of the deceased, if he had not been killed, will also affect the 'multiplier', but the court must also take into account the uncertainties of life in cases where the deceased was engaged in some specially hazardous employment.
> In the present case, very scanty evidence was adduced by the plaintiffs as to the expectation of the deceased's working life. Apart from the age of the deceased, which was given at 33 years at the time of his death, and that he earned £720 per annum as assistant sales manager within the three years of his appointment, the court was not told what further prospects the deceased has in the employment or how long he was expected to remain in such employment. I have therefore had very little assistance, if any, to enable me to decide the probable expectation of the deceased's working life.
>
> In the case of the widow's possibility of remarriage, there is no doubt that she is young and very attractive, but she was not asked any questions as to her possibility of remarrying and I was urged by learned counsel for the plaintiffs to exclude this possibility from

> my consideration. In Buckley v. Ford (1967) 1 All E.R. 539), Philimore J. excluded that possibility from his consideration of quantum damages when no question of remarriage was asked from the widow; and the Supreme Court of Nigeria seemed to have approved the stand in Nwafor v. Nduka (1972) 4 S.C. 4. Hence, I cannot consider the possibility of the widow remarrying in the present case.

After considering a number of English cases in which multipliers of between 11 and 14 were applied when the deceased were in their thirties and were survived in each case by a wife and between on and three children, the learned judge continued:

> In Nwafor v. Nduka (Ibolukwu v. Omoharigho (1964) 1 All N.L.R. 215, at 217, and in Oni v. Lagos City Council (1972) 10 CCHCJ 57, at p. 63), the Supreme Court of Nigeria approved the application of a multiplier of 12 years' purchase applied by the lower court in the case of a deceased aged 28 years who left a young widow and two children.
>
> After giving full consideration to the circumstances of the case, I have arrived at the conclusion that it would be reasonable to apply a multiplier of 12 years' purchase in this case.
>
> In the circumstances, on the basis of an annual value of dependency of £500, and a multiplier of 12 years' purchase, the total damages that would have accrued to the dependants would be £6,000 (Ibolukwu v. Onoharigho, supra, at p. 217). But I have already found That the deceased was 25 percent liable in causing the accident, hence This amount will be reduced to £4,500.

In Alliu Bello v. Attorney General of Oyo State (1986) 12 S.C. page 1, the deceased was executed by the squad of the Oyo State government and the Oyo State government was held vicariously liable for the action of the squad that executed the deceased. One of the issues that called for consideration at the Supreme Court is the formula to be adopted in the assessment of damages. The Supreme Court held that the formula for awarding damages is based on the expectation of the working life of a deceased scaled down to a number of years' purchase and then multiplied by the amount in cash the deceased spent annually on his dependants during his life time.

(b) Fatal Accidents

Where the victim of an accident caused wholly or partly by the defendant's negligence dies as a result of his injuries, the dependants of the deceased may recover compensation for his death from the defendant under the following statutes:

Fatal Accidents Law 1961, Cap. 40 (Lagos State)
Torts Law, Cap. 122 (Western States)
Fatal Accidents Law, Cap. 52 (Eastern States)
Fatal Accidents Law, Cap. 43 (Northern States)

A preliminary question may arise in a fatal accident claim in Nigeria where the action is in respect of an accident which occurred in a state other than that of the forum, and where different statutes apply in two states. In Amanambu v. Okafor (1966) 1 All N.L.R. 205; (1967) N.M.L.R. 118), the widow of a man who was killed in a road accident which took place near Lokoja in the then Northern Region brought an action against the driver of the offending vehicle in the High Court of the Eastern Region on behalf of herself and certain other dependants of the deceased, claiming damages under the Fatal Accidents Law of Eastern Nigeria (Cap. 52). The Supreme Court held that the action must fail since "in our view, the Fatal Accidents Law of Eastern Nigeria confers a right to sue for compensation in respect of a fatal accident which occurred in Eastern Nigeria and not outside it: for the legislature of Eastern Nigeria could only legislate for compensation in regard to such an accident". (at p. 207) However, the Court expressly left open the question as to whether the claim might have succeeded had it been based on the Fatal Accidents Law of Northern Nigeria (Cap. 43) instead of on the Eastern Nigeria statute. One year later, in Benson v. Ashiru (1967) 1 All N.L.R. 184), a differently constituted Supreme Court adopted a different approach. In this case, an action was brought to the Lagos High Court under the Fatal Accident Act 1846 (an English statute of general application then in force in the Federal Territory of Lagos) in respect of an accident which had occurred at Iperu, a town in the then Western Nigeria, where the Torts Law (Cap. 122) and not the Fatal Accident Act was in force. Without expressly disapproving Amanambu v. Okafor (Supra) the Supreme Court side-stepped that decision in the Lagos High Court, on the following grounds (1967) 1 All N.L.R. 184, at p. 188):

(i) Under the relevant English common law rules of private international law (Phillips v. Eyre (1870) 40 L.J.Q.B. 28), which applied in the High Court of Lagos, the latter court had jurisdiction over the action;

(ii) It was necessary for the plaintiff to refer in his pleadings to the statute on which he relied (in this case the Torts Law Cap. 122). The plaintiff would not be debarred from relying on the Law on the ground that he had not pleaded it, since under section 73 (1) (a) of the Evidence Act (Cap. 62) the High Court must take judicial notice of the laws in force in any part of Nigeria, and it was unnecessary to plead matters of which the High Court takes judicial notice;

(iii) No defence would have been available under the Torts Law which was not equally available on the action as framed;

(iv) In any case, section 22 of the Supreme Court Act 1960 (No. 12) empowered the Supreme Court to amend any error or defect in the record over the proceedings as that of the trial court, which would include the power to permit the plaintiff to amend his writ by striking out references to the Fatal Accident Act 1846 and substituting references to the Torts Law Cap. 122.

In Uko v. West African Portland Cement Co. Ltd. (1973) 9 CCHCJ 11 Odesanja J. decided that, in so far as Benson v. Ashiru (1967) 1 All N.L.R. 184 was difficult to reconcile with Amanambu v. Okafor (1966) 1 All N.L.R. 205; (1967) N.M.L.R. 118) he preferred to rely entirely on the former case, and it is submitted with respect that he was correct in so deciding, for, as the Supreme Court pointed out in Benson's case, the rules of private international law permit a court in one State to exercise jurisdiction over claims arising from torts committed in other States in

defined circumstances. Furthermore, as Odesanya J. emphasised, there is ample authority for allowing such actions under the applicable Rules of Court.

The learned judge said (1973) 9 CCHCJ at p. 13):

> The accident occurred in the Western State and there the cause of action arose. Nevertheless the action has been instituted here in Lagos State. Under Order VII, rule 4 of this Court's Civil Procedure Rules, this suit, founded as it is on a tort, or rather statutory liability for fatal accidents, may be commenced and determined in the judicial division in which the defendants reside. In fact, under rule 5, even if the suit has been wrongly commenced here, I have a discretion whether to allow it to be determined here or not.

Persons entitled to benefit

The classes of dependant who are entitled to be compensated under the Fatal Accidents legislation are members of the deceased's "immediate family", which is defined in the statutes as including the deceased's husband, wife or wives, parents and children (see Appendix post). The Fatal Accidents Law of the eastern states gives a wider definition which includes, in addition, the deceased's brothers and sisters and the nephews and nieces of the deceased who were under the age of 16 at the time of the death and were being maintained by the deceased.

A case in which a claimant was held not to come within the definition of "child" in the Torts Law of the western states is Dogbo v. Akinwande (1974) 8 Nig. L.J. 134. Here the plaintiffs claimed damages as dependants of their deceased aunt, who had been in loco parentis to them. The lower court found that there was a gap in the Law since it failed to provide for persons in the position of the plaintiffs' and went on to hold that since under the local customary law, the plaintiffs could be regarded as "children" of the deceased, they were entitled to claim under the law. The Western State Court of Appeal, however, overruled this decision on the grounds:

> (a) that, as a general rule, a court is bound to apply a statute as it stands and is not entitled to fill in what it regards as omissions or gaps;
>
> (b) that the word "child" is defined in section 5 of the Torts Law, and it is within the confines of that definition that the court must determine whether the plaintiff is entitled to claim or not; and
>
> (c) under the Torts Law the proper test for determining whether or not the plaintiff qualifies as a claimant is whether he or she is the husband, wife, parents or child of the deceased, and not whether he or she was in fact dependent upon the deceased (See also e.g. Oni v. Lagos City Council (1972) 10 CCHCJ 57 (niece unable to claim) and Okoroafor v. Adebayo (1977) 2 CCHCJ 243 (uncle unable to claim). Proof of dependency is, However, an additional requirement (see p. 271, post).

The statutes provide (See p. 310, post) that the action on behalf of the dependants must be brought within three years after the death, by and in the name of the executor or administrator of the deceased, but that (a) if there is no executor or administrator, or (b) if the executor or administrator does not commence an action within 6 months of the death, then any dependant who qualifies as a claimant under the Acts may sue in his own name on behalf of himself and the others.

(c) Damage to Property

Where the plaintiff's property is not lost, destroyed, or damaged in consequence of the defendant's tort, the aim of the law is restitutio in integrum i.e. to restore the plaintiff as far as possible to the position he would have been in had the loss not been inflicted. (Armel's Transport Ltd. V. Martins (1970) 1 All N.L.R. 27, at p. 32; Lagos City Council v. Unachukwu (1978) 1 LRN 142, at pp. 143, 144). The method of computation differs, however, according to whether it plaintiff's property is (1) totally lost or destroyed, or (2) merely damaged and repairable (1978) 1 L.R.N., at p. 144).

3.7.3 Loss or destruction

The measure of damages in cases where the plaintiff's vehicle is totally lost or destroyed by the defendant's negligence was laid down in the leading case of Kerewi v. Odegbeson (1965) 1 All N.L.R. 95, at p. 99) to be "the value of the car at the time of the accident plus such further sum as would compensate the owner for loss of earnings and the inconvenience of being without a car during the period reasonably required for procuring another car"; and the same formula was applied to other classes of goods by the Supreme Court in Lagos City Council v. Unachukwu (1978) 1 L.R.N. 142, at p. 144.

Where the goods destroyed were not new at the time of the accident, e.g. where a used vehicle is "written-off" in a collision, there may be some difficulty in assessing its immediate pre-accident value. In Alabilogbo v. Sofowora (1972) 8 CCHCJ 21, the plaintiff's Bedford lorry was destroyed in a collision with the defendant's vehicle. Evidence was given as to the original cost of the vehicle, but none as to its value at the time of accident. Kazeem J. approached the matter thus (at p. 26):

> It was held in Ubani-Ukoma v. Nicol (1962) 1 All N.L.R. 105 that the market value of a used chattel is the sum it would fetch under the state of things for the time being existing, and that it was a matter for estimation. In arriving at such estimation, its age, the mileage covered and the fact that such model as no longer available on the Nigerian market should be taken into consideration.

In the present case there was no evidence as to the vehicle's mileage, but it was proved that the vehicle was about one-year old and net profits of £12 per day were claimed. The learned judge therefore concluded that "having regard to the extensive use that was made of the vehicle in

realizing a sum of £4,500 within a year, I think it would be a fair estimate that the useful life of the vehicle could not be more than three years. On that basis I would estimate the market value of the plaintiff's vehicle at the time of the collision as two thirds of the original value of the vehicle plus the cost of accessories".

In addition to the pre-accident value of the chattel, the plaintiff is also entitled to be compensated for any loss of earnings (e.g. where a commercial vehicle or taxi-cab is destroyed) and the inconvenience arising from his being deprived of the use of the chattel during the period reasonably required for procuring a replacement (Kerewi v. Odegbeson, supra). What is a reasonable period for acquiring a replacement will vary according to circumstances, but in all cases the plaintiff is under a duty to mitigate his loss (see Chukwu v. Uhegbu (1963) 2 All N.L.R. 209). In Maiwake v. Gassau (1972) 8 CCHCJ 21), Wheeler J. said:

> It is a cardinal principle of law that a plaintiff must act reasonably in relation to the defendant so as to mitigate his loss, and it follows that the plaintiff in the present case was not entitled…to sit back and do nothing about replacing his lorry which had been written off'.

In Alabilogbo v. Sofowora (1972) N.N.L.R. 125) the plaintiff claimed loss of earnings in respect of his lorry for a period of eight months. Kazeem J. refused to uphold the claim, saying (at p. 27):

> I am not convinced that it could have taken about six to eight months to get another vehicle in replacement for the defendant's vehicle. The fact that the defendant had no money for the replacement seems to me immaterial, and if he had taken out comprehensive instead of third party cover on his vehicle, the insurance company could have borne the cost of the replacement ….. In the circumstances I would only award as loss of earnings a sum of £360 on the basis of £12 per day for 30 days.

Where the plaintiff claims special damages for the loss of a chattel, including loss of earnings, he must plead and prove strictly each item of loss, and if he fails to do so, his claim for special damages will fail. Thus, for example, in Maiwake v. Gassau, where the plaintiff claimed loss of earnings in respect of his destroyed lorry, Wheeler J. said (1971) N.N.L.R. 125, at p. 127:

> The plaintiff's evidence regarding the manner in which the daily profit/loss of £45 was arrived at was very much evidence of a general character indicating in general terms the work the plaintiff had been able to arrange for the lorry and the kind of profit he had been making with it. In particular, he gave or called no evidence showing that by reason of the accident he had been unable to undertake specific assignments for which the lorry had been engaged. Special damages, however, must be certain and strictly proved and, having regard to these matters, I am unable to find that there is satisfactory proof of the plaintiff's claim for special damages for loss of profits totaling £10,485, and that claim accordingly fails.

This, however, is not the end to the matter, for even if the plaintiff's claim for special damages fails, he may still recover general damages, provided he has pleaded them. (General Metalware

Co. Ltd. V. Lagos City Council (1973) 2 CCHCJ 68, at p. 79). In Maiwake's case (Supra), for instance, having rejected the claim for special damages, Wheeler J. went on to award general damages assessed on the principle that "the plaintiff is entitled to be awarded such sum as will fairly compensate him for the loss he has actually sustained" (The Hebridean Coast (1961) A.C. 545, at p. 562, per Devlin L.J). He therefore held as follows (1971) N.N.L.R. 125, at p. 128):

> There was a reasonably certainty that the lorry would have been engaged to carry out four trips a month (but not five) from Kano to Lagos and back carrying produce, which would have earned for the plaintiff £305-5-0 for each return trip or £1,217 per month. The costs of earning that sum have, of course, to be deducted. And the plaintiff's evidence, which I accept (he was not cross-examined on these matters), is that he paid the driver wages and expenses of £23 per month, that he spent £43-15-0 per trip on fuel (or £175 per month) and £10 per month on engine oil, giving a grand total of £208 per month. Consequently the net profit per month could not have been more than about £1,010, and as that figure does not take account of such overheads and insurance vehicle licence and the cost of servicing, in my opinion a fair assessment of the net profit made by the lorry was £950 per month.

However, it has frequently been emphasised in the Nigerian courts that the plaintiff must not be doubly compensated, and if he has been awarded special damages for his loss, he is not entitled to an additional award of general damages (Chukwu v. Uhegbu (1963) 2 All N.L.R. 209 at p. 211 etc.). In Lagos City Council v. Unachukwu, Bello J.S.C., delivering the Supreme Court's judgement said (Supra):

> It has been stated by this Court in numerous cases that where a victim of a tort has been fully compensated under one head of damages for a particular injury, it is improper to award him damages in respect of the same injury under a different head… In Ezeani v. Njidike (Supra) Brett J.S.C. stated: "Although the measure of damages in an action in tort is not the same as in an action in contract, the rule against double compensation remains the same, and applies to both". In the afore-mentioned case, the plaintiff claimed in an action for conversion the value of the goods converted and general damages. The trial judge awarded him both. This Court sets aside the award of general damages as being double compensation. Now, reverting to the case in hand, we are satisfied that the respondents have been fully goods stolen and their loss of profits. We hold that the additional award as general damages is unjustified double compensation and it must be set aside.

4.0 CONCLUSION

In an action for damages for personal injuries there shall (a) in assessing those damages be taken into account against loss of earnings or profit which have accrued or probably will accrue to the injured person from the injuries, such proportion as the court may in all circumstances of the case

consider just, of the value of any compensation which has been recovered or will be recovered by him.

5.0 SUMMARY

In this unit, we learnt about:

(f) the quantum of damages in which a plaintiff is entitled to in a given case;
(g) the mode of assessment of damages;
(h) several examples of the types of damages that we have e.g. nominal damages, general and special damages etc.

6.0 TUTOR MARKED ASSIGNMENT

1. Discuss the term quantum of damages in relation to tortuous act.
2. State the rule in Repolems and Furnas Witty & Co. (1921) case.

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