NATIONAL OPEN UNIVERSITY OF NIGERIA

LAW OF TORTS 1 (PPL 323)
FACULTY OF LAW

COURSE CODE: PPL 323

COURSE TITLE: LAW OF TORTS I

COURSE GUIDE

LAW OF TORTS I

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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 PPL 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 classes that are linked to the course. You are advised to attend these sessions.

What you will learn in this Course

The overall aim of PPL 323 is to introduce the fundamental principles and applications of Law of Torts. During this course you will learn about, Nature of Torts, historical background and general principles of tortuous liability, trespass, negligence, defences in relation to torts and damages.

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:

Introduce you to the basic sources of law of Torts

1.0	History of the Law of Torts
2.0	Principle of liability in Torts
3.0	Trespass to a person.

Learning Outcomes

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 of 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 units 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 Torts
(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 text books; these are not provided by NOUN, obtaining them is your own responsibility. You may purchase you own copies. You may contact your tutor if you have problems in obtaining these textbooks.

Modules and Study Units

There are 6 Modules and 25 study units in this course, as follows:

Modules 1 **Historical background and general principles of tortuous liability**
Modules 2 **Trespass**
Modules 3 **Negligence**
Modules 4 **Continuation of Negligence**
Module 5 **Defences in relation to torts**
Modules 6 **Damages**

Each unit contains a number of self-tests. In general, these self-tests question you on the materials you have just covered or require you to apply it in some way and, thereby, help you to

gauge your progress and to reinforce your understanding of the 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:

i. G. Kodilinye and O. Aluko, *The Nigerian Law of Torts*, 1996, Ibadan: Spectrum
ii. Fleming; G. John: The Law of Torts, Sweet & Maxwell
iii. Christian Witting, Street on Torts, 2016, Oxford Uni. Press

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 four assignments, out of which the best three 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 of three hours duration. This examination will also count for 70% of your total course mark.

Tutor Marked Assignments

There are four tutor-marked assignments in this course. You only need to submit three of the four assignments. You are encouraged, however, to submit all four assignments, in which case the highest three 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 you 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 discuss 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 examination for PPL 323 will be of three 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 out 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	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	
7	Battery	Week 7	
8	False imprisonmentand intentional harm to the Person	Week 8	
9	Trespass to chattels	Week 9	Assignment 3
10	Conversion	Week 10	
11	Detinue	Week 11	Assignment 4
12	Duty of care	Week 12	
13	Standard of care	Week 13	
14	Proof of negligence	Week 14	
15	Continuation of Negligence	Week 15	
16	Defences to the Tort of Negligence	Week 16	
17	Contributory negligence	Week 17	
18	Exclusion clauses and consent		
19	Mistake	Week 18	
20	Damages		
21	Assessment of Damages	Week 19	
22	Occupiers Liability	Week 20	

Table 2 course organizer

How to get the most from this Course

In distance learning, the study units replace 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 listening to a lecturer. In the same way that a lecturer might recommend some reading, the study units tell you which recommended books or other materials to read, and when to undertake practical work. Just as a lecturer might give you an in-class exercise, your study units provide 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 unit 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 the examples 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, do not hesitate to call and ask you tutor.

1.0 Read this course guide thoroughly

2.0 Organise 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 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 why 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 8 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 For any difficulties you might encounter 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 your 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 questions 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 to 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 conversion
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 everyday life. You are also equipped to take part in the debate about legal methods.

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

MAIN COURSE

Course Code: PPL 323

Course Title: Law of Torts 1

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Glossary

End of the Module Questions (These could be MCQs, True/False, or Matching)

Unit 1 : General Introduction

Unit Structure

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1.2. Learning Outcomes
1.3. General Introduction of Torts
1.3.1. Definition of tort
1.3.2. The purpose of the law of torts
1.3.3. The Rule in *Smith v. Selwyn*
1.4. Summary
1.5. References, Further Readings and Web Sources
1.6 Possible Answers to Self-Assessment Exercises

1.1. Introduction

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

1.2. Learning Outcomes

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

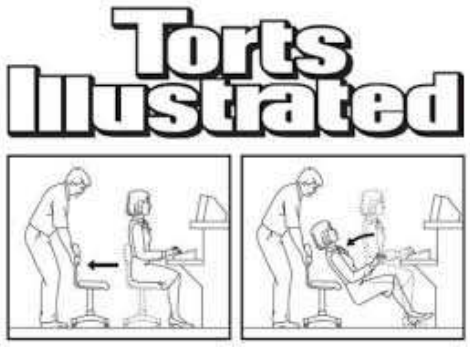
- Define law of torts;
- the purpose of the law of torts; and
- Explain the rule in *Smith v. Selwyn.*

1.3. General Introduction of Torts

1.3.1. 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.
So, have you thought of the meaning or the definitions of Tort.



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 (G. Kodilinye and O. Aluko, *The Nigerian Law of Torts*, 1996, Ibadan: Spectrum, 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.

In a recent Supreme Court case of *Aviomoh v. C.O.P & Anor* (2021) LPELR-55203(SC), the court stated the nature and purpose of a tort claim accordingly:

> 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 an individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct.

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. The SCN held in *Maja v*

Samouris (2002) LPELR-1824(SC) that where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary, the damages are unliquidated. So, too, when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate or what may be judged reasonable, the damages are said to be "unliquidated". Per Iguh ,JSC pp. 22-23, paras. E-B 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.

For further reading access this link

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi0_4Kbxe2AAxVSnFwKHRpUC98QFnoECCoQAQ&url=https%3A%2F%2Fwww.law.cornell.edu%2Fwex%2Ftort&usg=AOvVaw1y_8duv2UMnMvbpub0UulU&opi=89978449

As we can see, tort is not easy to define ;

Firstly, 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.

Self-Assessment Exercises 1

What is the nature of a tort?

1.3.2. 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, 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 interfere with the interests of other persons.

So, what is the main purpose of the law of torts.?

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 *and Edobor v Olotu & Anor* (2012) LPELR-9288 (CA) where the Court of Appeal held that damages are monetary compensations for loss or injury to a person or property. (Per Omoleye, JCA, pp. 46-47, paras. F-B)
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 every day include trespass to person, trespass to land or chattel, 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 the law of tort

The objectives of the law of tort can be summarised 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 remedies in the law 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.

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 recognised, 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 redistribution 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 2

1. What do you understand by injunction?
2. When will court grant injunction in a tort case?

1.3.3. 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 Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) and other statutes, that is to say:

1. Criminal Code Act;
2. Interpretation Act; and
3. 1999 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, 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.

See also *Adediran v. Interland Transport Ltd. (1991) 9 NWLR Pt. 214, P. 155 SC.*

So, identify and briefly explain the constitutional and statutory provisions that justify the abolition of the rule in *Smith v. Selwyn* in Nigeria.?

1.4. Summary

In this unit, you learnt about the definition, objectives and the scope of the law of tort. You also learnt the constitutional and statutory justification for the abolition of the rule in *Smith v. Selwyn* in Nigeria.

1.5. References/Further Readings/Web Sources

Harpwood Vivienne: Modern Tort Law, 5th ed., US: Cavendish Publishing Ltd, 2003.
G. Kodilinye and O. Aluko, *The Nigerian Law of Torts*, Ibadan: Spectrum, 1996.
Rogers, *Winfield & Jolowicz on Tort*, 15th edn, London: Sweet & Maxwell, 1998

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1.6. Possible Answers to SAEs

Answer to SAEs 1

A tort is a purely civil wrong which gives rise to civil proceedings, see *Aviomoh v. C.O.P & Anor* (2021) LPELR-55203(SC). The breach of a tort is usually redressed by an award of unliquidated damages, injunction, or other appropriate civil remedy see *Maja v Samouris* (2002) LPELR-1824(SC)

Answers to SAEs 2

1. An injunction is a court order forbidding the defendant from doing or continuing to do a wrongful act. Whether the plaintiff is claiming 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.

2. The court will grant an injunction in tort where there is the existence of a possibility of an irreparable injury and or the defendant intends to continue with such course of conduct/tort. Irreparable injury is a scenario wherein it is proved that the harm inflicted on the applicant cannot be remedied in any other form.

Unit 2 : An Overview of the Law of Torts

Unit Structure

2.1 Introduction

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

2.2. Learning Outcomes

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

- compare torts with other laws;
- identify the forms of action in the law of torts;
- classify torts

2.3. The Synopsis of the Law of Torts

2.3.1. Tort compared with some other laws

The dividing line between tort and other civil wrongs is thin. Furthermore, there is an element(s) of tort in most areas of 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

One of the main purposes 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 or both. Sometimes, non-custodial punishment can be imposed by virtue of Part 44 of the Administration of Criminal Justice Act, 2015. 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 Attorney General of the Federation (AGF), Attorney General of the State (AGS), a Law officer in office of the AGF or AGS, and a legal practitioner authorised by the AGF or the AGS and a legal practitioner authorised by the Act of the National Assembly.

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. (See the case of *Aviomoh v. C.O.P & Anor* (2021) LPELR-55203(SC) per Helen Moronkeji Ogunwumiju, JSC (Pp 22 - 22 Paras B - E)

There is, 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.

Example Box 1

> 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 willfully 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 or both or non-custodial punishment such as payment by the defendant of damages for injury or compensation for any loss suffered by the plaintiff and he may also be compelled in a civil action for tort to pay damages to the injured person by way of compensation. In *Tika Tore Press Ltd v. Umar* (1968) 2 All NLR p. 107 at 110, the court did not follow the rule in *Smith v. Selwyn* by refusing to stay proceeding in the suit pending the completion of the criminal case.

In *Abaver v. Alaga* (2018) LPELR-46566(CA) the court held:

> The position is that a person can be on trial for both the criminal aspect and as well as the civil aspect at the same time. In such cases, the remedies are therefore concurrent; while the accused person's tort-feasor might be imprisoned for the crime committed, he could at the same time pay damages to the Plaintiff for the tort committed.

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 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 135(1) Evidence Act 2011 and the case of *Bassey v State* (2012) LPELR-7813(SC); *Usman v State & Ors* (2020) LPELR-50555(CA). 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 also concerned 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.

The Court in *Babalola v. Apple Inc* (2019) LPELR-50986 (CA) per Jamilu Yammama Tukur, JCA highlighted the distinction between tort and contract in the following words:

> It is trite that the principle of privity of contract, seller's warranty and manufacturer's warranty are all not one and the some. On the distinction between tort and contract, the Court in G.B. Ollivant Nig. Ltd V. Agbabiaka (1972) 2 SC; Okwejiminor V. Gbakeji (2008) 1 SC. (pat. III) 263 at 284 held as follows:- "At page 3 paragraph 5 of Clerk and Lindsell on Torts (12th Edition), the learned authors stated as follows in considering the relation of tort and contract; "Sir Percy Winfield drew the distinction as follows: 'At present day, tort and contract are distinguishable from one another in that the duties in the former are primarily fixed by law, while in the latter they are fixed by the parties themselves. Moreover, in tort the duty is towards persons generally; in contract it is towards a specific person or specific persons.' If the claim depends on the proof of the terms of the contract, the action does not lie in tort, so a claim for wrongful dismissal is a claim in contract." Per Charles Olusoji Madarikan, J.S.C (P. 9, paras. C-F)." (Pp 40 - 41 Paras F - E)

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.

Example Box 2

(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.

Self-Assessment Exercise 1

Despite the unique nature of tort, it is not exclusive of crime, contract, and trusts. Adumbrate.

2.3.2. 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 recognised 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 form?"

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 recognised 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."

So, do the boundaries and definitions of modern torts still depend to a large extent on the boundaries of the old forms of action?

2.3.3. 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 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

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AAxU_XUEAHZITBd8QFnoECBkQAQ&url=https%3A%2F%2Fis.muni.cz%2Fdo%2F1496%2Fimpact%2Farchiv%2Fka2%2Fen%2F55961486%2F56079180%2F06_Law_of_Torts-Teachers.pdf&usg=AOvVaw3s9q2UXxJvGHoeQejuU2C7&opi=89978449

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 Exercises 2

1. Explain how torts are classified?
2. What is direct injury?

2.4. 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.

2.5. References/Further Readings/Web Sources

Criminal Code of the Southern States of Nigeria

Penal Code of the Northern States of Nigeria

Britannica
https://www.britannica.com › *topic* › *tort*

2.6. Possible Answers to SAEs

Answer to **SAE 1**

A tort is a purely civil wrong which gives rise to civil proceedings with the aim to give the individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct. Notwithstanding, this unique nature, tort is not exclusive from crime, contract and trust because a single conduct can give rise to liability in all these areas of law.

Answers to **SAEs 2**

1. Torts can be classified as those that protect or concern namely:
   a. Personal Interests
   b. Interference with judicial process
   c. Property interests
   d. Interest in reputation
   e. Economic interests
   f. Interference with relationships; and
   g. Miscellaneous interests

2. Direct injuries are caused by an external force or collision, which is produced by a source outside of the body. This comes from the immediate result of the violation of a right legally, while consequential injury occurs as a consequence of something else.

Unit 3 : The Reception of the Law of Torts in Nigeria

Unit Structure

3.1. Introduction

The evolution of the law of tort has been somewhat haphazard and it is an area of law that is still developing. For instance, not until 1932, was negligence officially recognised by the House of Lords in England as a separate tort, and 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. This unit examines how the law of torts was received into Nigeria.

3.2. Learning Outcomes

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

- explain how the law of torts was received into Nigeria;
- enumerate the sources of the Nigerian law of tort.

3.3. The Reception of the Law of Torts in Nigeria

3.3.1. 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 cutoff 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 modeled. 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, 2010).

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.

Self-Assessment Exercises 1

1. Describe how the law of Torts was received into Nigeria.
2. Name the statutes that facilitated reception of Law of Torts into Nigeria

3.3.2. 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 or judicial precedent; 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 revered 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 presence 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, 5th ed., WH Allen, 1978 p.11 and also Don R. Pember, Mass Media Law, 2nd ed. Dubuque, IA : WCB, 1982, 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 noble 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 Exercises 2

i. Define common law.
ii. What are its basic characteristics?

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. 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 (See the case of *Rebold Industries Ltd v. Magreola & Ors* (2015) LPELR-24612(SC) Per John Afolabi Fabiyi, JSC (Pp 34 - 35 Paras F - B). 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. See the case of *Suleman & Anor v. Cop Plateau State* (2008) LPELR-3126(SC) where the court, per Niki Tobi JSC stated:

> Under the doctrine of precedent, decisions of superior Courts are binding on inferior Courts. In the hierarchy of the Court system in Nigeria, decisions of the Supreme Court are binding on all other Courts. Next in the hierarchy is the Court of Appeal. Decisions of that Court are binding on all other Courts. I can still go further. The next in the hierarchy is the High Court. Decisions of the High Courts are binding on all other courts, including Magistrate Courts, Area Courts and Customary Courts.

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. See the case of *Babatunde v. Pan Atlantic Shipping And Transport Agencies Ltd & Ors* (2007) LPELR-698 (SC). But in countries where case law in the strict sense of law making by judges is obtained, it will be necessary to emphasize 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.

So, What is case law? ; What do you understand by the order of precedence or binding authority of case law?

Legislation

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 (Section 36(12) of the 1999 Constitution provides to the effect that no person shall be convicted of a criminal offence unless the offence is defined and the penalty therefore is prescribed in a written law), so also are many aspects of civil law.

Legislations or statutes are usually enacted by parliament 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 President or the State Governor vetoes the bill by not signing it, the legislature may override the President or the State Governor 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 (See Section 59(4) and 100(5) of the 1999 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, 2010 edition e.g. Weights and Measures Act.

So, What is legislation and how does it help in the development of the law of torts in Nigeria?

For further reading access this link

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjug47Kx_SAAxWGWkEAHYQWB2AQFnoECCoQAQ&url=https%3A%2F%2Fkubanni.abu.edu.ng%2Fitems%2F01e0120c-fb42-4f4e-a93d-21390eb8c8e5&usg=AOvVaw0OhIvtxGLxJwVPwIMcHnds&opi=89978449

3.4. Summary

In this unit, we discussed the various sources of the Law of Tort, which broadly consist of legislation, case law, and the Received English Law.

3.5. References/Further Readings/Web Sources

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3.6 Possible Answers to SAEs

Answers to **SAEs 1**

1. 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
2. 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, the Western Region of Nigeria 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.

Answers to **SAEs 2**

1. Common law or the common law of England is the law which was common to all parts of England and Wales and which 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 which is largely an unwritten law as opposed to statutory law which is codified.

2. The distinctive feature of common law is that it represents the law of the courts as expressed in judicial decisions. Judges decide cases found in precedents provided by past decisions, in contrast to the civil law system, which is based on statutes and prescribed texts.

Unit 4 : The Principles of Liability in Tort

Unit Structure

4.1 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 all 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.

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

Explain the principle of damage.

4.3 The Principles of Liability in Tort

4.3.1 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 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.

Tort law, liability and damages

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. This principle has been restated and applied by the courts. See the case of *Rite Foods Ltd & Anor v. Adedeji & Ors* (2019) LPELR-47698(CA). In *Oceanic Bank v. Abeokuta Commercial & Ind. Co. Ltd* (2014) LPELR-22937(CA), the court held that as no breach was found to have occurred, the issue of damages cannot therefore arise. The principle is *damnum sine injuria*, i.e, where there is no breach or wrong there can be no damages.

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 *damnum sine injuria* that is, damage without injury. Examples of damages without legal injury are:

1. Trade competition
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 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 for 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 - 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.

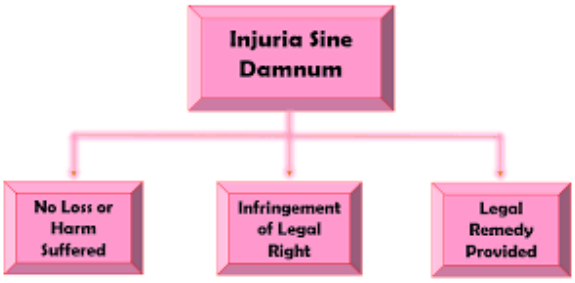
The corporation applied to court for an injunction to restrain him from collecting the underground water in his borehole. The court held that an injunction would not lie. The defendant was entitled as an owner to draw from his land the underground water. His "malice" if any, in trying to force the purchase of the land was irrelevant. No lawful use of property can become illegal even if done with an improper motive.

There is no tort of perjury.
There is no tort of 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. 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. 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.

Self-Assessment Exercise 1

Explain the Latin maxim *Damnum sine injuria* and list examples of damages without legal injury

3. 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. 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.

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

So, which torts are actionable *per se and why?*

We shall examine these torts briefly.

Defamation: Libel or slander

The tort of defamation aims at punishing and thereby discouraging the act of communicating false statements about a person that injure the reputation of that person. The Black's Law Dictionary 11th Edition at page 525 defines defamation as "malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person … A false written or oral statement that damages another's reputation" Thus to constitute defamation, the words themselves must be defamatory/disparaging in nature, the words must be false, there must be an intention to bring down the reputation of the subject defamatory words and people of right standing in society must hear or read the defamatory words. *Emmanuel v. Felix & Ors* (2022) LPELR-57960(CA) per Tukur, JCA [F-D] 8-11

The tort of defamation consists of libel and slander. Slander is spoken libel. It is slander because it is not in a written form and the difference between libel and slander is that the former is published in permanent form i.e. in writing, print, photograph, carving, statute or cartoon while the latter is spoken or gestures. Libel is actionable upon mere commission without the necessity of proving actual damage. As a general rule, slander is not actionable *per se*, *Udofia & Anor v Okon & Ors* (2018) LPELR-46154(CA) Par Nimpar JCA [F-A] 30-31;

Daura v Danhauwa (2009) LPELR-3714(CA) Okoro JCA [E-B] 7-8 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.

Self-Assessment Exercise 2

1. What elements constitute defamation?
2. Identify the main differences between libel and slander.

Trespass to Person

Trespass is an unlawful act committed against the person or property of another. Generally, trespass to person consists of three torts: assault, battery and false imprisonment. Assault is the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful of offensive contact. It is the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt to commit battery. Battery is the nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact. Assault and battery, each gives a right of action in itself. The Black's Law Dictionary 11th Edition, 141, 187 and 1810. It is trite that assault and battery qualify as both criminal and tortious acts. So it can arise in criminal or civil claim in tort. *FRSC & Ors v. Akpos* (2021) LPELR-52917(CA) per Nimpar JCA [E-F] 60. Although the term assault and battery is frequently used when a battery has been committed, one who commits a battery cannot also be punished for committing an assault, since the lesser offence or tort of assault blends into the actual battery. False imprisonment is the total deprivation of the liberty of a person; no matter how small the period is without lawful excuse or proper justification.

Any trespass to the person however slight gives a right of action to recover at least nominal damages. Even where there has been no physical injury, substantial damage may be awarded for the injury to the man's dignity or discomfort or inconvenience. When the liberty has been interfered with, damages are given to vindicate the plaintiff's right even though he has not

suffered any pecuniary damage. *Diamond Bank* v *Okpala* (2016) LPELR-41573(CA) Per Akomolafe-Wilson JCA [F-C] 25-26; *Okonkwo* v *Ogbogu* (1996) 5 NWLR (Pt. 449) 420, 435 [F-G].

Trespass to Chattel or Goods

Trespass to chattel or goods occurs where there is wrongful interference, either intentionally or negligently with the goods that are in possession of another. *Fat-Sanny (Nig) Ltd* v Saba (2020) LPELR-51402(CA) Trespass to chattels of 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 Exercises 3

1. What is trespass?
2. Explain the nature of trespass to land.
3. What is your understanding of the term nominal damages?

4.3.2 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. As a general rule, the damage must not be too remote from the tort otherwise the action will not succeed. Where an injury is the natural or reasonably foreseeable result of a tort, a court will usually award compensation for it.

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 was 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 damage? When is an injury too remote to be the result of a tort? How do we determine when 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.

The Test of directness of Damage

The test of directness of damage 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.

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 4

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 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 determining 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 defendant 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.

In Nigeria, foreseeability has held to mean that the defendant's conduct would have inflicted on the plaintiff the kind of damage in suit. That is what is implied in the statement that the duty

of care has to be 'owed' to the plaintiff. *Heritage Bank & Ors* v *Okorie* (2017) LPELR-42010(C) per Awotoye, JCA [B-D] 21-22. Also, in *Aluminium Manufacturing Company of (Nig) Ltd* v (2010) LPELR-3759(CA) it was held that one of the burden of proof of negligence on the Respondent/Plaintiff is to establish the foreseeability that the Appellant/ Defendant conduct would have inflicted on him the kind of damage that resulted and lead to the cause of action. Per Nwodo, JCA [F-C] 13-15.

So, how do you determine the liability of a tortfeasor? Also explain your understanding of the reasonable foreseeability test

4.4 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 of the law of assault.

4.5 References/Further Readings/Web Sources

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4.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**

D*amnum sine injuria means* damage without a legal wrong. It refers to a situation where encounters loss or damage which does not have a legal remedy. Examples of damages without legal injury are trade competition, defamation on a privileged occasion, lawful use of property or lawful conduct, and perjury.

Answers to **SAE 2**

1. To constitute defamation, the words themselves must be disparaging in nature, the words must be false, there must be an intention to bring down the reputation of the subject defamatory words and people of right standing in society must hear or read the defamatory words. *Emmanuel v. Felix & Ors* (2022) LPELR-57960(CA) per Tukur, JCA [F-D] 8-11.
2. Slander is spoken or gestures while libel must be published in permanent form i.e. in writing, print, photograph, carving, statute or cartoon. Libel is actionable upon mere commission without the necessity of proving actual damage. As a general rule, slander is not actionable *per se*

Answers to **SAEs 3**

1. Trespass is an unlawful act committed against the person or property of another. Generally, trespass to person consists of three torts: assault, battery and false imprisonment.
2. Trespass to land is a tort that is actionable *per se.* This implies that a right to sue arises for every unlawful entry or trespass to land, even though no actual damage was done to the land. Of course, the general rule of law is that where there is a wrong, there is a remedy, even though no specific damage was suffered. See *Ashby v. White* (1703) 1 ER 417.
3. 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 is that the law does not concern itself with trifles.

Answer to **SAE 4**

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.

Unit 5 Other Principles of Liability in the Law of Tort

Unit Structure

5.1 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.

5.2 Learning Outcomes

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

explain the principles of liability in the law of tort.

5.3 Other Principles of Liability in the Law of Tort

5.3.1 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.

5.3.2 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.

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.

Self-Assessment Exercise 1

Explain the principle in *Scott v Shepherd* (1773) 96 ER 525

5.3.3 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. This rule applies to all persons with unusual health conditions, including hemophiliacs, that is, persons who tend to bleed severely as a result of the inability of the blood to clot easily. 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.

Example Box 1

> 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.

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 preexisting disability, physical, mental, psychological or otherwise, a defendant did have to take a victim as he found him.

So Discuss; the “egg shell”, “thin skull” or “unusual plaintiff’s” rule is not without an exception.

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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.

5.3.4 The principle of Strict liability

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.

In *Mtn Nig. Communications Ltd v. Sadiku* (2013) LPELR-21105(CA), the Court of Appeal stated lucidly

> Strict liability as is applied in the instant appeal is rooted in Ryland vs. Fletcher (1866) L.R. 1 Ex. 265. The rule herein is that the occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape and is liable for all the direct consequences of its escape, even if he has not been guilty of negligence… it seems to me and I so hold that with or without negligence on the part of the appellant, the said appellant was under duty of care to ensure that there was no spillage of diesel from its storage tank to the extent of polluting the water-well and or causing any form of damage to the vegetation on the land. As enunciated in Ryland vs. Fletcher (supra), the appellant as a person in control of a substance such as diesel which can easily escape and cause damage, is placed under strict liability. To my mind, bringing to bear the tort of strict liability as was done by the learned trial Judge was unavoidable the same having flown directly from his findings. It had nothing to do with the lower Court making a case for the respondent or its jumping into the arena as is contended by the learned counsel for the appellant. Being consequential offshoot of the findings of facts by the learned trial Judge, he did not need to pause the judgment in order to call on the parties to address him on the tort of strict liability. Per Cordelia Ifeoma Jombo-Ofo, JCA (pp. 36 - 37 Paras F - F)

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.

See section 8 of the Consumer Protection Act which provides to the effect that where a consumer's right has been violated, the consumer shall in addition to the redress the state committee, subject to the approval of the Council, may impose, have a right of civil action for compensation or restitution in any competent court,

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; save where the relevant criminal law specifically ousts the requirement of a guilty mind.

So, what is a strict liability tort? Illustrate your understanding of strict liability tort with two examples

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 tortfeasor is 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 willful 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 willful 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 Exercises 2

1. What do you understand by "malice"?
2. In the law of Torts, what is the general rule on motive, malice or intention?

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.

Example Box 2

> 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.

Self-Assessment Exercise 3

List four torts where there is an exception to the general rule on motive, malice or intention

5. 4 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.

5.5 References/Further Readings/Web Sources

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https://www.jerseylaw.je › IoLJournal › Causati...

donaldlange.com
https://donaldlange.com › the-thin-skull-rule

5.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**

The principle in Scott v Shepherd is that 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.

Answers to **SAEs 2**

1. Malice in simple term means acting from a bad motive or bad reason; doing something with ill will or wickedness of heart, spite or recklessness. It is doing something with a bad motive or bad reason. In legal terms, malice means doing a wrong thing intentionally or without lawful excuse, or doing any act with a bad, improper or illegitimate motive.

2. 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. See *Bradford Corporation v. Pickles* (1896) AC 587 and *Wilkinson v. Downton* (1897) 2 QB 57; (1895-9) All ER 984

Answer to **SAEs 3**

The three torts where there is an exception to the general rule on motive, malice or intention are: malicious prosecution, nuisance, defamation, and conspiracy.

MODULE 2 TRESPASS

Module Structure

Unit 1 Trespass to the person: Assault

Unit Structure

1.1 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.

1.2 Learning Outcomes

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

- define assault;
- understand the purpose of the law of assault; and
- describe the elements of assault.

1.3 Trespass to the person: Assault

1.3.1 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. See the case of *FRSC & Ors v. Akpos* (2021) LPELR-52917(CA). 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 and Nigeria, 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 victims. Section 319 of the Administration of Justice Act gives the court the power to order payment of compensation in a criminal case. Section 324 gives the injured person discretion to accept or refuse compensation, but payment of compensation is bar to further liability. 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.

The Black's Law Dictionary 11th Edition at p. 141 defines assault as the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful of offensive contact. It is the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt to commit battery.

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. The act must imply personal violence, but contact is unnecessary. 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.

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?

For further reading click on this link :

https://www.google.com/search?client=firefox-b-e&sa=X&sca_esv=558970703&biw=709&bih=772&sxsrf=AB5stBj4zRd6tMlmyZqcYyoQGhRztbYNig:1692679081656&q=Assault+(tort)&stick=H4sIAAAAAAAAAOOQUeLUz9U3MMkrzzM3kimpLEgtVshPUyjJLyopVsjMU8hITcwpyUhOLEqN4k_OSSwuRsifYgRrNcswT6s8xcgBYpsmF6dDhY0q8sryoGyw6TAlpklGvxhlQvDY1MDCuIiVz7G4OLE0p0RBA6RCcwIb4y02SYZbK3pUArp_8zz5u-y8aFbVYjWGcyr5gkYJAG2QPe7IAAAA&ved=2ahUKEwid1IX7uO-AAxWERUEAHQO1CeEQ-BZ6BAgSEA4

1.3.2 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 is 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.

So, What is the purpose of the tort of assault?

1.3.3 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. This was the decision of the court in

In *R v St. George* (1840) 173 ER 921. See also *Logdon v DPP* (1976) Crim LR 121.

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 an 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. See *Thomas v National Union of Mine Workers* (1985) 2 All ER 1.

Self-Assessment Exercise 2

What two elements must a plaintiff prove to succeed in a claim for assault?

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1.4 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.

1.5 References/Further Readings/Web Sources

Bodunde Bankole, Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
Fidelis Nwadalo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
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1.6 Possible Answer to Self-Assessment Exercises

Answer to **SAE 1**

An assault is threatening to harm or apply force to another person with the present ability to carry out the threat. It refers to any act which makes another person to fear the immediate application of unlawful force.

Answer to **SAE 2**

To succeed in a claim for assault, the plaintiff must prove: that there was a threat to apply force, and 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

Unit 2: Battery

Unit Structure

2.1 Introduction

2.2 Learning Outcomes

2.3 Battery

- 2.3.1 Definition of Battery
- 2.3.2 The Purpose of the Law of Battery
- 2.3.3 Elements of battery

2.2.4 Summary

2.2.5 References/Further Readings/Web Sources

2.2.6 Possible Answers to Self-Assessment Exercises

2.1 Introduction

In this unit, we shall examine battery as another form of trespass to the person.

2.2 Learning Outcomes

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

- define battery;
- understand the purpose of the tort of battery; and
- understand the elements of battery and how to prove battery

2.3 Battery

2.3.1 Definition of Battery

Battery

The Black's Law Dictionary 11th Edition at p. 187 defines battery as the nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact. According to C.F. Padfield, battery is *"applying force however slight to the person of another, hostilely* or *against his will."* Kodilinye defines battery as "*the intentional application of force to another person." Like* Assault, battery gives a right of action in itself. In other words, batter is actionable per se.

In view of the above definitions, it may be explained that battery is the application of force on a person without his consent and without legal justification. It is contact, including the slightest, merest or the least undesirable touch, with another person.

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.

Self-assessment Exercise 1

What is Battery?

2.3.2 The Purpose of the Tort of Battery

The purpose of the tort 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.

Note also that the words of section 34 of the 1999 Constitution namely 'inhuman treatment, torture, and degrading treatment suggest something continuous and rather more permanent that an occasional assault and battery. See *Okorocha v IGP & Ors* (2021) LPELR-55042(CA) Per Ugo, JCA [E-B] 17-19. Complaints of battery and assault are mere torts and not by any means breach or contravention of fundamental right to dignity of the human person under section 34 of the 1999 Constitution. *Nnanna v Sa'id & Anor* (2022) LPELR-57396 (CA) Per Ugo, JCA [E-E] 43-48

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.

Example Box 1

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.

So, what harm does the tort of battery seek to prevent?

2.3.3 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, willfully, 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.

Self-assessment Exercise 2

What are the elements that a plaintiff needs to prove to succeed in a claim for battery?

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., the 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 on 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.

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.

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.

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 to 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, in 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, the 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 the 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.

2.4 Summary

This unit has taught the learners:

a. What is battery
b. the purpose of the tort of battery;
c. the elements of battery;
d. and how to prove battery

2.5. References/Further Readings/Web Sources

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

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2.6 Possible Answers to Self Assessment Exercises

Answers to **SAE 1**

Battery is the intentional and direct application of any physical force to the person of another. It is the intentional application of force to another without his consent.

Answers to **SAE 2**

For a plaintiff to succeed in a claim for battery, he/she must prove the application of force and the intention to apply force.

Unit 3 : False Imprisonment and Intentional Harm to the Person

Unit Structure

3.1 Introduction

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

3.2 Learning Outcomes

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

- define false imprisonment;
- explain the purpose of the tort of false imprisonment; and
- enumerate the defences and remedies for trespass to the person.

3.3 False Imprisonment and Intentional Harm to the Person

3.3.1 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 section 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)

In *Onuchukkwu v Fidelity Bank* (2017) LPELR-50015 the Court of Appeal held thus

> In simple terms, the tort of false imprisonment is the unlawful, wrongful and so unjustified restrain of a person's personal right and liberty to move freely and the tort is committed by any act which prevents the exercise of such right by a person. The law is that a person can be falsely imprisoned even if not within the confines of an enclosure or walls of a room and or that he may not even be aware of it. Per Garba, JCA [B-E] 24.

See also *Ojo v. Lasisi* (2003) 7 NWLR (819) 273; *Ezeadukwa vs. Maduka* (1997) 8 NWLR (578) 635

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.

(i) Compelling a person to remain where he does not wish to remain or to go to where he does not wish to go.

(ii) Restraint need not be in any cell or prison but may be in the open street.

(iii) There need not be battery.

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

(v) 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.

(vi) The restraint must be total or complete. See *Bird v Jones* (1845) 7 QB 742; 115 ER 668.

Is False Imprisonment the same thing as unlawful arrest and detention?

Ekanem JCA held in *Zenith Bank v Iyamu* (2021) LPELR-54150(CA) [D-D] 10-11 thus:

> … In Clerk & Lindsell on Torts, 13th Ed. P.681, it is stated that: "A false imprisonment is complete deprivation of liberty for any time, however short, without lawful excuse. "Imprisonment" is no other thing but the restraint of a man's liberty... " In Kodilinye and Aluko's, The Nigerian Law of Torts (1999) 2nd Ed. Page 14, ? it is opined that: "False normally means "fallacious" or "Untrue" but in this tort it means merely "wrongful" or

"Unlawful." It is clear from the foregoing that in the context of the tort of false imprisonment, "false" means "wrongful" or "unlawful" while "imprisonment" is the restraint of a man's liberty. Thus if one is "falsely imprisoned" it can be said that he is "Unlawfully detained" and as in "unlawful detention". Again once a man is arrested, he is by that act imprisoned though it be in an open field. Therefore the term "false imprisonment" can for all practical purposes be used interchangeably with "unlawful arrest and detention."

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, in a man's own house, and in all places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places wither he will without bail or otherwise so long as the restraint is complete. *Agbalugo & Anor v Izuakor* (2017) LPELR-43289 (CA) Per ABIRU ,JCA [D-A] 46-47

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.

3.3.2 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, Australia, 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 in spite of the plaintiff's entreaties to be allowed to leave. The plaintiff spent some time 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, 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 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. In *Onuchukkwu v Fidelity Bank* (2017) LPELR-50015) (CA), the Court of Appeal decided that even though there is no fixed period of restraint that may constitute the tort of false imprisonment, even a short period within which a person was actually prevented from freely exercising his right of movement from a particular area would suffice. Per Garba, JCA [A-C] 25

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 *Herring 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 ₦10,000.00 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, the 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 effected 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.

ABIRU, JCA held in *Agbalugo & Anor v Izuakor* (2017) LPELR-43289 (CA) [D-A] 46-48 thus

> … The position of the law is that an action for false imprisonment will not lie against a private individual who merely gave information which led the police on their initiative to arrest a suspect and this is because every private individual has the right to report a crime or a suspected crime to the police - Isheno Vs Julius Berger (Nig) Plc (2008) 6 NWLR (Pt 1084) 582 … To succeed in an action for false imprisonment, a plaintiff must show that it was the defendant who was actively instrumental in setting the law in motion against him. In other words, the plaintiff must show that the defendant did not only lodge a complaint against him to the Police, but also that he was actively instrumental to his arrest and detention"

See also *First Bank of Nigeria Plc & Ors Vs Attorney General of Federation & Ors* (2013) LPELR-20152(CA).

So, is it necessary for the person who is restrained to know at the material time that he was detained, restrained, confined, or being prevented from leaving a place?

3.3.3 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:

a. 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.

b. 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:

a. He is not acting hostilely to the patient;
b. There is implied consent by the patient; and
c. 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.

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 N.W.L.R. 549.

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. (For example see section 32(1) of the Police Act 2020 and section 13(1)(b) Economic and Financial Crime Commission Act). 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 Ukpai v Omoregie & Ors (2019) LPELR-47206(CA); *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 section 35 of the Nigerian Constitution, a person may be lawfully deprived of his personal liberty or his fundamental rights otherwise restricted in certain circumstances. These include;

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

b. In a connection with infectious disease, or unsoundness of mind;

c. In connection with immigration law;

d. 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 proper 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 as 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 judgment, and also any evidence which tends to aggravate the damage to reputation is admissible up to the moment when damages are assessed by court.

10. 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.

Self-Assessment Exercise 2

How and to what extent is consent a defence to trespass to person in sport games?

3.3.4 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 judgment, 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;

So, what is the purpose of the issuance of a writ of habeas corpus in a suit for trespass to person?

3.4 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. Defences to trespass to the person
5. Remedies for trespass to the person.

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3.6 Possible Answers to Self Assessment Exercises

Answer to **SAE 1**
False imprisonment is denying a person freedom of movement or personal liberty without his consent and 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.

Answer to **SAE 2**
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. 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.

Unit 4 Trespass to Chattels

Unit Structure

4.1 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.

4.2 Learning Outcomes

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

- Define chattel;
- Outline the differences between trespass to chattel, conversion and detinue;
- Explain the elements of trespass to chattel;
- List the persons who may sue for trespass to chattel; and
- Enumerate the remedies for trespass to chattel.

4.3 Trespass to Chattels

4.3.1 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 chattel may be defined as a direct and wrongful interference with a chattel in the possession of the plaintiff, such interference being either intentional or negligent. 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. The interest of the plaintiff which the law protects are:- (1) his interest in retaining the possession of the chattel; (2) his interest in the physical condition of the chattel and (3) his interest in protecting the chattel against intermeddling. Trespass to chattels may take various forms such as destroying damaging or wrongful moving them from one place to the other. *SPDC v Okonedo* (2007) LPELR-8198(CA)

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 damage has been done to a chattel, a plaintiff is entitled to prove it and recover damage for it as the case may be.

Self-assessment Exercise 1

What interest of the plaintiff does the law seek to protect in the tort of trespass to chattel?

4.3.2 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.

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.

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 unauthorised 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.

So, what must a plaintiff show/prove to maintain an action for trespass?

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.

4.3.3 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 2

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.

For further reading click on this link

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiX_abT_PSAAxXQVEEAHdniAhgQFnoECCYQAQ&url=https%3A%2F%2Fgibbswrightlawyers.com.au%2Fpublications%2Ftrespass-goods-chattels&usg=AOvVaw0C23qD4E9wofhmdltv8yBe&opi=89978449

4.4 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.

4.5 References/Further Readings/Web Sources

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4.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**

The interest of the plaintiff which the law seeks to protect are:- (1) his interest in retaining the possession of the chattel; (2) his interest in the physical condition of the chattel and (3) his interest in protecting the chattel against intermeddling.

Answer to **SAE 2**

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: owners, bailees, lenders, assignees, trustees, finders, custodians, caretakers, adverse possessors, executors, and administrators of estates; etc.

Unit 5 Conversion

Unit Structure

5.1 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.

5.2 Learning Outcomes

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

- Define conversion;
- Differentiate between conversion and trespass; and
- Enumerate the defences and remedies for conversion.

5.3 Conversion

5.3.1 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 interference, 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. See generally *Trade Bank PLC v. Benilux (Nig) Ltd.* (2003) LPELR - 3262(SC); *Ukpai & Anor v Ajike* (2018) LPELR-44269(CA)

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

Self-assessment Exercise 1

Who can sue for conversion?

5.3.2 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.

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.

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. Contrast 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. The 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.*

So, 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 All ER 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 of 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 feet 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**

5.3.3 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.

In *Ukpai & Anor v Ajike* (2018) LPELR-44269 (CA) the Court of Appeal held that

> Also dwelling on "jus tertii" vis-a-vis possession the learned author (Winfield and Jolowicz on Tort (17th edn) said at paragraph 17-18 on page 764 thus: - "Once a system of law

accepts possession as sufficient foundation for a claim for recovery of personal property it is faced with the question of how far a defendant should be allowed to raise the issue that a third party has a better title to the property than the claimant - the jus tertii. There are arguments either way. On the one hand, refusal to admit the jus tertii allows recovery by a claimant who may have himself wrongly dispossessed the true owner and also expose the wrongdoer to the risk of multiple liability. On the other hand, it may be argued that a person who has dispossessed another should have no right to raise such issues concerning the relationship between the dispossessed and some other party having a claim over the goods, for there is a serious risk of abuse and of the interminable prolongation of actions. The common law compromised. If claimant was in possession at the time of the conversion, the defendant could not set up the jus tertii, unless he was acting under the authority of the true owner. Where, however, the claimant was not in possession at the time of the conversion but relied on his right to possession, jus tertii could be pleaded by the defendant. To this rule there was an exception where the defendant was claimant's bailee, for the defendant was regarded as being estopped from denying the claimant's title unless evicted by title paramount or defending the action on behalf of the true owner.

Self-Assessment Exercise 2

What defences are available to a defendant in an action for conversion of a chattel?

5.3.4 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 equipment.

In the circumstance, what are the available remedies available to a plaintiff in a claim for conversion of a chattel?

5.4 Summary

In this unit, we discussed:

a. What is conversion and examples of conversion
b. The difference between conversion and trespass
c. Those who may sue for conversion
d. The various types of defences and remedies for conversion

5.5 References/Further Readings/Web Sources

Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
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UpCounsel
https://www.upcounsel.com › *lectl-trespass-to-chattels-...*

5.6 Possible Answers to Self Assessment Exercises

Answer to SAE 1

An owner can sue for conversion. Also, 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.

Answer to SAE 2

The following defences are available to a defendant in an action for conversion of a chattel: (a) Jus tertii, that is, the title or better right of a third party; (b) subsisting bailment; (c) subsisting lien; (d) temporary retention; (e) limitation of time.

Unit 6 : Detinue

Unit Structure

6.1 Introduction

In this unit, we consider the tort of detinue.

6.2 Learning Outcomes

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

- define detinue; and
- explain the differences between conversion and detinue.

6.3 Detinue

6.3.1 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:

Example Box 1

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.

In *UBA Stockbrokers Ltd & Anor v. Ugwu* (2021) LPELR-53189(CA), the Court of Appeal held as follows:

> Detinue is a common law action to recover personal property wrongfully taken or withheld by another. The essence of detinue is that the defendant holds on to property belonging to the plaintiff and fails to deliver the property to the plaintiff when a demand is made. The cause of action in detinue is the refusal of the defendant to return the goods to the plaintiff after the plaintiff must have made a demand for them. Per Abiru, JCA [E-B] 24-25

See also Enterprise Bank Ltd v Aroso (2014) 3 NWLR (Pt 1394) 256, 298

Self-assessment Exercise 1

What is the tort of detinue?

6.3.2 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 *Ihenacho v Uzochukwu* (1997) 2 NWLR pt 487, p. 257 SC.

In *West Africa 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's 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*.

So, what condition(s) must a plaintiff satisfy to maintain an action for the tort of detinue?

6.3.3 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.

For further reading click this link below :
https://portal.abuad.edu.ng › Assignments › 16...

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 replace 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 trespass 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.

Self-assessment Exercise 2

What defences are available to a defendant in an action for detinue?

6.4 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; and
d. defence and remedies for the tort of detinue

6.5 References/Further Readings/Web Sources

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6.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In summary, the tort of detinue is the wrongful detention of the chattel of another person, the immediate possession of which the person is entitled.

Answer to SAE 2

In an action for detinue, a defendant may plead that: (a) he has mere possession of the goods; (b) that the plaintiff has insufficient title as compared to himself; (c) 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; (d) innocent delivery; (e) subsisting bailment; (f) subsisting lien on the chattel; (g) temporary retention of the chattel to enable steps to be taken to check the title of the plaintiff; (h) inevitable accident; (i) reasonable defence of a person or property, such as when one beats or injures a dog that was attacking him or another person; (j) 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.

MODULE 3: NEGLIGENCE

Module Structure

Unit 1.	Meaning, nature and proof of negligence
Unit 2	Standard of care
Unit 3	Proof of negligence and the doctrine of *res ipsa loquitor*

Unit 1 : Meaning, Nature and Proof of Negligence

Unit Structure

1.1 Introduction

During the first half of the 19th Century, negligence began to gain recognition as a separate and independent basis of tort liability. Its rise coincided in a marked degree with the industrial revolution; and it very probably was stimulated by the rapid increase in the number of accidents caused by industrial machinery, and in particular by the invention of railway. It was greatly encouraged by the disintegration of the old form of action, and the disappearance of the distinction between direct and indirect injuries, found in trespass and case … intentional injuries, whether direct or indirect, began to be grouped as a distinct field of liability, and negligence remained as the main basis for unintended torts. Negligence thus developed into the dominant cause of action for accidental injury. W. Page Keeton et al, Prosser and Keeton on the Torts (5th edn. 1984) 28 at 169 cited in Bryan A. Garner, *Black's Law Dictionary* (11th edn. 2019) 1245

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 *Donoghue v Stephenson* (1932) Ap 562. In this case, Negligence was fully recognized as an independent tort capable of extension into new category.

1.2 Learning Outcomes

The purpose of this unit is to enable the student to know;

- The definition of negligence
- The purpose of the tort of negligence
- The elements of negligence: proof of negligence

1.3 Meaning, Nature and Proof of Negligence

1.3.1 Definition of the Tort of Negligence

Black's Law Dictionary defines negligence as the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below

the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or failure to do what such a person would do under the circumstances. Bryan A. Garner, *Black's Law Dictionary* (11th edn. 2019) 1245; *Ayadi v Mobil Producing (Nig) Unltd* (2016) LPELR-41599(CA)

Lord Wright reasoning in this vein in *Lochgelly Iron & Coal Co v McMullan* (1934) AC 1 at 25 explained negligence thus:

> In strict legal analysis, negligence means more than a heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

In the same regard, Anderson B in *Blyth v Birmingham Water Work Co* (1836) Ex 761 at 784 defined:

> Negligence…. is the omission to do something which a reasonable man, guided by those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do.

The Nigerian Court of Appeal in *NEPA v. Auwal* (2010) LPELR-4577(CA) quoting the Supreme Court in *Otaru v. Idris* (1999) 4 SC (pt 11) 87 at 92, defined the tort of Negligence to be:-

> That NEGLIGENCE is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. Further, negligence consists of failure to exercise due care in the circumstances in which a duty of care exists. It was further submitted that a duty of care, namely that which is owed to persons so closely and directly affected by the act of another and who ought to be in his contemplation existed vide Donoghue V. Stephenson (1932) AC 562 at 580 - 581. Such that in the final analysis the tort of NEGLIGENCE involves (i) a careless act or omission and (ii) a duty to the person injured." Per OHN INYANG OKORO, JCA [A – E] 18

In summary, negligence is the breach of a legal duty to take care undesired by the defendant to the plaintiff, which results in damage. Negligence in torts means omission to do something which a reasonable man would do or do something which a reasonable man would not do. This unlike intentional tort where the defendant desired the consequences, here it is undeserved damage to the plaintiff. Generally, the tort of negligence arises when a person who owes another a duty of care fails in doing so, consequent upon which the other party suffers injury or damages. In such a situation, once it is proved that the person owes a duty of care to another which is breached, the person will be liable for negligence - per Ebiowei Tobi, JCA in *Sterling Bank v. Akintoye Akinbode* (2018) LPELR-50669(CA)

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.

Onaolapo v. Zte (Nig) Ltd (2022) LPELR-57592(CA)

> The law on the tort of negligence appears to be fairly well settled. Generally, once a Claimant pleads and leads evidence which, creditably and cogently, establishes a duty of care owed him by a Defendant, and the breach of that duty by the Defendant as well as the

> resultant damages, he is entitled to his claim for damages for negligence. Thus, the converse is also the case that once a Claimant fails to establish by credible evidence all or any of the essential elements of the tort of negligence, his claim must fail and should be dismissed. The Claimant must plead and prove that the injury caused him was as a result of the negligence of the Defendant, and nothing else or less would suffice!." Per Biobele Abraham Georgewill, JCA (Pp 37 - 37 Paras B - F)

In *Uta v Golfic Securities (Nig) Ltd & Ors* (2022) LPELR-57079 (CA), the Court of Appeal held thus "It is also accepted in law that there can be no action in negligence unless there is damage. Negligence is only actionable if actual damage is proved. The gist of the action is damage and there is even no right of action for nominal damages. Negligence alone does not give a cause of action. Damage alone does not give a cause of action. The two must co-exist. See also the SCN judgment in *IMNL v Nwachukwu* (2004) 13 NWLR (Pt. 891) 543.

Self-Assessment Exercise 1

What three things must be proved by a plaintiff to establish negligence in a case?

1.3.2 Duty of Care

It is not every careless conduct that is actionable negligence even where damage results. Liability will only ensue where there is a legal duty to take care. The term "duty of care" means the duty a person owes in law to be careful so that his conduct will not cause injury to another person. It is a legal duty owed to another person to ensure that a person's actions or omissions do not injure that other person. In *DHL v Eze-Uzoamaka & Anor* (2020) LPELR-50459 [C] 31, Ogbuinya JCA held that a dutu of car can be imposed by law or created by contract or trust. Citing also *IMNL v Nwachukwu* (2004) 13 NWLR (Pt. 891) 543.

The concept of duty of care, when it is owed and when liability will attach for its breach was established in the case of *Donoghue v Stephenson* (1932) AP 532. In that case, 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 hers who was the plaintiff in this case. The plaintiff had consumed 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 hospitalised 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 her action was not based on contract.

Lord Atkin said:

> The liability for negligence…is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay….The rule that you are to love your neighbor became in law, you must not injure your neighbor; and the lawyer's question who is my neighbor? Receives a restricted reply. 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. Who, then in law is my neighbor? The answer

> seems to be persons who are so closely and directly affected by my acts, that I ought reasonably to have them in contemplation as being so affected, when I am directing my mind to the acts of omissions that are called in questions.

So your neighbour does not mean those closer or nearest to you but those who you foresee likely to be affected by carelessness on your part.

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, 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 from a shop when he felt a hard object. He then found a decayed tooth embedded in the biscuit. The plaintiff became ill and sued 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. Constance Ngonadi* (1985) 1 NWLR 739 SC. The plaintiff's action appears to be based on negligence and breach of warranty 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 knew for what purpose the plaintiff bargained for and bought the fridge

2. Whether the defendant gave the plaintiff an oral warranty 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 defendant's men carried the refrigerator and carried 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 warranty 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 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 *inter alia*, where as in this case, a warranty was implied by statute and the plaintiff action was based on the breach of that warranty in order words, the warranty 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.

So, Discuss, 'The High Court and Supreme Court decision in the case of *Nigeria Bottling Company v Ngodagi* could be criticized on the strength that it was based on contract and not tort.'

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1.3.3 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 the defendant must not only owe the plaintiff a duty of care, he must also be in breach of that duty.

Alderson B. described what constitutes breach of duty of care in *Blyth v Birmingham Water Works Co.* (1856) 11 Exch 781 at 784, where he stated that:

> Negligence is the omission to do something which a reasonable man, guided upon such considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The standard of assessment is objective and is devoid of the personal standard save that of the determining judge. See the case of *Glasgow Corporation v Muir* (1943) A.C. 448 at 547.

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 breached 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 "Risk Factor". This has four elements.

a. 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 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 proportional to the degree of risk involved if the duty of care should not be fulfilled. In *Glasgow Corporation v Muir* (1943) 2 ALL ER, the appellants allowed a church picnic party to have tea

room on a wet day. The members of necessity had to carry the tea through a passage where some children were buying ice cream and sweet. For unexplained reasons, some tea dropped and some children were burnt by it. It was held that the appellants were not liable in negligence in respect of the children's injuries because there was no reasonably foreseeable danger to the children from the use of the premises, which the appellants permitted. In *Bolton v Stone* (1951) AC 580, the court nevertheless held the defendant not liable taking into consideration such factors as the distance of the pitch to the ground, the presence of a seven feet wall and the fact that the injury to a person in the plaintiff's position was very slight and as such the cricket club was not negligent in allowing the game to go on their ground without taking extra precautions.

b. 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 remove 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.

c. 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. The courts will be seen to apply a lower standard of care where the defendant's activities have significant social value, although this will not usually justify all behaviour undertaken by the defendant. In all cases, one must balance the risk against the end to be achieved. Activities of a commercial nature such as to make profit are very different from activities to save life or limb.

d. 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 minimise 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 been negligent. The only other possible stop they could have taken would have been to close the factory, a position which will be too drastic.

Self-Assessment Exercise 2

What factors will the court take into account when assessing the standard of care expected of the defendant?

1.4 Summary

In this Unit you learnt about the essential element to establish to succeed in an action of Negligence:

1. The development of the tort of negligence
2. The existence of a duty of care by the defendant.

1.5 References/Further Readings/Web Sources

Bodunde Bankole: Torts: Law of Wrongful Conducts (1998) Libriservice Press, Lagos
G. Kodilinye: Nigeria Law of Torts (1999) Spectrum Publishers, Ibadan
John G. Fleming: The Law of Torts (1977) The Law Book co. Ltd. London.
Niki Tobi: Sources of Nigeria Law (1996) Mij Publishers.

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https://etheringtons.com.au › what-is-the-tort-of-negli...

Villamanta Disability Rights Legal Service
https://www.villamanta.org.au › information

1.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**
To establish Negligence the plaintiff must proof three things; the existence of duty of care; the breach of that duty of care; and damage resulting from the breach.

Answer to **SAE 2**
When assessing the standard of care expected of the defendant, the court will take into account: likelihood of harm, seriousness of the injury that is risked; the importance of the utility of the defendant activity; and the cost and practicability of measures to avoid the harm

Unit 2 : Standard of Care

Unit Structure

2.1 Introduction

Negligence is conduct falling below the standard established for the protection of others against unreasonable risk or harm.

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 an 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.

2.2 Learning Outcomes

At the end of this unit, you should be able to:

- define the term reasonable man;
- discuss moral qualities and knowledge;
- state what skills
- explain need for expert
- discuss age and lunacy

2.3 Standard of Care

2.3.1 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 law's 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 conform. 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.

The Court of Appeal in *Oilserv Ltd v. L. A. Ibeanu & Company (Nig) Ltd & Anor* (2007) LPELR-5149(CA), defined a reasonable man to be:

> …a fair-minded man, rational in thought and orientation. He is a man endowed with reason. It includes the ordinary person seen on our streets, whose means of transport is the popular Okada or mammy wagon. It also includes the affluent, highly literate or otherwise. Per Olabode Rhodes-Vivour, JCA (Pp 18 - 19 Paras F - A)

In 1837, in the famous case of *Vaughn v. Menlove* 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (Court of Common Pleas 1837), an English court of common pleas firmly established that, in the common law, the reasonable person standard is objective, as opposed to subjective. In that case, a farmer piled a haystack near his neighbor's cabin, which subsequently caught fire and burned his neighbor's cabin down. The farmer argued that he should not be liable since he genuinely did not consider that the haystack may cause his neighbor's cabin to burn down. The court nevertheless held him liable, since the jury found that his actions were objectively unreasonable, thereby holding him to the standard of a reasonable person.

In *Daniel v FRN* (2013) LPELR- 22148 (CA), the Court of Appeal held

> There is a legal personality known as the reasonable man. He is sometimes also known as a reasonable person or a reasonable citizen. His opinion is usually consulted in Courts to solve legal problems. He is an ubiquitous fictional figure of the law ... That reasonable man in some English authorities is the man in the Clapham Omnibus . For those of us in Nigeria who may not know anything about the Clapham Omnibus and the sort of man that takes a regular ride in it, Kayode Eso JSC gave us the Nigerian equivalent of that reasonable man in Adigun vs. Attorney General of Oyo State (1987) 1 NWLR (Pt.53) 678 at 720 . Said his Lordship: "A reasonable person here may be a pleasant housewife shopping for meal in Sandgrouse ..., he may be the ordinary worker in the Kano Native city living on his "Tuwo" or he is the plain woman in Okrika dress". Now it is what a reasonable man in the class indicated above thinks about the Appellant's case in the lower Court while observing the proceedings before that Court that will be the true test of whether or not the Appellant is having a fair hearing or fair trial. Per DANIEL-KALIO, JCA [B=B] 33-36

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 many of the personal characteristics of the actor himself.

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Self-assessment Exercise 1

Who is a reasonable man in law?

2.3.2 Moral Qualities and Knowledge

A man is expected to have that degree of common sense or knowledge of everyday things which normal adult would possess. 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 fire caused by discharging oil from the ship into Sydney Harbour, because their chief engineer 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 if he 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.

2.3.3 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 a 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.

So, what amount of care should a skilled person show in order to avoid liability in negligence?

2.3.4 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 acted "to the best of his own judgment" if his "best" is below that to be expected of a man of ordinary intelligence.

2.3.5 Age and Lunacy

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 arrows.

Moreover, a minor who engages in dangerous adult activities such as driving a car or handling industrial equipment, must conform 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 lunatics remains controversial. Some courts have 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 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.

Self-assessment Exercise 2

Explain the standard of care expected of children.

2.4 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.

2.5 References/Further Readings/Web Sources

Bodunde Bankole: Torts: Law of Wrongful Conducts (1998) Libriservice Press, Lagos
G. Kodilinye: Nigeria Law of Torts (1999) Spectrum Publishers, Ibadan

John G. Fleming: The Law of Torts (1997) The Law Book co. Ltd. London.
Niki Tobi: Sources of Nigeria Law (1996) Mij Publishers.

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2.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**
In law, a reasonable man is a hypothetical person of legal fiction crafted by the courts who approaches any situation with the appropriate amount of caution and then sensibly takes action. It is a standard created to provide courts with an objective test that can be used in deciding whether a person's actions constitute negligence. This does not mean they must be perfect**.**

Answer to **SAE 2**
A child, whether as plaintiff or defendant, is only expected to conform to the standard appropriate for children of the same age, intelligence and experience. If unable to understand the nature and likely consequences of his actions, negligence is not attributed to him at all; but given perception of the risk, he must display the judgment and behaviour proper for a child with like attributes. Some safeguard to the public is afforded by the obligation of parents and school authorities to observe reasonable care in the supervision of children under their control. Moreover, a minor who engages in dangerous adult activities, such as driving a car or handling industrial equipment, must conform to the standard of the reasonably prudent adult.

Unit 3 : Proof of Negligence and the Doctrine of *Res Ipsa Loquitor*

Unit Structure

3.1 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 from the breach. The damage must not be too remote.

3.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the circumstances of negligence act
- Know the plea *Res Ipsa Ioquitor*
- Know the appropriate condition under which *Res ipsa loquitor* will apply.

3.3 Proof of Negligence and the Doctrine of Res Ipsa Loquitor

Res Ipsa loquitur is a Latin phrase which means 'the thing speaks for itself'. The term is used to refer or describe anything that is plain, clear, or self-explanatory and needs no further explanation, proof or clarification. *Res Ipsa Loquitur* is a rule of the law of evidence whereby the mere fact that a thing happened raises an inference of negligence on the part of the defendant, so that there is a prima facie case and he has to make his defence. The principle of *res ipsa loquitur* as a rule of evidence does not apply in criminal law. The doctrine of *res ipsa loquitur* does not apply when the facts of what happened are sufficiently known, but the rule only applies when there is no explanation.

In the law of evidence, the general rule is that he who alleges a thing or a state of facts has the onus or duty to prove what he asserts. In other words, he who alleges a fact has a duty prove it. Therefore, as a general rule in actions for negligence, it is the plaintiff who must prove that the defendant has by his act or omission been negligent in the discharge of a legal duty of care he owed to the plaintiff, and that thereby he has suffered injury. However, in some cases, a plaintiff can prove that an accident or negligence had taken place and that he has suffered harm, yet he may be unable to show how the accident, negligence, or wrong happened, because he had not seen how it happened. He only knows that he has been injured. Ordinarily, the plaintiff's claim ought to fail as he has been unable to give evidence of the negligence of the defendant. In such an instance, plaintiff may rely on the principle known as *res ipsa loquitur* meaning 'the thing speaks for itself' to assist the plaintiff in establishing his claim of negligence against the defendant.

Self-Assessment Exercise 1

Explain the doctrine of *res ipsa loquitor*?

3.3.1 Proof of Negligence: *Res Ipsa Loquitor*

The burden of proving negligence ordinarily rests on the plaintiff, for he who alleges must prove. He must not only show that the defendant owes him a duty of care, but also that the duty was breached as a result of which he suffered foreseeable damage. This he can do by adducing legally admissible evidence. However, sometimes the plaintiff may not have known the cause of the accident beyond the accident itself. In such a situation he may rely on the doctrine of *res ipsa loquitor*, which literally means, the thing speaks for itself. The court is prepared to infer that the defendant was negligent without hearing detailed evidence from the plaintiff as to what the defendant did or did not do. *Res ipsa loquitur* means that, in some circumstances, the court will be prepared to draw an inference of negligence without hearing detailed evidence, as the events of the case would not normally occur in the absence of negligence. See the case of *NPA v. Rahman Brothers Ltd* (2010) LPELR-8962(CA).

To prove negligence, the claimant must show that the defendant breached their duty of care: that the defendant failed to act as a reasonable person would in their position. Where it is not possible for the claimant to prove exactly what the accident's cause was, the court will presume breach if the defendant was in control of the situation and the accident was not one which normally occurs without carelessness. See the case of *NBC Plc* v. *KPA & Anor* (2021) LPELR-54677(CA)

For the doctrine of *res ipsa loquitur* to be applied to any case, three conditions must be satisfied. These are:

1. There must be an absence of explanation of the occurrence by the plaintiff.
2. The thing that caused the harm must have been under the management or control of the defendant, or his servant; and
3. The accident or harm must be one which in the ordinary course of things, does not happen without negligence on the part of the defendant.

See the case of *UTA v. Golfic Securities (Nig) Ltd & Ors* (2022) LPELR-57079(CA) where the above three conditions were stated.

The Absence of Explanation by the Plaintiff

Whenever the court is able to find out from the evidence adduced how and why the occurrence or injury took place, then there is no need for the application of *res ipsa loquitur* and the presumption of negligence. See the case of *Julius Berger (Nig) Plc v. Nwagwu* (2006) LPELR-8223(CA). Therefore, when the facts of the incidents are sufficiently known, the question ceases to be one where the thing speaks for itself, and the solution is to be found by the court determining whether, on the facts as established the defendant is or is not, negligent.

Scott v London and st Katherine Cockes (1855) 3 H of L 596. The plaintiff a custom officer was passing through the door of the defendant warehouse when 6 bags of sugar fell on him. The judge of first instance directed a discharge verdict for the defendant on the ground of lack of negligence, the court of Appeal ordered a retrial and it was in that case that the rule *res ipsa loquitor* was formulated.

The Appeal Court ordered a retrial and it was that case that the maxim or rule *Res Ipsa 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 defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The facts relating to the accident must not be known, because once the facts of the accident are known then *res ipsa loquitor* fails.

See *Barkway v SmithWales Transport Co. Ltd* (1950) 1 All ER 392.
The claimant was injured when a bus drove off the road because of a latent, undetectable defect in the tyre that made it burst. There was evidence that the bus company ought to have made drivers report impacts which could cause this sort of defect, and had not done so. The claimant sued the defendant bus company in the tort of negligence. The House of Lords held that this was not a case where the doctrine of *res ipsa loquitur* applied. The House of Lords held that doctrine required the cause of the accident to be completely unknown. It was not applicable in a case where all the facts relating to the accident are known and the judge is merely being asked to decide between two or more competing interpretations of events. As such, the claimant retained the burden of proving negligence as usual.

See *Anichebe v Oyekwe* (1985) NWLR 100. There a lorry being driven by the defendant crushed the brother of the plaintiff. The defendant claimed that the accident happened because the U-bolt of the lorry broke and that he was unable to avoid the accident that happened. Although the Court held tha t there was an explanation by the defendant, it was not sufficient to discharge the inference of negligence raised by the happening of the accident therefore *res ipsa loquitor* apply and the defendant was held liable. See *Okeke v. Obidife* (1985) 1 All NLR 50.

Kuti v Gbodo (1962) N MLR 419. The plaintiff 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 *res 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 defendant while the train was in motion and was injured. There was 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 doors of the train are open continuously.

The Thing Was Under the Management or Control of the Defendant or His Servant
Where the thing that caused the injury was not under the management or control of the defendant or his servant, then the doctrine is inapplicable. See *Esson v LNE Ry* (1944) KB 421 CA. The question whether or not the thing that caused the harm was under, the management or control of the defendant or his servant is to be decided based on the circumstances of each case. A common example of a person having the management or control is a driver. A driver is presumed to have control of his vehicle and the surrounding circumstances to warrant the applicable of the rule in a case of negligent driving.
Also where the thing caused injury is under the control of several servants of a defendant and the plaintiff cannot identify the particular servant that is responsible, for instance during a surgery

operation in hospital when a patient is under anaesthesia, the doctrine will still apply to make the defendant vicariously liable for the act of the unidentified servant.

The Thing Does Not Ordinarily Happen Without Negligence by the Defendant

The harm must be one that does not ordinarily happen if proper care is taken by the defendant. Thus, the accident or injury must be one, which in the ordinarily course of things does not happen without negligence by the defendant. Negligence is readily presumed where human experience shows that the type of experience does not usually happen unless the defendant has been negligent. In other words, the harm must be one which as a matter of common experience does not happen without negligence by the person having the management or control of the thing that caused the injury. If the thing does not occur without negligence on the part of the defendant, then in the absence of an explanation of the occurrence, the court will readily draw an inference of negligence on the part of the defendant.

The summary of application of *res ipsa loquitur* to the tort of negligence was rightly captured by the SCN in *Miss Felicia Ojo v Dr Gharoro & Ors* (2006-03) Legalpedia – 28392(SC) thus:

> The doctrine of *res ipsa loquitur* is premised or predicated on the mere fact of the event happening, which is based on two rebuttable presumptions and I repeat two rebuttable presumptions, viz: (1) That the event happened as a result of a duty of care somebody owes his neighbour, (b) And that somebody is the defendant". (Per Niki Tobi JSC)
>
> "……In its very nature, the doctrine can only apply to negligence liability. In so far as nuisance rests on negligence, it can apply to nuisance also. The doctrine applies
>
> (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control;
>
> (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition:
>
> (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence." (Per Oguntade JSC quoting with approval the opinion of Clerk and Lindsell on Torts, 13th Edition, paragraphs 966 and 967 at pp. 568 and 569)

The court has applied the doctrine of *res ipsa loquitur* and presumed negligence in many cases which include the following:

1. Things falling from a building and injuring the plaintiff.
2. Accident due defective machines, objects, vehicles, structure and so forth.
3. Motor vehicle veering off and mounting a pavement.
4. Aircraft which crashed immediately after taking off.
5. Swab left in the body of a patient after an abdominal operation.
6. Having four stiff fingers and a useless arm after treatment of the hand and arm.
7. Clothing containing harmful sulphite which inflicted dermatitis on the wearer.
8. Motor vehicle knocking down a person walking on the roadside from behind.

Strabag Construction Nig. Ltd v Ogarekpe (1991) 1 NWLR pt 170, p. 733 CA.
The plaintiff respondent technician was an employee of the defendant appellant company. While the plaintiff and two others were on top of a tower being installed at a considerable height, the crane on which they were hoisted up suddenly collapsed and they fell down suffering serious injuries. He sued for damages and pleaded *res ipsa loquitur*. The court of appeal held: that the doctrine of *res ipsa loquitur* applied and that the appellant company was liable for negligence.

The doctrine of *res ipsa loquitur* is applicable in almost every area of tort, provided the requirements for its application are present. However, one area of tort where the doctrine is usually applied is in traffic accident. For instance where:

1. A petrol tanker ran into an electric pole and burst into flames, inflicting burns on the plaintiff who sat in a shop on the side of the road. See *Ifeagwu v Tabansi Motors Ltd* (1972) 2 ECSLR 790.
2. A bus going in the opposite direction swerved, broke through the central barrier and crashed into the plaintiff's car. See *Jibowu v Kuti* (1972) 2 UILR 367.

Alao v Inaolaji Builders Ltd (1990) 7 NWLR pt 160, p. 36 CA.
A petrol tanker driven by the 1st defendant appellant in the course of his duty as a driver and agent of the 2nd defendant appellant fell on its side and caught fire which spread and burnt down the plaintiff respondent company's site where road construction equipment and machinery are parked. The construction company sued for damages arising from the accident. The Court of Appeal held: that the defendants appellants were liable. In the absence of explanation as to why the accident occurred the doctrine of *res ipsa loquitur* applied.

Ifeagwu v Tabansi Motors Ltd (1972) 2 ECSLR 790.
The plaintiff was sitting in his brother's roadside shop in a village in the Onitsha-Enugu highway when a petrol tanker on its way to Enugu ran into a nearby electricity pole, overturned, burst into flames. The plaintiff suffered burns and he sued the defendant who were the employers of the tanker driver for negligence and relied on *res ipsa loquitur*. The court held: that the doctrine applied and the defendant was liable.

So, will the doctrine of *res ipsa loquitor* be applicable where the thing that caused the injury was under the management or control of the defendant or his servant?

The Effect of Proving *Res Ipsa Loquitur*
Where the doctrine of *res ipsa loquitur* is successfully pleaded by a plaintiff and is applied by court, the effects of the doctrine are as follows:

1. It affords prima facie evidence of negligence on the part of the defendant.

The least effect is that where the doctrine is accepted by court, it provides prima facie evidence of negligence on the part of the defendant. In which case, the defendant can no longer escape liability, even though he makes a 'no case' submission. He has to proceed to defend himself by adducing sufficient evidence in explanation to rebuts the inference of negligence. Where the defendant rebuts the inference, the plaintiff has to adduce evidence to establish his claim, otherwise it will fail.

2. It shifts the burden of proof to the defendant.

Secondly, the total effect of *res ipsa loquitur* is that it casts the burden of proof on the defendant, to establish by evidence that he has not been negligent. For instance by proving;

a. That he had observed the reasonable care required of him in the circumstances; or
b. That the harm was due to a cause which did not involve negligence on his part, such as inevitable accident, *novus actus interveniens*, fault of the plaintiff, fault of stranger, and so forth; or
c. By pleading such other appropriate defence that may afford him legal excuse.

The Court of Appeal stated how the plea of *res ipsa loquitor* can be raised in court in the case of *United Cement Company Of Nigeria Ltd & Ors v. Isidor & Ors* (2016) LPELR-41148(CA)

> It is pertinent to equally postulate, that the doctrine of *res ipsa loquitur* is essentially predicated upon pleadings *vis-a-vis* evidence. Essentially, the principle of *res ipsa loquitur* is raised in one of two ways. First, it may be pleaded or raised by expressly reciting the maxim itself. Second, it may alternatively be pleaded or raised to the effect that the plaintiff intends to rely upon the occurrence of the wrong or injury itself as evidence of negligence.

Where the defendant is unable to discharge the onus of proof cast on him, by establishing that he was not negligent, the plaintiff's claim will succeed, for the court will uphold the plea of *res ipsa loquitur* and make a finding of negligence against the defendant. Therefore, it must be borne in mind that the mere fact that the doctrine of *res ipsa loquitur* applies does not imply that the plaintiff will succeed.

Self-Assessment Exercise 2

What is the effect of a successful plea of the doctrine of *res ipsa loquitor*?

3.4 Summary

In this unit, we learnt about

a. The burden of proving negligence ordinarily rests on the plaintiff
b. Sometimes the plaintiff may not have known the cause of the accident beyond the accident itself. In such a situation he may rely on the doctrine of *res ipsa loquitor*

3.5 References/Further Readings/Web Sources

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3.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In tort law, *res ipsa loquitor* is a principle that allows plaintiffs to meet their burden of proof with what is, in effect, circumstantial evidence. The plaintiff can create a rebuttable presumption of negligence by the defendant by proving that the harm would not ordinarily have occurred without negligence, that the object that caused the harm was under the defendant's control, and that there are no other plausible explanation.

Answer to SAE 2

A successful plea of the doctrine of res ipsa loquitor will: affords prima facie evidence of negligence on the part of the defendant; and shift the burden of proof to the defendant.

MODULE 4 : Continuation of Negligence

Module Structure

Unit 1

Unit Structure

1.1 Introduction

Originally, no duty of care and liability was owed to a person who suffered nervous shock as a result of the negligent conduct of another person. This was because care was taken by the courts to prevent fraudulent claims. The problem of medical prognosis and the fear of creating indeterminate liability gave rise to the judicial view that it will be in the public interest to restrict the scope of recovery for injury by shock.

1.2 Learning Outcomes

At the end of this unit, you should be able to:

- Know what nervous shock is
- Know the appropriate application of the principle of negligence to nervous shock

1.3 Continuation of Negligence

Nervous Shock is a shock to nerve and brain structures of the body. It is a term used to denote psychiatric injury or illness, inflicted upon a person by intentional or negligent actions or omissions of another. It is most often applied to psychiatric disorders triggered by witnessing an accident, for example an injury caused to one's parents or spouse.

Nervous Shock cases may arise out of intentional acts of commission or omission, or unintentional or negligent acts of commission or omission. In case of intentional acts it is not even necessary to prove malice. In the case of *Wilkinson v Downston* (1897) 2 QB 57**,** as a practical joke, Mr Downton told the plaintiff Mrs Wilkinson, that her husband has been seriously injured in an accident and was lying in a ditch with broken bones. The effect of Downston statement was a violent shock to her nervous system resulting in weeks of suffering and incapacity. Wilkinson sued. The trial court found in her favour. Downston appealed on the grounds that damage was merely nervous shock out of a practical joke and there was no cause of action. The appeal court held that a party can recover for outrageous conduct that causes physical harm or mental distress. However, But it is the cases relating to unintentional or negligent acts that has given rise to an enormous body of judicial precedents.

Self-Assessment Exercise 1

What do you understand by the term ‘nervous shock’?

The existence of the duty of care and liability for nervous shock provided that the plaintiff was put in fear for his or her own safety was first recognized by court in 1901 in the case of *Dulieu v White* [1901] 2 KB 669. Injury to health from nervous shock is a bodily harm which attracts the award of damages in appropriate circumstances. A plaintiff may recover damages where a nervous shock caused an illness. This means, shock which produces any medical condition that is recognizable can be actionable. See the cases of *Hambrook v Stokes* (1925) 1 KB 141; *Dooley v Cammel-Laird* (1951) 1 Lloyd Rep 271; *Chadwick v British Railways Board* (1967) 2 All ER 945.

Nevertheless, the courts have been reluctant in applying the ordinary principles of negligence to shock cases without some qualifications to nervous shock liability. Lord Macmillan in *Bourghill v Young* (1943) AC 92 at p. 103 stated:

> In the case of mental shock, there are elements of greater subtlety than in the case of ordinary physical injury and those elements may give rise to debate as to the precise scope of legal liability.

In *Dulieu v White,* the claimant was pregnant and behind the bar in her husband's public house. A horse and cart crashed into the pub. The claimant was not physically injured but feared for her safety and suffered shock. She gave birth prematurely nine days later and the child suffered developmental problems. The court held that an action could lie in negligence for nervous shock arising from a reasonable fear for one's own immediate safety. *Kennedy J stated thus:*

> If impact be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact? It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself.

The 'impact theory' propounded by Kennedy, L.J. in *Dulieu v White* was abandoned in *Hambrook v Stokes Bros* (1924) All ER 110 .
The defendants' servant left a motor lorry at the top of a steep and narrow street unattended, with the engine running, and without having taken proper precautions to secure it. The lorry started off by itself and ran violently down the incline. The plaintiff's wife, who had been walking up the street with her children, had just parted with them a little a point where the street makes a bend, when she saw the lorry rushing round the bend towards her. She became very frightened for the safety of her children, who by that time were out of sight round the bend, and who she knew must have met the lorry in its course. She was almost immediately afterwards informed by bystanders that a child the description of one of hers had been injured. In consequence of her fright and anxiety she suffered a nervous shock which eventually caused her death, whereby her husband lost the benefit of her services. In an action by the husband under the Fatal Accidents Act. The court held that, on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children' s safety and not by fear for her own. Thus, claim for nervous shock is recoverable, if; shock resulted from what one saw or realised by one's own unaided senses and not from something which someone told him or her; and Shock was due to reasonable fear of immediate personal injury either to oneself or her/his children

Bourhill v Young (1942) 2 All ER 396
The observations of Atkin L.J as obiter dicta in *Hambrook v Stokes* were dealt with by the House of Lords in. In this case a motorcyclist was killed in a road accident for which he was responsible. A pregnant woman, who had got off a tram at scene of the accident (having heard the noise of an accident) claimed that when she reached the scene of the accident she saw blood on the road and as a result suffered shock which put her into premature labour - resulting in the loss of the baby. She subsequently brought a claim in relation to nervous shock and the resulting loss/damage. The House of Lords Court denied her claim because it was not reasonably foreseeable that someone not closely connected to the victim would suffer shock. There was insufficient proximity between the motorcyclist and the claimant. There was not a duty of care, owed by the motorcyclist to the claimant and she was not present at the scene of the accident (she had arrived after the accident had occurred. Hence, close degree of proximity is necessary to establish a claim; and foreseeability of injury an essential ingredient of duty of care.

In *Hinz v Berry* (1970) 2 QB 40 the emphasis was on the 'recognisable' psychiatric illness. The details are: Mr and Mrs Hinz went for a day out with their family in a Bedford Dormobile. They had four children of their own and fostered four other children. Mrs Hinz was also pregnant with her fifth child. They stopped in a lay-by to have a picnic. Mrs Hinz went across the road with one of the children to pick bluebells. Mr Hinz was in the dormobile making tea with the other children. A jaguar car driven by Mr Berry then came hurtling at speed. A tyre burst and the driver lost control and smashed into the dormobile. Mrs Hinz witnessed the horrible scene. Her husband died and the children were badly injured. As a consequence of this she became morbidly depressed. The court held she was entitled to recover as she had demonstrated a recognised psychiatric condition as opposed to feelings of grief and sorrow.
Lord Denning M.R. stated:

> In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant.

In *McLaughlin v O'Brien* (1982) 2 QB 40 the proximity factor was further expanded and clarified. The claimant's husband and three of her children were involved in a serious road traffic accident in which their car was struck by a lorry due to the negligence of the defendant lorry driver. Unfortunately one of the children was killed on impact. An ambulance took the injured parties to hospital. Another of the claimant's sons was a passenger in a car behind the family. The driver took him home and told his mother of the incident and immediately drove her to the hospital. She saw her family suffering before they had been treated and cleaned up. As a result she suffered severe shock, organic depression and a personality change. She brought an action against the defendant for the psychiatric injury she suffered. The Court of Appeal held that no duty of care was owed. She appealed to the House of Lords. The appeal was allowed and the claimant was entitled to recover for the psychiatric injury received. The House of Lords extended the class of persons who would be considered proximate to the event to those who come within the immediate aftermath of the event

Lord Wilberforce stated:

> Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the " aftermath " doctrine, one who, from close proximity comes very soon upon the scene, should not be excluded…. and

> by way of reinforcement of " aftermath " cases, I would accept, by analogy with " rescue " situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene—normally a parent or a spouse, could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible. Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

In *Page v. Smith* (1996) 1 AC 155, the claimant had suffered from ME (*Myalgic Encepahlomyelitis*) over a period of time and was in recovery when he was involved in a minor car accident due to the defendant's negligence. The claimant was not physically injured in the collision but the incident triggered his ME and had become chronic and permanent so that he was unable to return to his job as a teacher. He was successful at his trial and awarded £162,000 in damages. The court held that provided some kind of personal injury was foreseeable it did not matter whether the injury was physical or psychiatric. There was thus no need to establish that psychiatric injury was foreseeable. Also the fact that an ordinary person would not have suffered the injury incurred by the claimant was irrelevant as the defendant must take his victim as he finds him under the thin skull rule.

In *White v Chief Constable, South Yorkshire Police* (1991) 4 All ER 907 the emphasis was on the categorisation of 'victims'. This case arose from the disaster that occurred at Hillsborough football stadium in Sheffield in the FA cup semi-final match between Liverpool and Nottingham Forest in 1989. South Yorkshire Police had been responsible for crowd control at the football match and had been negligent in directing an excessively large number of spectators to one end of the stadium which resulted in the fatal crush in which 95 people were killed and over 400 were physically injured. The Claimants based their claims on the grounds that as employees, the defendant owed them a duty of care not to cause them psychiatric injury as a result of negligence, alternatively they claim as rescuers, which they argued promoted them to primary victims as oppose to secondary victims.
The court held that the claimants were not entitled to recover for the psychiatric injury. The position of the court was based on the following:

i. A rescuer, not himself exposed to physical risk by being involved in rescue was a secondary victim and as such, not entitled to claim.
ii. To qualify as a primary victim, the claimant, even if he is a rescuer has to be in the zone of physical danger.
iii. Both rescuers and employees are not to be given any favourable treatment.

All the cases stated above are cases in which people are caught up in serious , life threatening situations by acts of negligence, and the consequent shock suffered by others including the victims. It is also possible, and there are cases where the nervous shock is a result of witnessing damages to property. This can be seen in the decision of *Attia v British Gas Corporation* [1988] QB 304 CA. This case arose from a horrific train crash in Lewisham in which 90 people were killed and many more were seriously injured. Mr Chadwick lived 200 yards from the scene of the crash and attended the scene to provide some assistance. He worked many hours through the night crawling beneath the wreckage bringing aid and comfort to the trapped victims. As a result of what he had witnesses he suffered acute anxiety neurosis and received treatment as an inpatient for 6 months. The court settled the legal issue that nervous shock arising out of witnessing damages to property is actionable.

So, can nervous shock arise out of witnessing damage to property?

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https://onlinelibrary.wiley.com › doi › pdf › j.1468-223..

1.4 Summary

In this unit, we learnt about

a. The definition of nervous shock
b. The attitude of the courts to the application of principles of negligence to nervous shock

1.5 References/Further Readings/Web Sources

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1.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

Nervous Shock is a shock to nerve and brain structures of the body. It is a term used to denote psychiatric injury or illness, inflicted upon a person by intentional or negligent actions or omissions of another. It is most often applied to psychiatric disorders triggered by witnessing an accident, for example an injury caused to one's parents or spouse.

Unit 2 : Causation and Remoteness of Damages

Unit Structure

2.1. 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.

2.2. Learning Outcomes

The purpose of this unit is to enable you to:

- understand the term cause-in-fact i.e. whether the defendant's culpable conduct was a causally relevant factor;
- the 'But for' Test;
- remoteness of damage.

2.3. Causation and Remoteness of Damages

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).

2.3.1. 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 the "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 *Bernett v. Chelsea and Kessington 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"

In determining questions of causation, the court is not interested in what actually took place between the plaintiff and the defendant but what would have happened if the defendant's breach of duty is removed from the facts or set of events surrounding the accident and possibly replaced by a set of conduct not involving breach of duty. Thus the plaintiff is expected to prove that the injury would have been avoided if not for the breach of duty. See *Wilsher v Essex Area Health Authority* (1988) AC 1074.

The burden of proving causation rests on the plaintiff throughout the case. It never shifts. If he fails to show that the defendant's negligence materially contributed to the damage, his action fails.

Self-assessment Exercise 1

Explain the burden of proof on the plaintiff in relation to questions of causation?

2.3.2. Remoteness of Damage

Damages may even be denied where the plaintiff establishes a causal link between the breach of duty and his damage. This will be on the ground that the breach of duty, though the factual, was not the legal cause of damage. Thus, damage will be regarded as being too remote. That the defendant is liable only for those consequences resulting from his breach of duty is settled law. However, if only true in theory, the consequences of a conduct amounting to a breach of duty may be endless and/or far-reaching and it will be unjust to hold the defendant liable and *infunctum* for all the consequences of his conduct. The concept is an attempt by the courts to place a limit on the extent of a person's liability for injuries resulting from his negligent conduct.

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 forseeable that the plaintiff would as a result of the accident sustain 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.

So , will the defendant be liable in all cases where the plaintiff establishes a causal link between the breach of duty and his damage? Discuss.

2.4. 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 etc.

2.5. References/Further Readings/Web Sources

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2.6. Possible Answers to Self-Assessment Exercises

Answer to SAE 1

The burden of proving causation rests on the plaintiff throughout the case. Thus the plaintiff is expected to prove that the injury would have been avoided if not for the breach of duty. See *Wilsher v Essex Area Health Authority* (1988) AC 1074. In determining questions of causation, the court is not interested in what actually took place between the plaintiff and the defendant but what would have happened if the defendant's breach of duty is removed from the facts or set of events surrounding the accident and possibly replaced by a set of conduct not involving breach of duty.

Unit 3 : **Examples of Duty of Care in the Law of Negligence**

Unit Structure

3.1 Introduction

The case of *Donoghue v Stevenson, supra* have settled the position of law: "the categories of negligence are never closed". As a result, the various kinds of negligence are not exhaustible and the situations in which a duty of care may arise are many.

3.2 **Learning Outcomes**

At the end of this unit, you should be able to:

- Give examples of duty of care in the law of negligence
- Some duty situations which are governed by special rules or which have assumed a particular level of prominence

3.3 **Examples of Duty of Care in the Law of Negligence**

3.3.1. Road Users

All road users and by extension, other means of transport such as shipping at sea and railways, owe a duty of care to guide against causing injury to other road users or their property. On the road, he owes a duty of care to other drivers, passengers in other vehicles, cyclists, pedestrians as well as people's properties. He can fulfill this duty by obeying traffic rules and signals. It also extends to not taking drugs or alcohol while driving. In each case, whether the defendant has observed the required standard of care is a question of fact.

Esiegbe v Agholor (1993) 9 NWLR pt 316, 128
Bourhill v Young
Odebunmi v Abdullahi (1997) 2 NWLR pt 489, 526
Wright v Lodge (1993) 4 All ER 299 CA

Self-Assessment Exercise 1

While Out Shopping, Kate's 7-Year-Old Daughter Slips Out Of Her Hand And Runs Into The Road Causing A Serious Accident. Will Kate Be In Breach Of Her Duty Of Care?

3.3.2. Chattel Manufacturers

A producer or chattel manufacturer owes a duty of care to the ultimate consumer and if the consumer is harmed by any defect in the chattel, he will be liable. This position was first established in *Donoghue v Stevenson.*

A manufacturer includes producers, repairers, masons, assemblers and suppliers who do something to the product. The chattel would include items used internally or externally and capable of causing harm or injury whether given free or purchased.

Osemobor v Niger Biscuit (1973) 1 CCHC J at 71.
In this case the plaintiff was eating some biscuit which he bought from a shop when he felt a hard object. He then found a decayed tooth embedded in the biscuit. The plaintiff became ill and sued 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.

So, where supplies are given free, would chattel manufacturers still owe a duty of care to the consumer?

3.3.3. Negligent Misstatement resulting in Economic Loss

Negligent misstatement may have the effect of causing physical damage to any person who relies on it or causing financial or economic loss to the person. A duty of care exists where there is a special relationship between the parties. A negligent misstatement may give rise to an action for damages for economic loss. When a party seeking information or advice from another – possessing a special skill – and trusts him to exercise due care, and that party knew or ought to have known that the first party was relying on his skill and judgment, then a duty of care will be implied. Also, where an advice is given purely on a social occasion, no duty of care will arise because it would not be forseeable by the defendant that the plaintiff would rely on the advice nor reasonable for the plaintiff to do so.

Hedley Byrne and Co Ltd v Heller and Partners, supra
Hedley Byrne were advertising agents placing contracts on behalf of a client on credit terms. Hedley Byrne would be personally liable should the client default. To protect themselves, Hedley Byrne asked their bankers to obtain a credit reference from Heller & Partners ('H&P'), the client's bankers. The reference (given both orally and then in writing) was given gratis and was favourable, but also contained an exclusion clause to the effect that the information was given 'without responsibility on the part of this Bank or its officials'. Hedley Byrne relied upon this reference and subsequently suffered financial loss when the client went into liquidation.

The House of Lords ruled that damage for pure economic loss could arise in situations where the following four conditions were met:

(a) a fiduciary relationship of trust & confidence arises/exists between the parties;
(b) the party preparing the advice/information has voluntarily assumed the risk;
(c) there has been reliance on the advice/info by the other party, and
(d) such reliance was reasonable in the circumstances.

The House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605 also refined the Hedley Byrne test. Lord Bridge set out the three requirements to be found before a relationship of sufficient proximity would be established in a misstatements case:
'The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him, directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.'
In Caparo itself, reliance on the information was not reasonable because it was supplied for one purpose and could (and should not) be relied upon for any other purpose.

Self-assessment Exercise 2

Would an advice given purely on a social occasion amount to a negligent misstatement?

3.3.4. Bailment

A bailee who is in charge of goods entrusted to him by the bailor owes that bailor a duty of care towards those goods. Here the onus of proof is on the bailee to show that any loss or damage to the goods bailed was not due to his own negligence.

See the following cases:
Panalpina World Transport Ltd v Wariboko (1975) 5 ECSLR 460
Koko v Nigerian Ports Authority (1973) NCLR 342
Nigerian Ports Authority v Ali Akar and Sons (1965) All NLR 272 SC
Hill Station Hotel Ltd v Adeyi (1996) 4 NWLR pt 442, 294 CA

3.3.5. Employer

An employer owes a duty of care to his employees and may be liable in negligence where an employee suffers an injury in the course of his work, if there has been a breach of that duty. The position under Common Law was highlighted in the case of *Wilsons and Clyde Coal Co. v. English* [1938] AC 57. In the instant case, the defendants had employed the complainant, Mr English. He was working on a repair to an airway on the Mine Jigger Brae, which was used as part of the haulage system. He was going to the bottom of the mine pit when the haulage was started. Although he had tried to evade the danger through a manhole, he was trapped by machinery and it crushed him to death. The defendants and employers, Wilsons & Clyde Co Ltd, tried to claim that it was Mr

English's own negligence that had resulted in his death; he could have taken an alternative route or alerted the employee in charge of the machinery for it to be stopped.

It was held that the defendants had delegated the organisation of a safe working system to one of their employees on the site and they had taken all reasonable steps to ensure they entrusted this duty to an experienced employee. Thus, they were held not to be liable for damages. The complainant appealed on the issue of whether employers had a non-delegable duty of care towards the safety of workers.

The House of Lords decided that Wilsons & Clyde Co Ltd, as an employer, had a duty of care to ensure a safe system of work and this duty could not be fully delegated to another employee. Thus, the defendants always remain responsible for a safe workplace for their employees and are vicariously liable for any negligence of another. This duty includes; providing proper materials, employing competent workers, providing a safe place of work and providing valuable supervision. The defendants were liable for damages.

See the cases of:
Koiki v NEPA (1972) 11 CCHCJ 127
Strabag Construction Nig. Ltd v Ogarekpe (1991) 1 NWLR, Pt 170, p. 733
Western Nigeria Trading Co v Ajao (1965) NMLR 178
Walker v Northumbe
rland CC (1994) NLJ 1659
Davie v New Merton Board Mills (1959) AC 604
Obakoro v Forex Co Inc. (1973) 3 UILR 91.

So, does the duty of care owed by an employer to an employee extend to employing competent workers?

3.3.6. Occupier's Liability

An occupier may be defined as a person in control of premises. In *IITA v Amrani* (1994) 3 NWLR pt 332, 296 an occupier was defines as "a person who has sufficient degree of control over premises to put him under a duty of care towards those who come lawfully into the premises." A degree of control is *prima facie* sufficient if it is such that the defendant ought to realise that a failure on his part to use care may result in injury to a person coming under the premises. An occupier could be a landlord or the tenant where he lets out the property. No duty of care is owed to trespassers. Visitors and invitees are to be safe and prevented from injury. Where the invitee uses the place in an unauthorised way, the occupier will not be liable.

3.3.7. Professional Liability

Professional negligence occurs when a professional (lawyer, insurance broker, accountant, architect, realtor, financial advisor, etc.) fails to fulfil the professional duties or obligations that they were hired by their clients to fulfil. When someone agrees to perform professional services for someone else who needs these services, the hired professional must exercise "reasonable care" in providing these services.

The law of professional negligence has developed in the following professional fields: accountants and auditors, bankers, architects, engineers, legal practitioner, medical practitioners, etc.

JEB Fasteners Ltd v Marks (1983) 1 All ER 583
The court held that auditors preparing company accounts owe a duty of care to any person whom they ought reasonably to foresee might rely on the accounts of the company to his injury.

Clayton v Woodman (1962) 2 QB 533
An architect was held liable in negligence for giving wrong instruction to a bricklayer which resulted in the collapse of a wall occasioning injury to the bricklayer.

For legal practitioners, and with regards to the tort of negligence, they are in a special position in that the legal practitioner owes a fiduciary duty towards his client and so has always been liable for any negligent mis-statement made or negligent advice given to the client. Also, the legal practitioner when acting as a barrister or advocate in the course of judicial proceedings enjoys complete immunity from actions in negligence proceedings and the immunity extends to pre-trial work. See the cases of *Saif Ali v Sidney Mitchell & Co.* (1978) 3 All ER 1033, 1039; *Rondel v Worsley* (1969) 1 AC 191.

Medical practitioners owe certain duties to their patient which include duty to provide adequate counselling, duty to warn the patient on the risks of the treatment, duty to carry out a proper diagnosis, and duty to administer proper treatment. The nature of a medical practitioner's professional duty of care was stated by Lord Hewart CJ, in *R v Bateman* (1925) All ER 45 at 48:

> If a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patent or client to use due caution in undertaking the treatment.

Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428
Mr Barnett went to hospital complaining of severe stomach pains and vomiting. He was seen by a nurse who telephoned the doctor on duty. The doctor told her to send him home and contact his GP in the morning. Mr Barnett died five hours later from arsenic poisoning. Had the doctor examined Mr Barnett at the time there would have been nothing the doctor could have done to save him. The court applying the "but for" test, held that the hospital was not liable as the doctor's failure to examine the patient did not cause his death.

Cassidy v Ministry of Health [1951] 2 KB 343
The claimant was a patient at a hospital run by the defendant who required routine treatment to set the bones in his wrist. Due to negligence on the part of one of the doctors, the operation caused his fingers to become stiff. The claimant sued the defendant in the tort of negligence on the basis of vicarious liability. The court held that the evidence disclosed a prima facie case of negligence on the part of the defendant medical personnel, which had not been rebutted and the defendants were accordingly liable.

Self-Assessment Exercise 3

What is the legal basis for professional liability in negligence?

3.4 Summary

In this unit, we learnt about

a. Some duty situations which are governed by special rules or which have assumed a particular level of prominence

3.5 References/Further Readings/Web Sources

Ese Malemi, Law of Torts (Princeton, Lagos 2008)

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)

F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

3.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

While Kate will owe a duty of care to other road users, it is unlikely (so long as she was keeping an eye on her daughter) that she will be in breach of her duty of care.

Answer to SAE 2

Where an advice is given purely on a social occasion, no duty of care will arise because it would not be forseeable by the defendant that the plaintiff would rely on the advice nor reasonable for the plaintiff to do so.

Answer to SAE 3

Professional liability in negligence is based on the principle that when someone agrees to perform professional services for another who needs these services, the hired professional must exercise "reasonable care" in providing these services.

MODULE 5 : Defences To The Torts of Negligence

Module Structure

Unit 1	Consent/*Volenti non fit injuria*
Unit 2	Contributory Negligence
Unit 3	Necessity or Emergency
Unit 4	Novus actus interveniens and Mistake
Unit 5	Limitation of Action and Illegality

Unit 1 : Consent/Volenti Non Fit Injuria

Unit Structure

1.1. Introduction

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 maxim 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.

1.2. Learning Outcomes

The purpose of this unit is to enable you to:

- define and discuss the meaning of *volenti non fit injuria*;
- comprehend the implication of *volenti non fit injuria* on a plaintiff and the defendant.

1.3. Consent/*Volenti non fit injuria*

Volenti non fit injuria or consent refers to situations in which the claimant can be regarded as having consented to a risk which then manifests itself. Consent is a complete defence - if consent is found, a claim will be defeated.

Consent defences can be broken down into two categories. In the first are situations of negligence where a claimant agrees that the defendant will not be held liable for any injuries they might incur whilst undertaking a particular activity. So an individual might sign a waiver in which they consent to any risk of injury that might occur when they bungee jump. In the second are where the claimant effectively tells a defendant to do something. So an individual who tells another to burn down his house cannot sue that person for damaging his property.

The Court of Appeal in *Dare & Anor v. Fagbamila* (2009) LPELR-8281(CA) stated:
The principle of volenti non fit injuria has been the subject of a lot of misconceptions. This is a common defence in actions of negligence. It emphasises the necessity for knowledge and consent. The question primarily is whether the plaintiff agreed to the breach of the duty of care by the defendant towards him or, at least, to waive his right of action arising out of such breach. The defence has both these applications. The first of which negatives the wrongfulness of the defendant's conduct, while the second prevents the plaintiff from recovering without affecting the fact that the defendant has committed a wrong. But whatever the application, voluntas emphasises the need for knowledge of the risk in the plaintiff. The law is that if a defendant desires to succeed

on the ground that the maxim *volenti non fit injuria* is applicable, he must obtain a finding of fact that the plaintiff voluntarily and freely, with full knowledge of the knowledge of the risk he ran, impliedly agreed to incur it. Therefore, there must be knowledge before there can be consent." Per Jummai Hannatu Sankey, JCA (Pp 22 - 23 Paras E - D)

Self-assessment Exercise 1

What are the two circumstances/situations that consent as a defence can apply?

Consent is made up of three factors. The claimant must have a knowledge of the nature and extent of the risk they consented to, the claimant's consent must be voluntary, and they must be shown to have agreed to the risk.

a. Knowledge of Risk

Before consent can be effective, a claimant must know what it is that they are consenting to. This is subjective, so the courts will ask what a claimant knew at the time consent occurred.

Morris v Murray [1991] 2 QB 6
The claimant had been drinking with the defendant all day (to the point at which the defendant had consumed roughly seventeen servings of whiskey). The defendant, who had a pilot's licence, suggested that they take his light aircraft for a flight. The claimant agreed and drove to the airfield. In a perhaps predictable turn of events the plane crashed, killing the defendant and seriously injuring the claimant, who brought a case against the defendant's estate. The defence argued that the claimant had consented to the risk, since he must have known how glaringly dangerous the flight would have been. This argument was successful - the claimant was held to have known of the risk but continued on regardless, and thus the defence of consent applied.

It can thus be seen that whilst knowledge is subjective, there is no need for an explicit expression on the part of the claimant that they are aware of the risk they are running. Instead, the court will infer the likely knowledge of the claimant (although they will of course pay attention to any explicit evidence that the claimant knew of a particular risk).

Since this requirement is subjective, the defence will fail if the defendant was not aware of a risk, even if they should have been. Thus in *Smith v Austin Lifts Ltd* [1959] 2 Lloyd's Rep 583 the claimant was injured by a risk that he reasonably should have known about. Nonetheless, a consent defence failed, because the claimant wasn't aware of the extent of the risk he was exposing himself to.

b. Voluntariness

Key to the employment of a consent defence is that the claimants must have been given true freedom of choice before they can be said to have consented. This can be seen in *Bowater v Rowley Regis Corp.* [1944] KB 476. The claimant was employed by the defendant as a road sweeper. Part of this work involved using a horse-drawn cart to collect sweepings. He was ordered by his foreman to use a horse which was known for misbehaviour. The claimant protested, but his protests were ignored. A few weeks later the horse bolted, throwing the claimant from his cart and injuring him. The defendant raised a consent defence. The defence failed - the claimant could not be regarded as willing since he had no real choice in the matter, and thus consent did not apply.

This case also demonstrates a couple of other points. Firstly, employees can rarely be described as consenting to risk, where that risk comes about as part of their employment. Since the actions of employees are usually dictated by a manager, it is the manager who is effectively making the choices in such scenarios. This can be seen in *Smith v Baker & Sons* [1891] AC 325. The claimant was injured on a building site when a stone fell from a crane. Whilst he was aware of this risk, and continued to work on the site, this was not effective consent - he had no control over the risk, and thus no choice over whether he was exposed to it or not (outside of his general consent to employment on the site). This principle also fits into wider legal views of the employer-employee relationship, which tend to emphasise the duty of employers to avoid harm and their ability to bear losses via organisational coffers or insurance policies. There exists an exception to this principle, however, where an employee is paid 'danger money' to undertake a particularly risky activity - since such payments are predicated on an employee consenting to undertake a particularly risky activity, this can be considered effective consent (unless of course, the choice was between taking on the extra risk and becoming unemployed).

Secondly, freedom of choice does not mean merely 'it was possible to avoid the risk'. So in *Bowater* the employee had the freedom to refuse the order to use the dangerous horse and potentially run the risk of dismissal or disciplinary action. Still, it would be disingenuous to assert that the claimant had a free choice between using the horse and not. To put it another way, a choice between fighting a bear or jumping off a cliff is not a freely made choice.

c. Agreement

Agreement can take one of two forms - express and implied.
Express agreements include explicit forms of consent such as the eponymous consent form, or else an explicit agreement between claimant and defendant. So a paintballing accident, for example, which is not caused by negligence but results in the loss of an eye, can be excluded via the proper contract terminology. Express agreements are, overall, much simpler than implied agreements, since they will usually make it clear what the consent pertains to.

Implied consent includes situations in which a claimant can reasonably be held to have consented to a particular risk, but do not make this consent explicitly known (after all, the phrase 'I consent to that risk' is hardly a common phrase in everyday life). However, the courts are relatively reluctant to imply consent unless it is very clearly (but not explicitly) in place, since this is effectively putting words into the claimant's mouth. The situations in which it tends to be found are those in which a claimant is aware of an obvious danger but presses on regardless. This can be seen in *Imperial Chemical Industries Ltd v Shatwell* (also discussed in employers' statutory breach).

Imperial Chemical Industries Ltd v Shatwell [1965] AC 656
In defiance of express instructions and statutory regulation, the two claimants tested mining explosives in a quarry in an unsafe manner. They could have undertaken a safe test had they just waited for a colleague to return with a longer detonator wire. The explosives detonated early, and the claimants were injured. They then brought a case against their employer. The courts allowed a consent defence to succeed, on the basis that the claimants were clearly in full knowledge of the risks and decided to press ahead anyway.

However, unless a danger is staggeringly clear (thus in *Imperial Chemical Industries*, there were explicit warnings in place) the courts will not imply consent. This can be seen in a series of cases where passengers have knowingly ridden in the vehicles of drunk drivers.

Thus in *Dann v Hamilton* [1939] 1 KB 509, the defendant went drinking in a variety of different pubs with the claimant and a third party. The trio got into the defendant's car (defendant driving), but after a short while the third party declared the defendant to be drunk, and got out. The claimant stated that she would accept the risk of an accident occurring. A negligently caused accident did occur, injuring the claimant. Nonetheless, a consent defence was not accepted - the claimant was not held to have consented to absolve the defendant from any acts of negligence. The same principle can be seen in *Owens v Brimmell* (discussed in contributory negligence.) Again, although the claimant passenger knew that the defendant driver was drunk, a consent offence did not apply.

These cases can be contrasted with *Morris v Murray* (drunken pilot), in which the danger was held to be so incredibly obvious and extreme that consent could succeed. Thus, unless a danger is overwhelmingly apparent and grievous, consent will usually not be implied by the courts.

What three factors would need to be proved for the defence of Consent to be applicable to a defendant?

1.4 Summary

In this unit, we learnt about:

a. Definition of volenti non fit injuria
b. The three factors that must apply for consent to be valid

General Defences to the law of Torts

1.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

1.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

Consent defences would apply firstly to situations of negligence where a claimant agrees that the defendant will not be held liable for any injuries they might occur whilst undertaking a particular activity, and secondly where the claimant effectively tells a defendant to do something that results in the claimant suffering damage to his property.

Unit **2 :** **Contributory Negligence**

Unit Structure

2.1 Introduction

Contributory negligence is one of the principal defences to an action in negligence and suggests the negligence of the plaintiff which combines with the negligence of the defendant to bring about injury to the plaintiff.

2.2 Contributory Negligence

At the end of this unit, you should be able to:

- Explain what contributory negligence is.
- Main elements of contributory negligence.
- Cases where a lower standard is expected for contributory negligence
- Apportionment in contributory negligence

2.3 Contributory Negligence

One of the most commonly used defenses to negligence claims is to show contributory negligence on the part of the plaintiff. Contributory negligence occurs when a plaintiff's conduct falls below a certain standard necessary for the plaintiff's protection, and this conduct cooperates with the defendant's negligence in causing harm to the plaintiff. In plain English, this means the plaintiff most likely would have avoided injuries had he or she not also been negligent.

Contributory negligence is basically the negligence of the plaintiff himself which combines with the defendant's negligence in bringing about the injury to the plaintiff. 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.

Example 1

Where a factory worker suffers serious burns to his face after his welding torch malfunctions. However, he failed to flip down his mask before using the torch, which would have prevented the injury.

The basic essence of contributory negligence is that the plaintiff's carelessness contributed to his damage. A contributory negligence defence is quite simply an argument that the claimant, through

some action or omission of their own, contributed manifestly to their own injuries, and that this fact should be reflected in the awarded damages.

In *Eastchase Aluminium Products Ltd v. Ugwu & Anor* (2016) LPELR-40936(CA), the court stated:
Basically, the essential characteristic with regard to the principles of contributory negligence, is to the effect that the party charged must be primarily liable for the negligence if any, that gave rise and caused the damage or injury. The principle of contributory negligence is founded upon the application of common sense to the simple facts of life. These are facts which reveal the action or inaction of a person who although was not primarily responsible for an accident or the cause of an injury, had by his own conduct created a situation which favoured the cause of the accident and or resulted in the injury which had occurred; be it in the form of damages or otherwise. Thus, contributory negligence as a defence to a claim is essentially predicated on negligence. It applies to cases where a plaintiff has, through his own negligence, contributed to cause, the damages he incurred as a result of defendant's negligence. Indeed, a plea of contributory negligence is tantamount to a tacit admission of the defendant's primary responsibility for the complaint of negligence and thereby relieves the plaintiff of the burden of proving negligence. See S.C.C. (Nig.) Ltd. & Ors. vs. Mrs. Igueriniovo (2004) All FWLR (Pt.189) 1133 @ 1148-1149." Per Massoud Abdulrahman Oredola, JCA (Pp 14 - 15 Paras C - B)

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 for his own safety.

There are two main elements of a contributory negligence defence. Firstly, the claimant must be at fault (their conduct having fallen short of the expected standard of care). Secondly, once fault has been established, the extent of blame must be apportioned.

Jones v Livox Quarries [1952] 2 QB 608
The claimant worked in a quarry owned by the defendant. He decided to hitch a lift on the back of an excavator by standing on the tow bar, unbeknown to the driver, and a policy was in place forbidding this behaviour. A dump truck, driven recklessly by another employee, went out of control and hit the back of the excavator, crushing the claimant’s legs, leading to amputation.

Whilst the dump truck's driver was to blame for the accident, the court held that the claimant was 20% to blame for his injuries - he had acted negligently, and had acted against orders.

Thus, contributory negligence is not based on being in the wrong place at the wrong time, but rather on whether the claimant had acted reasonably in the circumstances, with 'reasonable' defined as taking action to avoid foreseeable harm. It should be noted that reasonable behaviour is not based on acting to prevent any and all foreseeable accidents, but rather just taking precautions to avoid generally foreseeable harm. All that can be asked of claimants is that they take reasonable precautions to self-protect themselves, since the nature and extent of the tort that affects them will be determined by the behaviour of the defendant who has harmed them. What is reasonable will depend on the context.

Claimants will be expected to wear seatbelts whenever they get into a car, regardless of length or road conditions.

Froom v Butcher [1976] 1 QB 286
The claimant was involved in a negligently caused car accident, in which the claimant was not wearing a seatbelt. A lengthy discussion of contributory negligence ensued, with Lord Denning coming to the follow conclusion (in reference to failures to wear seatbelts):

> Sometimes the evidence will show that the failure made no difference. In such case the damages should not be reduced at all. […] At other times the evidence will show that the failure made all the difference. In such cases I would suggest that the damages should be reduced by 25 per cent. […] Often enough the evidence will only show that the failure made a considerable difference. In such case I would suggest that the damages […] should be reduced by 15 per cent.

It is perhaps odd that situations in which the entire harm of the accident can be attributed to non-seatbelt wearing only attract a 25% reduction in damages. However, it should not be forgotten that whilst a claimant has a responsibility to wear a seatbelt, they have a greater right to not be hit by a negligent driver. Of course, this only refers to non-seatbelt wearing - it may well be a case that a claimant contributes to an accident in more than one way, and so the contribution will be greater.

The same principle applies for motorcycle drivers who do not wear helmets, as per *O'Connell v Jackson* [1971] 3 WLR 463. The claimant was injured whilst riding his motorcycle without a helmet. A negligent driver moved into his lane and struck him. The court used the Highway Code as their benchmark for responsibility, and noted that it told motorcyclists to wear helmets. Since the motorcyclist did not contribute to the accident, and the lack of a helmet only caused some but not all of his injuries, damages were reduced by 15%. This case also demonstrates the utility of codes of conduct and guidelines: it can generally be held that someone undertaking a job or activity has read any relevant guidance or codes of practice that pertain to it (after all, that's why they exist.) Thus such codes or guidelines can form a useful demonstration of what constitutes reasonable behaviour.

The courts should consider each instance of contributory negligence on the basis of its own facts and circumstances. This principle can be seen at work in the case of *Owens v Brimmell* [1977] QB 859. The claimant knowingly got into a car with the defendant, with whom he had been drinking with at a pub. He also failed to wear his seatbelt. The defendant negligently caused an accident in which the claimant was injured. Tasker Watkins J noted (at 867) that a substantive body of case law existed regarding such situations, but ultimately, that:

> whether [the law] can be relied on successfully is a question of fact and degree to be determined in the circumstances out of which the issue is said to arise.

Thus, not every situation involving a seatbelt has to be decided according to *Froom*. Of course, a prudent judge will still attempt to maintain the continuity of the law unless the case at hand can be sufficiently distinguished.

The relevant standard of care can change depending on the characteristics of the claimant. Thus, children will be expected to act less carefully than adults.

Gough v Thorne [1966] 1 WLR 1387.
Three siblings aged seventeen, thirteen and ten were waiting to cross a road. A lorry driver slowed down, and beckoned them to cross. They did so, but then a car overtook the lorry via a narrow gap, and hit the two youngest siblings. At trial, the thirteen year old was held to have contributed a third to her injuries, for not checking the road for any other oncoming traffic. On appeal this decision was struck out on the basis that her behaviour was acceptable for a thirteen year old, although negligent if undertaken by an adult.

It should be noted that unless very young, children will rarely be held to be blameless, thus in *Morales v Ecclestone* [1991] RTR 151 an eleven year old was held 75% responsible for running out into a road without looking and getting hit by a car.

The situation that the claimant is in will also change the relevant standard of care, so rescuers attending to an event will be held to a lesser standard of care and those who act quickly when placed in an emergency situation will not be handled as if they were capable of rational, calculating thought. Thus in *Jones v Boyce* [1816] 171 ER 540, the defendant negligently drove a horse-drawn coach in which the claimant was a passenger. The claimant thought the coach was about to crash, and so jumped from it to avoid the danger, injuring himself. The coach did not crash. Nevertheless, the claimant was not held to have contributed to his injuries - whilst he had acted unreasonably by normal standards, he had acted reasonably for someone put in a position of perceived danger.

However, there is a limit to when ‘emergency’ behaviour will be considered reasonable. Thus in *Sayers v Harlow* [1958] 1 WLR 623 the claimant was negligently locked in a toilet cubicle which had no inside handle. In a desperate attempt to escape the claimant stood on the cubicle’s toilet roll holder which gave way, injuring her. The courts held that her behaviour was unreasonable, and thus applied a 25% reduction to the claimant’s damages.

Self-Assessment Exercise 1

What must a defendant prove in a defence of contributory negligence?

Apportionment
The present position of law is that contributory negligence is a partial defense in an action for negligence and has the effect of reducing the damage recoverable by the plaintiff by the percentage of his contribution. This position is statutorily recognised in Nigeria. The effect of a successful plea of contributory negligence would be the apportionment of blame between the culprits/parties and consequently the apportionment of liability or damages recoverable in the suit. That is all a

successful plea of contributory negligence is about. It means that the parties must share the blame and consequently the damage.

The Court of Appeal in *Learn Africa Plc v. Oko* (2018) LPELR-45181(CA) stated:

> Where the plea of contributory negligence succeeds, the Court would apportion blame between the parties. The principle is that the measure of damages is to be apportioned according to the proportion, in which the parties are responsible. See Ololo v. Nig. Agip Oil Ltd. (2001) 13 NWLR (PT. 729) 88. I am of the view that the fact that a Defendant is setting up that defence, is a sign post to the fact that he has apparently seen the need to contend that the blame should not be his alone but that of the victim also…The conclusion of the Court below that the plea of contributory negligence if anything is a tacit admission that Appellant was primarily guilty of negligence fell short of the expectation of the law on this issue of contributory negligence. The Court below ought to have given attention to that plea because it is his defence and make a finding on whether the plea was successful or not. This was not done so the sum of N20m general damages cannot be allowed to stand without occasioning a miscarriage of justice. Where a plea of contributory negligence is made the Court must resolve it." Per Stephen Jonah Adah, JCA (Pp 26 - 28 Paras C - C)

However, it should be noted that the contributory negligence must be pleaded, if the defendant is to rely on it. The onus of pleading such negligence lies on the defendant. See *Walkelin v. L & S. W. Ry* (1886) 12 AC 41 at 47. In determining the extent of the plaintiff's contribution, the court have wide discretionary powers since what is just and equitable are not defined by the statutes. The criteria used were neither static nor absolute. In some cases, the courts stress the causation factor. See *Harvey v Road Haulage Executive* (1952) 1 K.B 120.

In *Stepney v Gypsum Mines Limited* (1953) All ER 633 at 682, Lord Reid stated that in determining what is just and equitable, "a court must deal broadly with the problem of apportionment and in considering what is just and equitable, must have regard to the blameworthiness of each party. But the claimant share in the responsibility for the damage cannot, I think be accessed without considering the relative importance of his act in causing the damage apart from his blameworthiness".

The SCN in *Ololo v Agip* [2001] 13 NWLR (Pt. 729) 88, stated as follow:

> The measure of damages be apportioned according to proportions in which the parties are responsible for the damage taking into account both causation and blameworthiness and the amount recoverable must be reduced to such an extent as the court thinks fit having regard to the plaintiff's share of in the responsibility for the damage.

In this regard, what is important is the assessment of the extent of the plaintiff's contribution, the importance of his act as distinct from his fault in causing the damage.

Moreover, in interpreting the phrase 'having regard to the claimant's share of responsibility to the damage' under statute blameworthiness is the central factor. Thus, Denning L.J (as he then was) in the case of *Davies v Swan Motors* (1969) 2 KI. B 291 stated that:

> Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff nevertheless the amount of reduction does not depend solely on the degree of causation… This involves a consideration of the causation potency of a particular factor but also its blameworthiness.

Thus the blameworthiness of the plaintiff determines the extent to which damage due to him will be reduced.

The court sometimes adopt a comparative approach in sharing the damage between the plaintiff and the defendant. Thus, the one with greater measure responsibility will have to bear greater liability.

In *Darwan v Nutt* (1961) 1 WLR 253, where the issue was the appropriate method of apportioning damages between the defendant driver and the plaintiff and her husband, the court stated that:

> In the case of a driver who was most reluctant to drive and practically refused to do so, and finally succumbed to the urgent entreaties, and possibly the bribe of the passenger. I think that one could very properly apportion a measure of a greater degree of responsibility to the passenger.

In this case, damage was reduced by seventy percent since the plaintiff's blameworthiness in persuading a reluctant person to drive outweighed that of the defendant. See *Owens v Brimell* (1977) 2 WLR 943.

There is no hard and fast rule for apportioning damage and it seems a lot of discretion is left to the court by the statutes. This appears to make the likelihood of abuse too glaring. However, bearing in mind that a discretion can only be exercised both judicious and judicially, the factors governing their exercise limits the extent to which they can unnecessarily be applied.

What factor(s) will affect/reduce the damage recoverable by a claimant/plaintiff where a defence of contributory negligence is raised by the defendant?

2.4 Summary

In this unit, we learnt about

a. Nature and main elements of contributory negligence.
b. Cases where a lower standard is expected for contributory negligence.
c. Apportionment in contributory negligence.

2.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjE-d-1r_WAAxXnQUEAHUT3AnoQFnoECCsQAQ&url=https%3A%2F%2Fwww.armstronglegal.com.au%2Fcommercial-law%2Fnational%2Ftort-law%2Fcontributory-negligence%2F&usg=AOvVaw0Kl07aDWRwe5OR08iavV9M&opi=89978449

2.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

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.

Unit 3 : Necessity or Emergency

Unit Structure

3.1 Introduction

When the plaintiff brings an action against the defendant for a specific tort, proving the existence of all the essentials of that tort, the defendant would be liable for the same. The defendant may, however, in such a case, avoid his liability by using any of the defences available against the tort that he has committed. One of such defences is necessity or emergency.

3.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the defence of necessity or emergency under tort

3.3 Necessity or Emergency

The complete defence of necessity applies in cases of trespass (personal, property or goods). It is a justification defense for a person who acts in an emergency hat he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's action. In some cases even damage intentionally done may not involve the defendant in liability when he is acting under necessity to prevent a greater evil. The defence of necessity, if successfully raised enables a defendant to escape liability for the intentional interference with the security of the plaintiff or property on the ground that the acts complained of were necessary to prevent greater damage to the plaintiff, his property, to the defendant himself or to the community at large. Bryan A. Garner, Black's Law Dictionary, (11th edn 2019) 1243

In raising the defence of necessity, it is essential to show the presence of the following to prove the necessity defence:

a. The damage caused was less than the harm that would have occurred otherwise.
b. The person reasonably believed that his actions were necessary to prevent imminent harm.
c. There was no practical alternative available for avoiding the harm.
d. The person did not cause the threat of harm in the first place.

When a person asserts a necessity defence, it is up to the court's discretion to decide if it can be applied in the given situation or not and if the person can be excused from all liability or not. It is very difficult to invoke this defence as it becomes very difficult to prove whether there was a necessity or not. In most cases, such emergency situations arise when other persons are not present and so proving the need to break the law for a certain urgency is hard.

In the case of *Cope v. Sharpe* (No 2) [1912] 1 KB 496, the defendant entered the plaintiff's land to prevent the spread of fire to the adjoining land and prevent the damage which could have been caused. The plaintiff, in this case, sued the defendant for trespass but since the defendant's act was considered to be reasonably necessary to save the property and from real and imminent danger, the court held that the defendant was not liable for trespass as he has committed an act of necessity.

In *I.M.N.L v. Nwachukwu* (2004) LPELR-1526(SC), the Court decoded that tt is also obvious that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages in the tort of negligence. In *Munday Ltd. v. L.C.C.* (1916) 2 K.B. 331 at 334 Lord Reading, C.J. stated:- "Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist." Per Dahiru Musdapher, JSC [B – D] 22

Example Box 1

Someone is driving on the M1 Motorway and his or her vehicle was struck by lightning. Because of the lightning strike, the driver lost control of the vehicle, ended up changing lanes and hitting another car which caused the accident injuries to the plaintiff. In this scenario, if the defendant can show that his loss of control of the vehicle was really because of the lightning strike and for no other reason and there was nothing that the defendant could have done to prevent that accident, then, this particular defence will succeed.

Necessity Defence

Self-Assessment Exercise 1

When raising the defence of necessity, what factors must be proved by the defendant?

When there is a case of necessity or emergency, a medical practitioner would be justified to administer treatment or carry out necessary operation without consent. However, what amounts to an emergency is a question of fact, to be determined by court based on the facts of each case. However, there are some

guiding rules as to what is an emergency or when an emergency exists, to justify trespass to the person of a patient by giving medical care without consent. Indicators of an emergency are many and include:

1. Medical care must be essential and urgent in the circumstances. In other words, lack of medical care must endanger the patient's life or limb; or
2. The patient must be unfit or incapable of giving consent; and
3. The relatives who are in position to give consent must not be easily accessible.

There are two types of defence of necessity: private necessity and public necessity. In the realm of intentional torts, private necessity usually involves trespassing or damaging another person's property to protect yourself, your property, or a small number of people. Furthermore, you usually have the right to continue trespassing or using the person's property for as long as the emergency is still ongoing. The defence of private necessity is a partial defence which is available to the defendant. This means the defendant who commits trespass and claims the defence of private necessity, must still pay for any harm caused to the plaintiff's property by his trespass. However, the defendant is not liable for nominal or punitive damages.

Public necessity, on the other hand, means any action taken by public authorities/officials or private individuals to avert a public calamity which had a tendency to harm the public at large. This is applied when any trespass is done by a person to protect a greater community. Public necessity is an absolute defence which means that the persons who have trespassed are not required to pay any compensation to the owner of the property. Generally, public employees like firefighters, police, and army personnel claim public necessity.

So, what indicators of an emergency would justify trespass to the person of a patient without consent by a medical care practitioner?

3.4 Summary

In this unit, we learnt about

a. The defence of necessity in tort
b. Requirements for proof of necessity of defence

3.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjasZHrsPWAAxVwVEEAHdtaBxUQFnoECB4QAQ&url=https%3A%2F%2Fwww.studysmarter.co.uk%2Fexplanations%2Flaw%2Fuk-criminal-law%2Fdefence-of-necessity%2F&usg=AOvVaw1Xnkt8r3UW1Bvv2gSBBMzT&opi=89978449

3.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In raising the defence of necessity, the defendant must prove:

a. The damage caused was less than the harm that would have occurred otherwise.
b. The person reasonably believed that his actions were necessary to prevent imminent harm.
c. There was no practical alternative available for avoiding the harm.
d. The person did not cause the threat of harm in the first place.

Unit 4 : Novus Actus Interveniens

Unit Structure

4.1 Introduction

Causation ordinarily consists of two elements that determine whether or not a party can be held liable for the damages caused to another. These elements are factual causation and legal causation. However, another element of causation that is often overlooked is that of *novus actus interveniens*. *Novus actus interveniens* is Latin for a "new intervening act".

4.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the defence of *novus actus interveniens* under tort

4.3 Novus Actus Interveniens

4.3.1 Novus Actus Interveniens

In a tortious action for negligence, *Novus actus interveniens* is any intervening act that can sever the legal connection between a defendant's actions and the harm suffered by the plaintiff, with the effect that the defendant cannot be deemed legally responsible for the plaintiff's harm or damage. A *novus actus* breaks the causal chain between the initial wrongdoer's action and the liability that is imputed to him or her as a result thereof. There is a new act intervening, when for instance, after a medical personnel’s breach of duty by a wrongful act or omission, an independent event takes place which causes the death of the plaintiff, aggravates his injury or causes other injury or damage to the plaintiff. The new act intervening may be the:

1. The action of the plaintiff, in which case, it may become the new sole cause, or be a contributory cause only;
2. The act of a third party.

A requirement for an act or omission committed after the initial wrongdoer's act to constitute a *novus actus* is that the secondary act was not reasonably foreseeable. If the subsequent event was reasonably foreseeable at the time of the initial wrongful act, it is not to be considered as a *novus actus* capable of limiting the liability to be imputed on the initial wrongdoer.

Self-assessment Exercise 1

What is *Novus actus interveniens* in an action for negligence?

In the case of *Haynes v. Harwood* [1935] 1 KB 146, the defendant owed a two-horse van which was left unattended by his servant on a busy street. A kid threw stones on the horses due to which they bolted on the street carrying the van with them. A police constable while trying to stop them suffered several injuries for which he claimed compensation. Now, the important question that arose, in this case, was whether this act of intervention by the rescuer is *novus actus interveniens*, which breaks the chain of causation so that the initial negligence of the defendant be considered to be remote cause of the rescuer's injury? Here, it was held that the rescuer's act was not a kind of act that could make the defendant's negligence a remote cause for the plaintiff's injury. The defendant pleaded that his negligence is a remote cause while the child's mischief was the proximate cause for the damage, however, the Court observed that such a mischief on the part of a child was reasonably foreseeable due to which it could not be considered a *novus actus interveniens* and defendant was held liable.

In another case of *Lynch v. Nurdin* 1 QB 29, (1841) Arn and H 158, the defendant left his horse cart on the road. Certain children started playing with it and one child jumped on the cart setting the horse in motion, due to which he suffered injuries. The Court held that although the misconduct of the child was *novus actus interveniens*, the proximate cause of the accident was defendant's negligence because such mischievous behaviour on the part of children could very well be apprehended especially when you have left an open opportunity for them to do so.

In the case of *Tanimu & Anor v Rabiu & Ors* (2016) LPELR-45469(CA) the Court of Appeal held that

> ...where the candidate is no longer a candidate contesting an election but is ensconced in his legislative office, the person challenging his contesting the election on the ground of the alleged falsity of affidavit or document cannot succeed for the simple reason that there is no candidate contesting an election to speak of. The erstwhile candidate has crossed the Rubicon of electoral contest and is now an elected member of the legislature. The cause of action abates due to a *novus actus interveniens*, that is, an act or event that breaks the causal connection between a wrong or crime committed by the defendant and subsequent happenings thereby relieving the defendant from responsibility for those happenings. In the circumstances therefore, the proverbial horse has bolted from the stable and shutting the stable to prevent its escape has become a pointless exercise." Per DANIEL-KALIO ,JCA [A-F] 31

A *novus actus* is not confined to either factual or legal causation only, and can interrupt the causal chain at either point. In respect of factual causation, a *novus actus* interrupts the nexus between the wrongful act of the initial wrongdoer and the consequences of his act to such an extent that it frees him of the liability of his actions. However, when assessing *novus actus* in respect of legal causation, regard must be had to the aspects of policy, fairness, reasonableness and justice in order to determine whether liability for the initial wrongful act can still be imputed to the initial wrongdoer, and whether the causal

chain has been broken. A *novus actus* therefore disrupts the "directness" aspect of the initial act and the subjective test of legal causation cannot be fulfilled.

As a *novus actus* is an "independent" intervening act, it can be occasioned by anyone or anything other than the initial wrongdoer. This general category also includes the injured party him or herself, another third party or even an act of God. Therefore, an injured patient who walks on a slippery floor after having been injured thereafter occasioning further surgery will have created his own *novus actus*, or where a storm caused further and greater damage to a property after it has been damaged by a wrongdoer will also be viewed as a *novus actus*.

Novus actus is often utilised as a defence by initial wrongdoers who wish to prove that their liability is limited or non-existent and should be imputed on another party. This must be distinguished from contributory negligence. If an act or omission occurs before the incident that gives rise to the injury, then that is classified as contributory negligence, such as when a passenger in a motor vehicle fails to wear a seatbelt, he or she is contributory negligent. Whereas an independent act that occurs after the damage-causing incident is a *novus actus*, such as when a passenger is hospitalised after a motor vehicle collision and sustains further injuries in hospital.

However, in some instances, the court may hold both the defendant and the doer of the new act intervening liable as joint tortfeasors, that is, each was contributory negligent and both of them contributed to the occurrence of the injury.

Is there a difference between contributory negligence and novus actus?

4.4 Summary

In this unit, we learnt about

a. The defence of *novus actor interveniens* and circumstances under which it will be applicable.

4.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)

Ese Malemi, Law of Torts (Princeton, Lagos 2008)

F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwid0ZiqsvWAAxViSkEAHYoLD_4QFnoECCQQAQ&url=https%3A%2F%2Fwww.mills-reeve.com%2Finsights%2Fpublications%2Fnovus-actus-%25E2%2580%2593-intervening-acts-as-an-element-of-ca&usg=AOvVaw1KQVD0QI8E4ypiJ1aZgzLI&opi=89978449

4.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

A *novus actus interveniens* in an action for negligence is an act that breaks the causal chain between the initial wrongdoer's action and the liability that is imputed to him or her as a result thereof.

Unit 5 : Limitation of Actions and Illegality

Unit Structure

5.1 Introduction

A defendant in a tort action in negligence can also set up the defence of limitation of action, where the action is statute barred or illegality of the action. These will be discussed below.

5.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the defences of limitation of action and illegality in relation to the tort of negligence

5.3 Limitation of Actions and Illegality

The law dictates that there is a limit on how much time can pass after a claim arises before it becomes inactionable. This is generally ascribed to two factors. Firstly, the more time that passes after a claim arises, the harder it is to deal with them. Injuries heal, damage is repaired, and records of events are destroyed or forgotten by witnesses. This makes such claims onerous and expensive to deal with. Secondly, defendants have a right to eventually consider themselves finished with a particular dispute or conflict, and it is just to expect claimants to bring a case in a timely manner (and to prevent them from holding the potential claim over the heads of defendants, or using it as a tool to economically harm someone when they are most vulnerable).

The limitation period is a creation of laws, which vary from jurisdiction to jurisdiction. The statute of limitation for each state stipulates the time frame within which actions can be initiated, and each subject has its own statute. For example, sections 7 and 8(1) of the Limitation Act, Abuja provides respectively that actions in damages for negligence and slander must be commenced within 3(three years) of its occurrence

In *INEC v Ogbadibo Local Government & Ors* (2015) LPELR-24839 (SC) the SCN set out the yardstick for determining whether ac action is statute-barred as follows:

i. The date when the cause faction occurred;
ii. The date of commencement of the suit as indicated in the writ of summons

iii. Period of time prescribed to bring the action, which must be ascertained from the relevant law in question

Illegality, sometimes referred to as '*ex turpi causa*' (from a foul cause), is a complete defence essentially asserting that the claimant's harm occurred whilst in pursuit of a illegal endeavour. The *Black's Law Dictionary* (11th edn 2019) 896 defines illegality as an act that is forbidden by law. This should not be regarded as a rule that prevents all claims from succeeding - if this were the case then every road user not wearing a seatbelt or speeding would have their claims in tort barred. Instead, the defence tends to only by applied by the courts when it is just to do so, and as a prerequisite the harm must be closely linked to the criminal act that the claimant is engaged in.

See *Cummings v Granger* [1977] QB 397. The claimant was a burglar who was in the process of robbing a scrap yard. Unbeknownst to the claimant, an untrained Alsatian was loose in the yard to deter intruders. The dog bit the burglar, who then sued the defendant. The claim was denied by the courts on the basis that the claimant was in the process of a criminal enterprise, and his injury could be connected to it.

In the case of *Jegede & Anor v INEC & Ors* (2021) LPELR-55481 (SC) [E-F] 174, Peter-Odili JSC while delivering his dissenting judgment said "...The situation on ground calls to mind the admonition of Eko JSC in *Nwosu v APP & 3 Ors* (2020) 16 NWLR (pt. 1749) 28 thus: "No person is allowed to benefit from illegality as illegality confers no right." By the same token, the Supreme Court is now called upon to authenticate an illegality and cloth it with legality which power this Court does not have.

Self-assessment Exercise 1

What benchmark would the courts use to determine whether an action is statute-barred?

The three primary elements of an illegality defence were identified by Sir Stuart-Smith were:

a. The harm must be linked inextricably to the claimant's criminal enterprise,
b. The defence must be justified by public policy, and
c. The criminal conduct must be sufficiently serious.

It is notable that Stuart-Smith notes that the defence is rooted in public policy - this essentially means it is a defence which is available to the judiciary to use, rather than one which the defendant can actively rely upon. Whilst this provides the judiciary with a lot of discretion, it also allows the defence to be used even when the defendant has themselves acted poorly. In essence, it allows the court to throw out a claim because it would be unjust to allow the claimant to use tort law in such a manner.

So, will all claims for negligence fail due to the defence of illegality?

5.4 Summary

In this unit, we learnt about

a. The defence of limitation of action and illegality in an action for negligence.

5.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

5.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In *INEC v Ogbadibo Local Government & Ors* (2015) LPELR-24839 (SC) the Supreme Court of Nigeria set out the standard for determining whether ac action is statute-barred as follows:

a. The date when the cause faction occurred;
b. The date of commencement of the suit as indicated in the writ of summons,
c. Period of time prescribed to bring the action, which must be ascertained from the relevant law in question

MODULE 6 : Damages

Module Structure

Unit 1

1.1 General Introduction

Unit Structure

1.1 Introduction

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 different kind of damages that exist in the law of tort.

1.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the different kind of damages

1.3 General Introduction

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. In *Ibikunle & Anor v Air France* (2015) LPELR-15773 (CA) the Court of Appeal held that compensatory damages, certainly such damages will not be available to them because compensatory damages are awarded to indemnify a person for a particular loss suffered as a result of the conduct of the Respondent, it provides a plaintiff with monetary amount necessary to replace what was lost and nothing more. Per Abubakar, JCA [E-A] 37-38

2. Nominal Damages also termed contemptuous damages or diminutive 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.

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. *Ugwu & Ors v NB PLC* (2020) LPELR-50858(CA); *Salini Nig. Ltd v Lifewire Industries Ltd & Anor* (2019) LPELR-51433(CA)

Note that in the case of tort not actionable per se, for example, negligence, if the plaintiff fails to establish a loss, the action will be dismissed. The practical significant of nominal damages is that the plaintiff thereby establishes a legal right. The judgment has the effect of a declaration of a legal rights and may deter future infringement or may enable the plaintiff to obtain an injunction to restraint a repetition of the wrong.

Note further that where a party acts contemptuously towards the Court, it is open to the Court to set aside the act. The Court may, upon proper application, commit the contemnor for the contempt pursuant to Section 72 of the Sheriffs and Civil Process Act and its inherent power. The remedy for contemptuous conduct does not include award of damages by the Court in favour of the opponent of the contemnor. *Okhizumate & Anor v Ukabi & Ors* (2021) LPELR-54139(CA) Per Ekanem, JCA [C-E] 28.

Self-Assessment Exercise 1

What is the difference between compensatory damages and nominal damages?

3. 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 *Think Ventures Ltd & Ors v Spice and Regler Ltd & Anor* (2020) LPLER-50296(CA), the Court of Appeal held thus: Exemplary damages has been described as an intermix of general and punitive damages. While speaking on the nature of exemplary damages, the Supreme Court in *Eliochin (Nig) Ltd & Ors v. Mbadiwe* (1986) LPELR-1119 (SC) held as follows:

> ...The primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit; exemplary damages, punitive damages; vindictive damages, even retributory damages can come into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like. Per Aboki, JCA [A-F] 38-39

According to the Black's Law Dictionary (11th edn 2019) 491, exemplary or punitive damages are also termed vindictive damages, presumptive damages, added damages, aggravated damages, speculative damages, imaginary damages, smart money, punies, punitory damages. But exemplary damages, to some extent, are distinct from aggravated damages whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into consideration in the assessment of compensatory damages. In *Julius Berger (Nig) Plc & Anor v Ugo* (2015) LPELR-24408 (CA the Court of Appeal per Oho, JCA held that exemplary (or punitive) damages are intended not primarily to compensate the plaintiff but rather to punish the defendant and to deter him from similar behaviour in the future. Exemplary damages are punitive damages and it is awarded where a party to the suit can show or establish by evidence that the injury or loss suffered is due to the malicious act of the party against whom he is claiming 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 contempt of the plaintiff's right or disregard of every principle which actuates the conduct of a gentleman. See *J.M. Johnson v. Mobil* (1959) WNLR 128 at 134 and *F.R.A. Williams v. Daily Times* (1990) 1 NWLR Part 124 at 31. It is now established that exemplary damages may be awarded only in the following three circumstances, namely: (a) Where the plaintiff has suffered from oppressive, arbitrary or unconstitutional action by a servant of the Government. See *Rookes v. Barnard* (1964) A.C. 1129 AT 1226; *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. See *Drane v. Evangelou* (1978) 1 W.L.R. 455; *Cassell & Co. Ltd. v. Broome* (1972) A.C. 1027. Aggravated Damages, on the other hand, 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 and not the injury sustained.

Although compensatory damages and punitive damages are typically awarded at the same time by the same decision-maker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as 'quasi-criminal' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury or judge assessment of the extent of a plaintiff's injuries is essential a factual determination, whereas its imposition of punitive damages ia an expression of its moral condemnation. Black's Law Dictionary (11th edn 2019) 491

In earlier case *J.M. Johnson v. Mobil* (1959) WNLR, 128 at 134 and *William v. Daily Times* (1990) 1 NWLR (Pt 124) 31 the courts had described the conduct of the defendant as being 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.

Other instances where exemplary damages may be awarded include:

(a) where the plaintiff has suffered from oppressive, arbitrary or unconstitutional action by a servant of the government. See *Rookes v. Barnard* (1964) A.C. 1129, 1226, per Lord
Devlin; *Garba v. Lagos City Council* (1974) 3 CCHCJ 297, 309;

(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. *Drane v. Evangelou* (1978) 1 W.L.R. 455

So, highlight instances where exemplary or punitive damages would be most suitable to be awarded by the courts

4. General and Special Damages

Both of these are species of compensatory damages. General damages are that which the law implies or presumes to have occurred from the wrong complained of. They are presumed to flow from the immediate, direct and proximate result of the wrong complained of. All the Court need do in exercising its discretion is to calculate what sum of money will be reasonable in the circumstance of the case … it may however be unwise for a plaintiff to rely heavily on inferences and presumptions of

damages, for a failure to produce any evidence at all may result in an award of small or even nominal damages. This is because the proper approach in such circumstances is to regard an injuria or wrong as entitling the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only ... Quantum of damages like any other issue in our civil procedure is a matter of evidence; where one gives no evidence that can help in the assessment of damages, he is normally entitled to nominal damages. *Salini Nig. Ltd v Lifewire Indusries Ltd & Anor* (2019) LPELR-51433(CA) Per Idris JCA, [F-B] 55-59.

Special damages have been defined as those damages which are the actual but not the necessary result of the injury complained of which in fact, follow as a natural and proximate consequence in the particular case, that is, by reason of special circumstances and conditions. Special damages are such as the law will not infer from the nature of the fact. They do not follow in ordinary cause. They are exceptional in their character and they must be claimed specifically and proved strictly. See generally *Ahmed & Ors v. CBN* (2012) LPELR - 9341 (SC); *Kopek Construction Ltd v. Johnson Koleole Ekisola* (2010) LPELR - 1703 (SC); *Calabar East Co - Op Thrift & Credit Society Ltd & Ors v. Ikot* (1999) LPELR - 826 (SC); *Yalaju & Ors v. Adidi & Ors* (2022) LPELR-56693(CA) Per Obaseki-Adejumo, JCA [E-D] 43-44.

The burden to specifically plead and strictly prove special damages is on a party who claims it, although the tendering of documentary evidence in the form of receipts in proof of special damages could be a good mode of discharging the burden on the claimant, it is however not an indispensable or exclusive means of poof of special damages. See *Produce Marketing Boaro v. A.O. Adewunmi* (1972) 11 SC 111/24, where it was held: "The pleadings and evidence in the claim for special damages must be such that they are of such character and quality for assessment and quantification." Also in the case of NBB Co. Ltd v. A.C.B. Ltd, the Supreme Court had stated the requirement as follows: "It is trite law that where the claimant specifically alleges that he suffered special damages, he must per force, prove it. The method of such proof is to lay before the Court concrete evidence demonstrating in no uncertain terms easily cognisable, the loss or damage he has suffered and being claimed. A damage is special in the sense that it is easily discernible and quantified. See generally *FCDA & Anor v. MTN & Anor* (2016) LPELR- 41248(CA) Per Garba JCA." Per MUSTAPHA ,JCA [F-E] 6-7.

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.

1.4 Summary

In this unit, we learnt about

a. The various kind of damages in the law of tort
b.

1.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

1.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

Compensatory damages are intended to compensate for injury while nominal damages are awarded to commemorate the plaintiff's vindication in court.

Unit 2 : Assessment of Damages in Particular Torts - Negligence

Unit Structure

2.1 Introduction

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).

2.2 Learning Outcomes

At the end of this unit, you should be able to do:

- Assessment of damages under the tort of negligence

2.3 Assessment of Damages in Particular Torts - Negligence

Damages in the tort of negligence falls 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

In personal injury cases, two main factors have to be taken into consideration in assessing damages in cases of liability. These are (a) the financial loss resulting from the injury (b) the personal injury, involving not only pain and suffering, but also the loss of the pleasures of life *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-E] 16. The personal injury otherwise known as non-financial or future financial losses are in the nature of general damages. See *Rite Foods Ltd & Anor v Adedeji & Ors* (2019) LPELR-47698(CA) Per Ogakwu, JCA [B-D] 23-26

(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 judgment. 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. 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).

With regards to assessment of damages in cases where loss is of a financial nature, the SCN held in *Soetan & Anor v Ogunwo* (1975) LPELR-3089 (SC) thus

> "We take the view that where, as in this case, the loss is in itself of a financial character, the assessment of damages is primarily a matter of arithmetic. It seems to us that in such cases, the plaintiff, subject to the rule that special damages should be strictly proved, is entitled in principle to full indemnity and no more. In other words, such plaintiff is not entitled to be doubly compensated under the guise of general damages. It has been well said that a Court of law is not a donor of charities; it gives to either party only that which the justice of his case demands." Per Ibekwe, JSC [C-E] 11

The term "strict proof" in a claim for special damages means exactly what it connotes i.e. strict proof of the quantity and value of each item of property allegedly damaged." *Oyegade & Ors v Oyelowo & Anor* (2012) LPELR-7893(CA) Per Alagoa, JCA [B-E] 26

(ii) *General damage*

The court of Appeal held in *Ogundipe v Nitel & Ors* (2015) LPELR-24920(CA) that the term general damages covers all losses which are not capable of exact quantification. 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.

Per Ndukwe-Anyanwu, JCA [A-D] 25; See also *Lagos City Council v. Ogunbiyi* (1969) 1 All NLR. 297

"In respect of assessment of damages for personal loss, which involves pain and suffering, and the loss or dimunition of the enjoyment of life, the term "personal loss" denotes every kind of harm and disadvantage which flows from a physical injury, other than the loss of money or property. It therefore necessarily includes the loss or impairment of the integrity of the body; pain and suffering both physical and mental loss of the pleasures of life, actual shortening of life, and mere discomfort or inconvenience." *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-E] 18

In assessing damages both the, financial and personal loss factors should be taken into account and compensation given for both types of loss. However damages should only be given for every admissible factor. Although the Judge directs his mind to the factors which are established on the facts the award of damages is made in a single global sum. This was the approach adopted in *Agaba v. Otobusin* (1961) All NLR 299 and *Lagos City Council v. Ogunbiyi* (1969) 1 All NLR. 297. This has been the approach in the English Courts as far back as in 1879 in Phillips v. South Western Rail

Co. (1879) 4 Q.B.D. 406 at p. 407 and more recently in *H. West & Son Ltd. v. Shephard* (1964) A.C. 326. The Courts of this country have adopted the same approach. In this last mentioned case Lord Pearce said, "if a plaintiff has lost a leg, the court approaches the matters on the basis that he has suffered a serious physical deprivation, no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increases the assessment..... These considerations are not dealt with as separate items but are taken into account by the Court in fixing one inclusive sum for general damages." *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [E-D] 18-19

Considering all the elements together before arriving at a single global sum is done to avoid the possibility of over compensation by making more awards for the same factor and to consider the effect of the injury sustained as a whole. In *Agaba v Otobusin* (2961) 1 All NLR 299, 302, Bairamian F.J said: "With respect to the learned Judge, it is clear that he has, unwillingly, granted compensation more than once for what are substantially the same matters, besides being overgenerous and over-looking what should be the dominant point, namely - that the plaintiff has not suffered any disability to his earning capacity; ... " See *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [G-B] 19-20.

It must be recognised and conceded that the fullness and the adequacy of damages awarded as compensation will in each case depend on proved solid facts of the case and a just and fair assessment of the effect of the injury complained of. Damages are assessed as a lump sum and once for all, not only in respect of loss accrued before the trial but also in respect of prospective loss – see British Transport Commission v. Gourley (supra). It is the duty of the Court to award as perfect a sum as was within its power based on the established facts, accuracy and certainty are often unattainable *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [B-F] 17

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. See Taylor CJ in *Anumba v. Shohet* (1965) 2 All NLR 183, 186. The rule, however, is that even in such cases, where the original position could not be restored the Court must endeavour to give a fair equivalent in money, so far as money can be an equivalent for the loss or injury suffered. But that is another matter." *Soetan & Anor v Ogunwo* (1975) LPELR-3089 (SC) Per Ibekwe, JSC [F-B] 10-11

Soetan & Anor v Ogunwo (1975) LPELR-3089 (SC) Per Ibekwe, JSC [E-C] 11-12

"It is admittedly the practice that awards in similar cases within the jurisdiction is taken as a guide in the assessment of the damages - See *Rushton v. National Coal Board* (1953) 1 Q.B. 495, *Ward v. James* (1966) 1 Q.B. 273. Although the award of damages is basically a conventional figure derived from experience and from awards in comparable cases, allowance ought to be made for increases in the rate of earning and for inflation in the value of money earned, and the possibility of early retirement. Again the tendency of wages to rise are also matters to be taken into account. However since some of those are factors which are merely speculative, it is safer in the assessment of future earnings to base damages on the rate in force at the time." *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-F] 22. See also *Ejisun v. Ajao* (1975) N.M.L.R. 4, 7.

Again, with regard to the nature of a claim for damages in personal injury cases. The Court of Appeal held in *Julius Berger (Nig) Plc & Anor v. Ugo* (2015) LPELR-24408(CA) thus:

As it relates to the question of pain and suffering, this head of claim or head of damages cover past, present and future; pain, physical and mental anguish including fear of future treatment or anguish caused by life expectancy being shortened. See the case of WISE vs. KAYE (1963) 1 QB. 639. In the case of loss of Amenities of life, it will be important to note that as a head of general damages this relates to the curtailment of a plaintiff's enjoyment of life and the inability to pursue hobbies. Usually any injury which prevents the Claimant from pursuing the activities, such as leisure, sports and pastimes, or natural function, which he or she was pursuing before or prevents or impairs the use of his or her natural faculties or senses or any part of his or her body- can all be compensated for as loss of amenities. See the case of WEST vs. SHEPARD (1964) AC 326 … Loss of amenities also includes inability to pursue an enjoyment occupation. See case of UBA LTD & ANOR. vs. MRS. NGOZI ACHORU (1990) SC.33/1988; COOK vs. J.L. KIER & CO. (1970)1 W.L.R. 774 It is well settled that the heads of claim for pain and suffering, and for loss of amenities of life are two distinct and separate claims arising from the same damage and injury. Per Oho, JCA [A-E] 92-93

Self-Assessment Exercise 1

In personal injury cases, what two main factors have to be taken into consideration in assessing damages?

(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 Fatal Accident Law or the Tort Law of each state. For instance, the applicable law in Lagos State is the Fatal Accidents Law, Chapter F2 Laws of Lagos State, 2015 and in Oyo State Tort Law, Cap 124 Laws of Oyo State of Nigeria 1978

Persons entitled to benefit

Section 1of the Fatal Accidents Law of Lagos State provides to the effect that

(1) Where after the coming into operation of this law, the death of a person is caused by wrongful act, neglect or default, and the wrongful act, neglect or default is such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

(2) Every action under this section shall be for the benefit of the members of the immediate family of the deceased person and will

According to section 8(1) of the Fatal Accidents Law of Lagos State, immediate family for a deceased person not subject to a system of customary law includes the widow or widow(s) as the case may be; the widower, any parent, and any child. For a deceased person subject to a system customary law but not being Muslim Law, in addition to the already mentioned persons, the surviving brother,

sisters, stepbrothers and stepsisters. For a deceased person subject to a system customary law known as Muslim Law, in addition to the already mentioned persons, the person entitled to share in the award of diya prescribed by Muslim Law for involuntary homicide. Parent includes grandfather, grandmother, stepfather and stepmother.

Section 8(2) of the Fatal Accidents Law of Lagos State provides to the effect that for the purpose of this law, a person is deemed to be the parent or a child of the deceased person notwithstanding that the person was only related to the deceased illegitimately; and in deducing relationship under this section an illegitimate person will if acknowledged as his by the reputed father, betreated as the legitimate offspring of the mother and reputed father. As fact back as 1990, the SCN held in Jenyo & Anor v Akinreti & Anor (1990) LPELR-1605(SC) that under the Fatal Accident Act (which was applicable in Lagos), damages are awarded to compensate the defendants of the deceased for loss of actual or prospective pecuniary benefits derived from the relationship between them. Per Abubakar Bashir Wali JSC [F-G] 40. The defendants in this context will refer to the immediate family of the deceased person.

Who can sue or bring the claim?
The claim shall, (a) if the deceased person was not subject to a system of customary law, be brought by and in the name of the executor or administrator of the deceased person; or (b) if the deceased person was immediately before his death subject to a system of customary law relating to estate, be brought at the option of his immediate family, by and in the name of such person as the court is satisfied is under the customary law, entitled or empowered to represent the deceased person or his estate. (3) If there is no executor or administrator, or where there is an executor or administrator but no action is brought by the executor or administrator within six months after the death of the deceased person, then action may be brought by and in the names of all or any of the persons for whose benefit the action would have been, if it had been brought by the executor or administrator; and every action brought shall be for the benefit of the same persons and be subject to the same regulations and procedure, as nearly as may be as if it had been brought by an executor or administrator. Jenyo & Anor v Akinreti & Anor (1990) LPELR-1605(SC) Per Agbaje, JSC [E-E] 15-17 See generally section 1 (2) (a) and (b) and (3) of the Fatal Accidents Law of Lagos State. Note that section 2(1) of the Fatal Accidents Law of Lagos State provides that the action under the law must be brought within three years after the death of the deceased person.

Assessment and apportionment of damage
4(1) of the Fatal Accidents Law of Lagos State provides that subject to the provisions of this section, the Court may, in assessing and apportioning damages in an action brought under this law, award such damages as it may think proportionate to the injury resulting from the death of the deceased person to the persons respectively for whom and for whose benefit such action is brought; and the amount so recovered, less the costs not recovered from the defendant, shall be apportioned in such shares as the court directs amongst the persons entitled: Provided that where the deceased person was, immediately before his death, subject to any system of customary law relating to estate, the court shall have regard to the particular system of customary law, and decide which members (if any) of the immediate family of the deceased person are entitled to share in the damages, and shall apportion the shares amongst the persons entitled. (2) No account shall be taken of any sums paid or payable on the death of the deceased person under any contract of assurance, and the award of damages may include reasonable funeral expenses of the deceased person incurred by the persons for whose benefit the action is brought." *Jenyo & Anor v Akinreti & Anor* (1990) LPELR-1605(SC) Per Agbaje, JSC [E-E] 15-17.

Measure of damage

The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages, all circumstances which may be legitimately pleaded in diminution of the damages must be considered *Grand Trunk Ry. Co. of Canada v. Jenning*. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death... The general principle that the right of the individual defendant under these acts is for damages to be assessed on a balance of loss and gain, which is established by long standing authority, would prima facie seem to apply to this case... There is no question here of what my 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 basic figure which will generally be turned into a lump sum by taking a certain number of year's 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. Per Agbaje, JSC [E-F] 24-25 citing *Davies v Powell Duffryn Associates Collieries Ltd* (1942) AC 601, 611-612 ; See also *Alliu Bello v. Attorney General of Oyo State* (1986) LPELR-764(SC); *Ibolukwu v. Onoharigho* (1964) 1 All N.L.R. 215, 217.

The formula 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. *Alliu Bello v. Attorney General of Oyo State* (1986) (1986) LPELR-764(SC) [A-B] 45. In *Julius Berger (Nig) Plc & Anor v Ugo* (2015) LPELR-24408(CA), the Court of Appeal decided the principles that guide the court in a claim for damages as result of non-financial or future financial losses as follows:

"This head of claim is yet another item of general damages … This head of damages represents the loss to the plaintiff which cannot be precisely quantified. It includes all non-financial or future financial losses. Items of this head of general damages need not and should not be specifically pleaded, but some evidence of such damages is required. A claim for future expenses, whether for on-going medical expenses or not, is a claim for general damages for which the 'Multiplier' and 'Multiplicand' approaches have been employed in the assessment of damages where future ongoing medical expenses have been claimed by the injured party. These approaches have been known to apply to personal injury cases and as well as fatal accident cases in Nigeria. See *Osholake v. Lagos City Council* (1972) 12 CCH CJ 56; *Ibolukwu v. Onoharigho* (1964) 1 ALL N.L.R. 215, 217; and *Owolo v. Olise* (1967) F.N.L.R. 179. In personal injuries cases, the multiplicand is an estimation of the plaintiff's annual loss or earnings whereas in fatal accident claims it is an estimation of the annual value of the dependency … In other words, it is usually that sum which represents the amount which the deceased would have spent on his family if he were to have been alive. Generally, the multiplicand in fatal accident claims is usually lower than in personal injury claims. Furthermore, in choosing the appropriate multiplicand 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. The multiplier also is therefore likely to be lower than in personal injury cases. Per Oho, JCA [F-D] 101-105; See *Owolo v. Olise*(1967) F.N.L.R. 179.

In *Ibolukwu v. Onoharigho* (1964) 1 ALL N.L.R. 215, AT P.217 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 led in the case did not support the view that the deceased spent her whole income on maintaining her husband and children, and spent nothing on herself".

In the case of *Julius Berger (Nig) Plc & Anor v. Ugo* (2015) LPELR-24408(CA), what the Cross Appellant claims from the Cross Respondents under this head of damages is a claim for future medical expenses including cost adaptations or aids and travel expenses where applicable. The usual components of any such calculations will involve what was available to Court in terms of financial figures (pre-trial) easily totaled and awarded as special damages on the one hand, and what would be the annual cost of treatment. That is; (multiplicand) x multiplied by the number of years of treatment (multiplier) will be required and awarded as General damages.

In the case of *Ifeanyichukwu Osondu Co. Ltd v. Akihgbe* (1999) 11 NWLR (Pt.625) 1, the Supreme Court, per Uwaifo, JSC said; "... Money actually spent before the time of hearing a claim for damages for injuries suffered comes under special damages, while prospective expenditure is money which has not yet crystallized in actual disbursement. The latter does not qualify as special damages but is claimable as part of General damages. In this case the trial Court erred in rejecting the Respondent's claim of N45,000 for future treatment oversea as too remote and the Court of Appeal rightly overruled the trial Court on that point..." Perhaps, what the Great Denning had to say on the subject in the English case of *Croke v. Wiseman* (1982) 1 WLR 71 AT 78 may serve as the required icing on the cake as far as the Cross Appellant's claim under this head of Claim is concerned. He said; "...there should be ample provision for the cost of keeping this boy (sic) the Respondent in the future so that he should have the best possible care for the rest of his expected life. This is always done by finding first the multiplicand and afterwards the multiplier." See generally, *Julius Berger (Nig) Plc & Anor v. Ugo* (2015) LPELR-24408(CA) per Oho, JCA [F-D] 101-105

So, how are damages assessed and apportioned in cases of fatal accidents?

(c) Damage to Property

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**.** 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 or damage 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)..

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 by Onyeama, J.S.C., as he then was, in the leading case of *Kerewi v. Odegbeson* (1965) 1 All N.L.R. 95, at p. 99) to be either the value of the car, if it was a total loss, or loss of earning during repairs and the cost of the repairs if it was not; 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, 144. See also Soetan & Anor v Ogunwo (1975) LPELR-3089 (SC) Per Ibekwe, JSC [E-C] 11-12

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 *SPDC Nig Ltd v. Ambah* (1999) LPELR-3202(SC) the SCN held that where there is a claim for total destruction of property, as in this case where the Respondent's car is a write off, the measure of damages will be the value of the property at the time of its destruction … This is based on the principle of restitutio in integrum. Per Wali, JSC [D-E] 20. The court went further to cite the case of *Anambra State Environmental Sanitation & Anor v. Ekwenem* (2009) LPELR-482 (SC) where it held that computation of damages is not however uniform. It varies between total loss calling for replacement of damaged property and repairs. While replacement is static, repairs are subject to vagaries of unpredictable market forces. Cost of repairs should not be unjust to the one who suffered legal injury and so therefore cannot be confined to the time when the damage occurred. For this reason, it was emphasised in court decisions that assessment of damages must take into consideration the current market situation. The Courts must take into consideration the economic strength on decline of the currency (which in this case is the Naira) and its purchasing power. Per Adekeye, JSC [C-F] 30; *Reynolds Construction Co. Ltd v. Odigie* (2018) LPELR-44776 (CA) Per Oseji, JCA [C-F] 40. While supporting the leading Judgment of Adekeye JSC, Muntaka-Coomassie, JSC added in his supporting judgment thus "Consequently, for the actual loss, the right measure of damages is the value of the property at the time of the destruction plus such further sum as would compensate the owner of the properties destroyed for loss of earnings and the inconvenience." See [C-E] 36.

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 judgment 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.

Self-Assessment Exercise 2

What is the measure of damages in cases where the plaintiff's vehicle is totally lost or destroyed by the defendant's negligence?

2.4. Summary

In this unit, we learnt about:

(a) the quantum of damages in which a plaintiff is entitled to in a given case;
(b) the mode of assessment of damages; and
(c) several examples of the types of damages that we have e.g. nominal damages, general and special damages etc.

2.5. Reference/Further readings/Web Sources

Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
Fidelis Nwadialo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
John G. Fleming: The Law of Torts (1977), The Law Books Co. Ltd publisher, London. Sweet & Maxwell.
A. Street: The Law of Torts Swet & Maxwell (1977), London
G. Kodilinye & Oluwole Aluko: Nigeria Law of Torts. Spectrum Law Publishers, 1999.

2.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

The two main factors taken into consideration in assessing damages in cases of liability for personal injury cases are: (a) the financial loss resulting from the injury (b) the personal injury, involving not

only pain and suffering, but also the loss of the pleasures of life. See *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-E] 16.

Answer to SAE 2

The measure of damages in cases where the plaintiff's vehicle is totally lost or destroyed by the defendant's negligence was laid down by Onyeama, J.S.C., as he then was, in the leading case of *Kerewi v. Odegbeson* (1965) 1 All N.L.R. 95, at p. 99) to be either the value of the car, if it was a total loss, or loss of earning during repairs and the cost of the repairs if it was not.

Unit : 3 Occupier's Liability

Unit Structure

3.1 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 governed by statute particularly under the Law Reform (Tort) Law of Lagos State 2015 (LRTL 2015) in Lagos State. In other states where no such statute exists the common law continues to operate including its reformation in *BRB v Herrington infra*.

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.

3.2 Learning Outcomes

The purpose of this unit is to enable you to:

- define the concept occupier's liability;
- identify the law (tort) or statute that governed occupier's liability in Lagos and in other parts of Nigeria;
- identify the liability of a plaintiff to:
  (a) a trespasser ;
  (b) a contracting party;
  (c) an invitee; and
  (d) a licensee.

3.3 Occupier's Liability

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjx1bWNtfWAAxUNVkEAHbqNBsUQFnoECCsQAQ&url=https%3A%2F%2Fwww.oxfordreference.com%2Fview%2F10.1093%2Foi%2Fauthority.20110803100244597&usg=AOvVaw3LAH5DCOgOxmo8sKetOiGc&opi=89978449

Who is an Occupier?

The word occupier means one who has control of the premises. Thus an occupier need not be an owner. Exclusive occupation is not necessary. The foundation of occupier's liability is occupational control .i.e. control associated with and arising from presence in and use of or activity in the premises. See also *Wheat v. Lacon & Co Ltd* [1966] AC 552. In *Nig. Airways v Abe* [1988] 4 NWLR (pt. 90) p.

524 the court stated that occupier's liability is the tort that governs liability of an occupier, controller or manager of a premises, fixed or immovable structures including any vessel, vehicle or aircraft and the duty of care he owes to any person who comes into or enters such property. In most cases claims are made against local authorities and other public bodies who have duty for road maintenance pavements and other public places and against organizers of sporting and recreational facilities for personal injury suffered from the latent condition of the premises.

Statutory regulation of the liability of an occupier is now common in most jurisdictions. In Lagos State for example, the Law Reform (Tort) Law of Lagos State 2015 applies to regulate occupier's liability. In other states where no such statute exists the common law continues to operate.

Definition of Premises
Premises does not include only lands and buildings but also any fixed or move-able structure including any vessel, vehicle or aircraft.

Occupiers Liability under Common Law
At common law, there existed the problem of variation in the standard of care required with regard to persons on premises. The liability of an occupier to persons injured on such premises depends largely on the legal status of the injured. There were essentially three categories at common law and these are:
a) Invitee
b) Licensee
c) Trespasser

Invitee: an invitee is defined in *Pearson v Lemaitre* (1843) 134. ER 742 as person who comes into the occupier's premises with his consent on a business in which the occupier and the entrant have a common interest. A typical illustration of this would be where a customer who enters a shop with a view to purchasing an article. An occupier is liable to this category of persons for injuries arising not only from the danger known to the occupier but also for those dangers which the occupier ought to have known.

Licensee: This is described as a person who enters or come upon permission of the occupier in respect of a matter in which the occupier has no specific interest. For example, in exercising a public right such as visiting a recreational ground or a part. To this class of person (i.e. licensee) the occupier at common law is only obliged to give warning of any positive act of misfeasance that may inure the licensee.

Trespassers: These are persons come upon premises without the invitation of the occupier and their presence on the premises of known to the occupier and their presence on the premises if known to the occupier is practically objected to. At common law, the initial attitude was that occupiers owed no duty of care whatsoever towards trespassers. This state of affairs received statutory attention is England. The first statute in England which brought to coming upon premises is the British Occupiers Liability Act 1957. The English statute was subsequently amended in the year 1984.

Self-Assessment Exercise 1

Who would you describe as an occupier for the purpose of liability under the law of tort?

The Common Law on Trespassers before *BRB v. Herrington*

Until 1972 when the case of *British Railways Board v Herrington* (1972) 2 W.L.R 537 it was decided that an occupier duty towards a trespasser under common law, was a duty to refrain from deliberately or recklessly causing harm to a trespasser. The general rule of common law was that an occupier owed no active duty to a trespasser. Thus, under common law, a trespasser entered the premises or property of another person at his own risk until the case of *British Railways Board v Herrington (supra)* was decided.

Under common law, where a trespasser was known to be present on the property, the occupier was under a duty not to inflict injury on him recklessly or intentionally. Therefore, an occupier was under a duty not to create dangers intentionally to injure a trespasser.

The Duty to Notify or Warn the Public and Trespassers of Dangers

Under the common law, and to date, an occupier has the duty to warn the public of dangers on his land. In the case of *Illot v Wilkes* (1820)5 KB 674, Bayley J. explained the law thus:

> Although it may well be lawful to put those instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons, for many trespassers are comparatively innocent, it is necessary to give a much notice to the public on guard against the danger.

With regards to children, an occupier has to exercise greater care. In the words of Lord Denning MR in *Pannet v McGuinness* (1972) 2 QB 599:

> A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child, when you may not expect a burglar.

The Common Law rule that a trespasser enters a premises at his own risk as was decided in series of cases including *Addie & Sons Ltd v Dumbreck* (1929) A.C 358 was harsh on trespassers, including children trespassers especially those who suffered serious injury or even death. In 1972 this common law rule was abolished by the House of Lords in the case of *British Railway Board v Herrington*, supra where the House of Lords established the duty of common humanity, as the new duty of care owed by an occupier to a trespasser.

In the case, the House of Lords stated that whereas an occupier does not owe a general duty of care to a trespasser, but a duty to refrain from deliberately or recklessly injuring him, he does owe a duty of "Common Humanity" a limitless duty, which is a duty to act "in accordance with common standards of civilized behavior" for the safety of a trespasser.

British Railway Board v Herrington:

The fence guarding a railway line had broken down and the gap in the fence was being used as a short cut to cross the railway line. The plaintiff respondent, a boy of six walked over the broken down fence, came into contact with the electrified rail line and was injured. The plaintiff sued by his next of friend

alleging a failure and negligence by the defendant appellant railway board to maintain the fence, when they knew that children were likely to come onto the rail line without realizing the danger that live rails posed. The House of Lords held: that the defendant appellant board was liable to the plaintiff. The defendants were guilty of reckless disregard for the safety of the plaintiff, in that they knew that children had been seen on the line, because the fence was broken, and therefore they were likely to do so again, in which case they would be exposed to hidden and mortal danger, and yet the defendants took no steps to repair the fence.
In this case, the House of Lords stated that whereas an occupier does not owe a general duty of care to a trespasser, but a duty to refrain from deliberately or recklessly injuring him, he does owe a duty of 'common humanity' a limitless duty, which is a duty to act 'in accordance with common standards of civilized behaviour' for the safety of trespasser.

Contractual Modification of the Statutory Common Duty of Care

The statutory common duty of care of an occupier can be restricted or excluded by an agreement with a visitor, for instance, Mr 'A' puts up a signpost, stating clearly that he, the occupier will not be liable to any person who enters this premises, nor of any loss of property kept around, in front, or inside the premises, however the loss was caused.

Common Duty of Care
The English Occupier's Liability Act 1957 and the LRTL 2015 imposes upon the occupier a duty of care. The occupier must take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

The common duty of care is set out in section 2(2) of the Occupier's Liability Act 1957 and section 4(1)(2) of the LRTL 2015. Section 2(2) of the occupier's liability act 1957 defines the common duty of care as: the duty to take such care as in all circumstances of the case. Case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

Section 4(2) of LRTL 2015 defines the common duty of care thus:

> The common duty of care is a duty to take such care in all the circumstances of the case as reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which is being invited or permitted by the occupier to be there.

Thus the standard of care varies according to the circumstances.

Before proceeding further click on these links

Claims.co.uk
https://www.claims.co.uk › land-law › occupiers-liability

LexisNexis
https://www.lexisnexis.co.uk › legal › occupiers-liability

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjhw83Bt_WAAxWhQEEAHd1bCQsQFnoECBkQAQ&url=https%3A%2F%2Fvia.library.depaul.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D3882%26context%3Dlaw-review&usg=AOvVaw076SBK2H3R0Wt8Q4qn2aFy&opi=89978449

Child Visitors

Section 2(3)(a) of the Occupier's Liability Act 1957 and section 4(3)(a) of the LRTL 2015provides that an occupier must be prepared for children to be less careful than adults. As a result, a higher standard of care is expected from the occupier when children are visiting his premises. However, an occupier may reasonably expect that his child visitors can be accompanied by their parents or guardians, who will look after them. Therefore, it had been held that the occupier will have discharged his duty of care toward a child if he had made the premises reasonably safe for the child accompanied by the kind of guardian that he can expect them to be accompanied by in the circumstances. Understanding a child of that age may be expected to have. See *Tichener v. British Railway Board* (1983) 1 WLR 1427, *Taylor v. Glasgow City Council* (1922) 1 AC 44, *Jolley v. Sutton* (2000) 1 WLR 1082

Occupier's Liability

The Allurement Principle

It is in this context that it is necessary to consider the case in which courts have found occupiers liable to children who were attracted by traps onto certain parts of premises and injured there.

For example in *Glasgow Corp v Taylor* (1922) 1 A.C 44 a seven year old child was playing in public park when he noticed some attractive poisonous berries on a bush was not fenced off and the child picked this berries and ate them. He died later as a result. It was held that, the occupiers were liable because the berries constituted a 'trap' or 'allurement' to the child. It was also held in the case of *Jolley*

v London Borough of Sutton (2000) 1 WLR 1082, that an abandoned boat in a dangerous condition constituted an allurement to two boys.

An allurement will not necessarily make a child trespasser, a lawful visitor. As seen in the case of *Liddle v Yorkshire (North Riding)* (1934) 2 kb 101, it was held that the defendant in this case were not liable when a child who was a trespasser was playing on a high bank of soil trying to show to his friends how bees flew and he was injured. It was clear that the child was a trespasser as he had been warned off by the defendant on previous occasions. The pile of soil could not therefore make him a lawful visitor. It used to be the case that the courts were prepared to assume that in the case of very young children the responsibility was that of their parents to ensure that they were safe. It was clear to this case that, the child was a trespasser as he had been warned off by the defendant on previous occasions. The pile of soil could not therefore make him a lawful visitor. It used to be the case that the courts were prepared to assume that in the case of very young children the responsibility was that of their parents to ensure that they were safe.

In *Phibbs v Rochester Corporation* (1955) 1 QB. 450 a child aged only five was walking across the defendant's land when he fell into a trench. The child was a licensee because he played there often with other children and the defendant had done nothing to warn the children away. However, it was held that, even though as a licensee he was a lawful visitor, the occupiers of the land were not liable because, the parents should have been taken care of the child.
Despite these two cases, there are many cases in which the courts have been particularly lenient towards child trespassers and it is very unusual nowadays for a court to find that, there is no liability on the part of an occupier towards children on the grounds that, their parents should have taken care of them. Nevertheless, as a general principle, children should normally be supervised.

Duty Owed to Skilled Workmen
Section 2(3)(b) Occupiers' Liability Act 1957 and section 4(3)(b) LRTL 2015 provides that a person exercising a particular calling will guard against special risk ordinarily incidental to the particular calling and an occupier is entitled to assume so.. This applies to skilled professional workmen like an electrician, a carpenter etc. *In Roles v. Nathan* (1963) 1 WLR 1117 – Chimney sweeps killed by carbon monoxide (CO) fumes while sealing up a "sweep hole" in the chimney of a coke-fired boiler were held to have known about the danger and to have guarded against it as it was one of the dangers which could arise in the profession of chimney sweeping. As such the occupiers were not liable for not warning them of the danger. See also the case of *General Cleaning Contractors Ltd. v. Christmas* (1954) AC 180 where a window cleaner injured by a window while cleaning could not succeed against the occupier because the court held that, as a trained workman, he should have exercised reasonable care against the hazards of his profession.

A Visitor under Occupiers Liability Act 1957
See section 1(2) of the act which defines visitor as a person whom the occupier gives (or is to be treated as giving) an invitation or permission to enter or use the premise. Visitor is a person who have express or implied permission to enter into a premises by the occupier. A visitor who exceed the permission given to him by the occupier e.g. by going to a part in where he was told not to go by the occupier or

staying longer than he is supposed to stay there by making the visitor a trespasser and will not be within the scope of the Act (1957).

The duty under the occupiers liability Act 1957 is common to all types of visitors that is most categories of lawful visitors. Trespassers were still not owed a duty under this Act. Visitors does not include users of private rights of way see *McGeown v Northern Ireland Housing Executive* [1994] 3 All ER 53.

The question whether the occupier has fulfilled his duty to the visitor is thus dependent upon the facts of the case and though the purpose of the visit may be a relevant circumstance, it can no longer be conclusive as it so often was before when it governed the status of the entrant.

(a) An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leave him free to do so.
(b) An occupier must be prepared for children to be less careful than adults, it will be reasonable for the occupier to expect children to be on his premises unaccompanied, but it is submitted that the law is still as it was stated before the act by Delvin J in *Phipps v Rochester Corporation, supra* namely that one of the circumstances which must be taken into account in measuring the occupiers obligation is the degree of care for the children's safety which the occupier may assume will be exercised by the parents. The claimant in that case a boy aged 5 out blackberrying with his sister aged 7, and they walked across a large open space which formed part of a housing estate being developed by the defendants. The defendants had dug a long deep trench in the middle of the open space, a danger which was quite obvious to an adult. The claimant fell in and broke his legs on the fact that was held prudent would not have allowed two small children to go alone on the open space in question or, at least, he would have satisfied himself that the place held no dangers for the children. The defendants were entitled to assume that parents would behave in this manner and therefore, although the claimant was licensee, the defendants were not in breach of their duty to him.

An occupier would be liable in full to the child, but presumably could recover contribution from the guardian. In *Bates v Parker* 256 La. 1039, 241 So. 2d213 (1970) where a householder employs an independent to do work, be it of cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he is to work. In *Roles v Nathan, supra* two chimney sweeps were killed by carbon monoxide gas while attempting to seal up a 'sweep hole'' in the chimney of a coke-fired boiler being a light at the time but the occupier was not held liable for their deaths, partly at the least on the ground that paragraph 'a' applied as Lord Dening M.R said when a householder calls in a specialist to deal with defective installation on his premises he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect.

Categories of Visitors
1. Contractual visitors
2. Invitees
3. Licensees
4. Entrant as of right
5. Trespassers

The occupier of the premises owes each of these persons a duty of care. That duty differs in each case.

1. **Contractual entrants:** These are generally people who pay to enter. In such cases the court will look to the purpose for which the person has entered the premises and will infer on the occupier a duty to make the premises as safe as reasonable care and skill can make them.

2. **Invitees:** An invitee is not a person who is invited onto the premises rather an invitee is one whose visit will bring an economic benefit to the occupier. Invitees have an obligation to look out for their own safety but the occupier has a duty to use reasonable care to prevent injury or damage from unusual dangers of which the occupier knows or ought to know.

3. **Licensees:** A licensee who enters premises is one whose presence does not confer upon the occupier an economic advantage. The most common example is that of a guest in one's home or a viewer who attends a performance on a complimentary ticket. See the case of *Agura Hotel & Anor v. Diambaya* (2015) LPELR-41696(CA). The duty of the occupier to licensee is to protect them from concealed dangers that are known to the occupier. This is a more limited duty than that owed to invitees.

4. **Trespassers:** A trespasser is a person who comes into property without permission or stays on property without when requested to leave. An occupier owes a duty of care to trespassers but, as maybe expected, the duty is not as high as with other categories of visitors.

Persons who may be liable as an Occupier

The persons who may be liable for accidents, injuries and damages as an occupier of a premises include the following:

1. An owner or landlord
2. Tenants, by whatever name, designation; and interest in the land
3. An independent contractor, such as a builder, and so forth.

A plaintiff may claim under the Occupier's Act or under the law of negligence depending on which of the two laws will be more favourable to his claim. When an injured person sues an occupier, for liability on the ground of negligence, or state of his property, the main remedy of the plaintiff is an award for damages for the injury suffered.

Defences to Occupier's Liability

1. Warnings: Particularly important as they offer a simple inexpensive way to avoid potential liability. When a warning is given, such warning must however satisfy the requirement of reasonableness. An occupier may plead, that he sufficiently warned the entrant for his safety. See section 4(4)(a) LRTL 2015. Safety signs could be used to call attention of visitors. That would mitigate the liability as same would serve as act of carefulness. The absence or failure by a person in occupation to exercised the standard of what a reasonably prudent person would have exercise in a similar situation would denote carelessness and make such person liable. See the case of *British Airways v. Atoyebi* (2010) 14 NWLR (PT 6621).

2. Consent: This involves willingly accepting the risk, such as going sailing on a particularly choppy day, walking down a slippery pontoon. Section 4(5) of LRTL 2015 states "The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted by the

visitor". However, mere knowledge of a danger by a visitor may not be sufficient. For an occupier to successfully plead consent, the knowledge of the visitor must be enough to enable the visitor to be reasonable safe for the purpose for which the visitor is on the premises. Under section 4(3)(b) of the LRTL 2015 an occupier may expect that a person, in the exercise of his calling will appreciate and guard against any risk ordinarily incident to his profession, in so far as the occupier leaves him free to do so.

3. Individual responsibility. A good example is the sobriety of the claimant at the time of the accident - if it can be shown that the claimant was drunk at the time of the accident, this will at the very least, amount to a finding of contributory negligence; possibly even a finding of no liability whatsoever.

4. Exclusion clauses are always construed strictly against the person attempting to rely on them as the Courts do not favour such clauses. Although an exclusion clause may be ineffective as such, it may nevertheless prove to be effective as a warning notice thereby discharging the duty of care by drawing attention to a particular danger.

5. If you hire independent contractors that turn out to be incompetent you may well be liable for their actions. Conversely if you have acted reasonably in entrusting the work to an independent contractor, having taken all such steps as you ought reasonably to in order to satisfy yourself that the contractor was competent, then your defence to a claim against you may be to blame your competent independent contractor. See section 4(4)(b) LRTL 2015.

6. Act of stranger: An occupier may plead that the injury is entirely due to an act of God, Provided that the occupier is not guilty of continuing it by allowing the dangerous state of affair created by the stranger, by allowing the property to linger to be in that state for an unreasonable period of time without repairing it.

7. The Plaintiff is a wrongdoer or Trespasser: An occupier may plead that the plaintiff is a trespasser or wrongdoer. Where a plaintiff is a wrongdoer, for instance he may have no cause of action provided that the defendant is not guilty of implied consent, nor condonation, nor guilty of deliberately or recklessly harming him. Worse still, if the trespasser is a thief or other criminal and so forth, his case is far worse. He will have no cause of action at all, and he may also be charged and prosecuted for any crime he may have committed.

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

.

So, what defences can be used in an action for occupier's liability?

3.4 Summary

Generally, in this unit, you learnt about:

(a) the concept occupier's liability;
(b) occupier's liability in Lagos and in other parts of Nigeria;
(c) understand the liability of a plaintiff to: a trespasser; a contracting party; an invitee; and a licensee.

3.5 References/Further Readings/Web Sources

Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
Fidelis Nwadialo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
John G. Fleming: The Law of Torts (1977), The Law Books Co. Ltd publisher, London. Sweet & Maxwell.
A. Street: The Law of Torts Sweet & Maxwell (1977), London
G. Kodilinye and Oluwole Aluko: Nigeria Law of Torts. Spectrum Law Publishers, 1999.
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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwik3dTVqe-AAxVYQEEAHXYIBMM4FBAWegQIDBAB&url=https%3A%2F%2Fwww.britannica.com%2Fdictionary%2Foccupier&usg=AOvVaw3vLdlXDso9VG48f7qOkqu0&opi=89978449

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3.6 Possible Answers to Self-Assessment Exercises

Answer to SAEs 1

Occupier means one who has control of the premises and does not necessarily mean an owner. It also means a person who has possession, occupation, use or some degree of control of premises, fixed or movable structure.

1. The extent of an occupier's duty to invitees, licensees and trespassers are stated below:

Invitees: An invitee is not a person who is invited onto the premises rather an invitee is one whose visit will bring an economic benefit to the occupier. Invitees have an obligation to look out for their

own safety but the occupier has a duty to use reasonable care to prevent injury or damage from unusual dangers of which the occupier knows or ought to know.

Licensees: A licensee who enters premises is one whose presence does not confer upon the occupier an economic advantage. The most common example is that of a guest in one's home or a viewer who attends a performance on a complimentary ticket. The duty of the occupier to licensee is to protect them from concealed dangers that are known to the occupier. This is a more limited duty than that owed to invitees.

Trespassers: A trespasser is a person who comes into property without permission or stays on property without when requested to leave. An occupier owes a duty of care to trespassers but, as maybe expected, the duty is not as high as with other categories of visitors.

NATIONAL OPEN UNIVERSITY OF NIGERIA

LAW OF TORTS 1 (PPL 323)
FACULTY OF LAW

COURSE CODE: PPL 323

COURSE TITLE: LAW OF TORTS I

COURSE GUIDE

LAW OF TORTS I

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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 PPL 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 classes that are linked to the course. You are advised to attend these sessions.

What you will learn in this Course

The overall aim of PPL 323 is to introduce the fundamental principles and applications of Law of Torts. During this course you will learn about, Nature of Torts, historical background and general principles of tortuous liability, trespass, negligence, defences in relation to torts and damages.

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:

Introduce you to the basic sources of law of Torts

1.0	History of the Law of Torts
2.0	Principle of liability in Torts
3.0	Trespass to a person.

Learning Outcomes

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 of 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 units 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 Torts
(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 text books; these are not provided by NOUN, obtaining them is your own responsibility. You may purchase you own copies. You may contact your tutor if you have problems in obtaining these textbooks.

Modules and Study Units

There are 6 Modules and 25 study units in this course, as follows:

Modules 1 **Historical background and general principles of tortuous liability**
Modules 2 **Trespass**
Modules 3 **Negligence**
Modules 4 **Continuation of Negligence**
Module 5 **Defences in relation to torts**
Modules 6 **Damages**

Each unit contains a number of self-tests. In general, these self-tests question you on the materials you have just covered or require you to apply it in some way and, thereby, help you to

gauge your progress and to reinforce your understanding of the 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:

i. G. Kodilinye and O. Aluko, *The Nigerian Law of Torts*, 1996, Ibadan: Spectrum
ii. Fleming; G. John: The Law of Torts, Sweet & Maxwell
iii. Christian Witting, Street on Torts, 2016, Oxford Uni. Press

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 four assignments, out of which the best three 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 of three hours duration. This examination will also count for 70% of your total course mark.

Tutor Marked Assignments

There are four tutor-marked assignments in this course. You only need to submit three of the four assignments. You are encouraged, however, to submit all four assignments, in which case the highest three 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 you 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 discuss 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 examination for PPL 323 will be of three 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 out 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	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	
7	Battery	Week 7	
8	False imprisonmentand intentional harm to the Person	Week 8	
9	Trespass to chattels	Week 9	Assignment 3
10	Conversion	Week 10	
11	Detinue	Week 11	Assignment 4
12	Duty of care	Week 12	
13	Standard of care	Week 13	
14	Proof of negligence	Week 14	
15	Continuation of Negligence	Week 15	
16	Defences to the Tort of Negligence	Week 16	
17	Contributory negligence	Week 17	
18	Exclusion clauses and consent		
19	Mistake	Week 18	
20	Damages		
21	Assessment of Damages	Week 19	
22	Occupiers Liability	Week 20	

Table 2 course organizer

How to get the most from this Course

In distance learning, the study units replace 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 listening to a lecturer. In the same way that a lecturer might recommend some reading, the study units tell you which recommended books or other materials to read, and when to undertake practical work. Just as a lecturer might give you an in-class exercise, your study units provide 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 unit 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 the examples 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, do not hesitate to call and ask you tutor.

1.0 Read this course guide thoroughly

2.0 Organise 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 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 why 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 8 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 For any difficulties you might encounter 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 your 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 questions 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 to 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 conversion
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 everyday life. You are also equipped to take part in the debate about legal methods.

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

MAIN COURSE

Course Code: PPL 323

Course Title: Law of Torts 1

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Unit 2 : An overview of the Law of torts
Unit 3 : The Reception of the Law of Torts in Nigeria
Unit 4 : The principles of liability in Tort
Unit 5 : Other principles of liability in the Law of Tort

Glossary

End of the Module Questions (These could be MCQs, True/False, or Matching)

Unit 1 : General Introduction

Unit Structure

1.1. Introduction
1.2. Learning Outcomes
1.3. General Introduction of Torts
1.3.1. Definition of tort
1.3.2. The purpose of the law of torts
1.3.3. The Rule in *Smith v. Selwyn*
1.4. Summary
1.5. References, Further Readings and Web Sources
1.6 Possible Answers to Self-Assessment Exercises

1.1. Introduction

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

1.2. Learning Outcomes

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

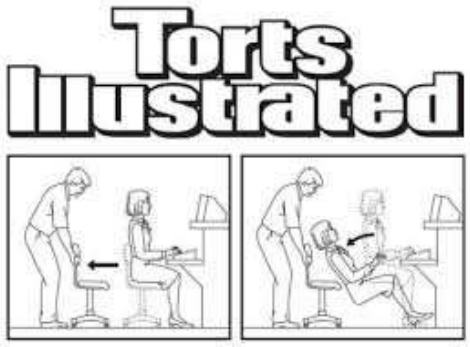
- Define law of torts;
- the purpose of the law of torts; and
- Explain the rule in *Smith v. Selwyn.*

1.3. General Introduction of Torts

1.3.1. 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.
So, have you thought of the meaning or the definitions of Tort.



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 (G. Kodilinye and O. Aluko, *The Nigerian Law of Torts*, 1996, Ibadan: Spectrum, 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.

In a recent Supreme Court case of *Aviomoh v. C.O.P & Anor* (2021) LPELR-55203(SC), the court stated the nature and purpose of a tort claim accordingly:

> 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 an individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct.

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. The SCN held in *Maja v*

Samouris (2002) LPELR-1824(SC) that where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary, the damages are unliquidated. So, too, when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties and is fixed by opinion or by an estimate or what may be judged reasonable, the damages are said to be "unliquidated". Per Iguh ,JSC pp. 22-23, paras. E-B 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.

For further reading access this link

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi0_4Kbxe2AAxVSnFwKHRpUC98QFnoECCoQAQ&url=https%3A%2F%2Fwww.law.cornell.edu%2Fwex%2Ftort&usg=AOvVaw1y_8duv2UMnMvbpub0UulU&opi=89978449

As we can see, tort is not easy to define ;

Firstly, 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.

Self-Assessment Exercises 1

What is the nature of a tort?

1.3.2. 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, 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 interfere with the interests of other persons.

So, what is the main purpose of the law of torts.?

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 *and Edobor v Olotu & Anor* (2012) LPELR-9288 (CA) where the Court of Appeal held that damages are monetary compensations for loss or injury to a person or property. (Per Omoleye, JCA, pp. 46-47, paras. F-B)
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 every day include trespass to person, trespass to land or chattel, 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 the law of tort

The objectives of the law of tort can be summarised 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 remedies in the law 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.

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 recognised, 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 redistribution 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 2

1. What do you understand by injunction?
2. When will court grant injunction in a tort case?

1.3.3. 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 Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) and other statutes, that is to say:

1. Criminal Code Act;
2. Interpretation Act; and
3. 1999 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, 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.

See also *Adediran v. Interland Transport Ltd. (1991) 9 NWLR Pt. 214, P. 155 SC.*

So, identify and briefly explain the constitutional and statutory provisions that justify the abolition of the rule in *Smith v. Selwyn* in Nigeria.?

1.4. Summary

In this unit, you learnt about the definition, objectives and the scope of the law of tort. You also learnt the constitutional and statutory justification for the abolition of the rule in *Smith v. Selwyn* in Nigeria.

1.5. References/Further Readings/Web Sources

Harpwood Vivienne: Modern Tort Law, 5th ed., US: Cavendish Publishing Ltd, 2003.
G. Kodilinye and O. Aluko, *The Nigerian Law of Torts*, Ibadan: Spectrum, 1996.
Rogers, *Winfield & Jolowicz on Tort*, 15th edn, London: Sweet & Maxwell, 1998

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1.6. Possible Answers to SAEs

Answer to SAEs 1

A tort is a purely civil wrong which gives rise to civil proceedings, see *Aviomoh v. C.O.P & Anor* (2021) LPELR-55203(SC). The breach of a tort is usually redressed by an award of unliquidated damages, injunction, or other appropriate civil remedy see *Maja v Samouris* (2002) LPELR-1824(SC)

Answers to SAEs 2

1. An injunction is a court order forbidding the defendant from doing or continuing to do a wrongful act. Whether the plaintiff is claiming 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.

2. The court will grant an injunction in tort where there is the existence of a possibility of an irreparable injury and or the defendant intends to continue with such course of conduct/tort. Irreparable injury is a scenario wherein it is proved that the harm inflicted on the applicant cannot be remedied in any other form.

Unit 2 : An Overview of the Law of Torts

Unit Structure

2.1 Introduction

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

2.2. Learning Outcomes

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

- compare torts with other laws;
- identify the forms of action in the law of torts;
- classify torts

2.3. The Synopsis of the Law of Torts

2.3.1. Tort compared with some other laws

The dividing line between tort and other civil wrongs is thin. Furthermore, there is an element(s) of tort in most areas of 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

One of the main purposes 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 or both. Sometimes, non-custodial punishment can be imposed by virtue of Part 44 of the Administration of Criminal Justice Act, 2015. 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 Attorney General of the Federation (AGF), Attorney General of the State (AGS), a Law officer in office of the AGF or AGS, and a legal practitioner authorised by the AGF or the AGS and a legal practitioner authorised by the Act of the National Assembly.

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. (See the case of *Aviomoh v. C.O.P & Anor* (2021) LPELR-55203(SC) per Helen Moronkeji Ogunwumiju, JSC (Pp 22 - 22 Paras B - E)

There is, 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.

Example Box 1

> 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 willfully 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 or both or non-custodial punishment such as payment by the defendant of damages for injury or compensation for any loss suffered by the plaintiff and he may also be compelled in a civil action for tort to pay damages to the injured person by way of compensation. In *Tika Tore Press Ltd v. Umar* (1968) 2 All NLR p. 107 at 110, the court did not follow the rule in *Smith v. Selwyn* by refusing to stay proceeding in the suit pending the completion of the criminal case.

In *Abaver v. Alaga* (2018) LPELR-46566(CA) the court held:

> The position is that a person can be on trial for both the criminal aspect and as well as the civil aspect at the same time. In such cases, the remedies are therefore concurrent; while the accused person's tort-feasor might be imprisoned for the crime committed, he could at the same time pay damages to the Plaintiff for the tort committed.

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 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 135(1) Evidence Act 2011 and the case of *Bassey v State* (2012) LPELR-7813(SC); *Usman v State & Ors* (2020) LPELR-50555(CA). 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 also concerned 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.

The Court in *Babalola v. Apple Inc* (2019) LPELR-50986 (CA) per Jamilu Yammama Tukur, JCA highlighted the distinction between tort and contract in the following words:

> It is trite that the principle of privity of contract, seller's warranty and manufacturer's warranty are all not one and the some. On the distinction between tort and contract, the Court in G.B. Ollivant Nig. Ltd V. Agbabiaka (1972) 2 SC; Okwejiminor V. Gbakeji (2008) 1 SC. (pat. III) 263 at 284 held as follows:- "At page 3 paragraph 5 of Clerk and Lindsell on Torts (12th Edition), the learned authors stated as follows in considering the relation of tort and contract; "Sir Percy Winfield drew the distinction as follows: 'At present day, tort and contract are distinguishable from one another in that the duties in the former are primarily fixed by law, while in the latter they are fixed by the parties themselves. Moreover, in tort the duty is towards persons generally; in contract it is towards a specific person or specific persons.' If the claim depends on the proof of the terms of the contract, the action does not lie in tort, so a claim for wrongful dismissal is a claim in contract." Per Charles Olusoji Madarikan, J.S.C (P. 9, paras. C-F)." (Pp 40 - 41 Paras F - E)

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.

Example Box 2

(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.

Self-Assessment Exercise 1

Despite the unique nature of tort, it is not exclusive of crime, contract, and trusts. Adumbrate.

2.3.2. 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 recognised 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 form?"

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 recognised 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."

So, do the boundaries and definitions of modern torts still depend to a large extent on the boundaries of the old forms of action?

2.3.3. 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 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

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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 Exercises 2

1. Explain how torts are classified?
2. What is direct injury?

2.4. 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.

2.5. References/Further Readings/Web Sources

Criminal Code of the Southern States of Nigeria

Penal Code of the Northern States of Nigeria

Britannica
https://www.britannica.com › *topic* › *tort*

2.6. Possible Answers to SAEs

Answer to **SAE 1**

A tort is a purely civil wrong which gives rise to civil proceedings with the aim to give the individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct. Notwithstanding, this unique nature, tort is not exclusive from crime, contract and trust because a single conduct can give rise to liability in all these areas of law.

Answers to **SAEs 2**

1. Torts can be classified as those that protect or concern namely:
   a. Personal Interests
   b. Interference with judicial process
   c. Property interests
   d. Interest in reputation
   e. Economic interests
   f. Interference with relationships; and
   g. Miscellaneous interests

2. Direct injuries are caused by an external force or collision, which is produced by a source outside of the body. This comes from the immediate result of the violation of a right legally, while consequential injury occurs as a consequence of something else.

Unit 3 : The Reception of the Law of Torts in Nigeria

Unit Structure

3.1. Introduction

The evolution of the law of tort has been somewhat haphazard and it is an area of law that is still developing. For instance, not until 1932, was negligence officially recognised by the House of Lords in England as a separate tort, and 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. This unit examines how the law of torts was received into Nigeria.

3.2. Learning Outcomes

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

- explain how the law of torts was received into Nigeria;
- enumerate the sources of the Nigerian law of tort.

3.3. The Reception of the Law of Torts in Nigeria

3.3.1. 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 cutoff 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 modeled. 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, 2010).

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.

Self-Assessment Exercises 1

1. Describe how the law of Torts was received into Nigeria.
2. Name the statutes that facilitated reception of Law of Torts into Nigeria

3.3.2. 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 or judicial precedent; 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 revered 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 presence 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, 5th ed., WH Allen, 1978 p.11 and also Don R. Pember, Mass Media Law, 2nd ed. Dubuque, IA : WCB, 1982, 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 noble 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 Exercises 2

i. Define common law.
ii. What are its basic characteristics?

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. 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 (See the case of *Rebold Industries Ltd v. Magreola & Ors* (2015) LPELR-24612(SC) Per John Afolabi Fabiyi, JSC (Pp 34 - 35 Paras F - B). 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. See the case of *Suleman & Anor v. Cop Plateau State* (2008) LPELR-3126(SC) where the court, per Niki Tobi JSC stated:

> Under the doctrine of precedent, decisions of superior Courts are binding on inferior Courts. In the hierarchy of the Court system in Nigeria, decisions of the Supreme Court are binding on all other Courts. Next in the hierarchy is the Court of Appeal. Decisions of that Court are binding on all other Courts. I can still go further. The next in the hierarchy is the High Court. Decisions of the High Courts are binding on all other courts, including Magistrate Courts, Area Courts and Customary Courts.

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. See the case of *Babatunde v. Pan Atlantic Shipping And Transport Agencies Ltd & Ors* (2007) LPELR-698 (SC). But in countries where case law in the strict sense of law making by judges is obtained, it will be necessary to emphasize 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.

So, What is case law? ; What do you understand by the order of precedence or binding authority of case law?

Legislation

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 (Section 36(12) of the 1999 Constitution provides to the effect that no person shall be convicted of a criminal offence unless the offence is defined and the penalty therefore is prescribed in a written law), so also are many aspects of civil law.

Legislations or statutes are usually enacted by parliament 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 President or the State Governor vetoes the bill by not signing it, the legislature may override the President or the State Governor 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 (See Section 59(4) and 100(5) of the 1999 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, 2010 edition e.g. Weights and Measures Act.

So, What is legislation and how does it help in the development of the law of torts in Nigeria?

For further reading access this link

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjug47Kx_SAAxWGWkEAHYQWB2AQFnoECCoQAQ&url=https%3A%2F%2Fkubanni.abu.edu.ng%2Fitems%2F01e0120c-fb42-4f4e-a93d-21390eb8c8e5&usg=AOvVaw0OhIvtxGLxJwVPwIMcHnds&opi=89978449

3.4. Summary

In this unit, we discussed the various sources of the Law of Tort, which broadly consist of legislation, case law, and the Received English Law.

3.5. References/Further Readings/Web Sources

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3.6 Possible Answers to SAEs

Answers to **SAEs 1**

1. 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
2. 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, the Western Region of Nigeria 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.

Answers to **SAEs 2**

1. Common law or the common law of England is the law which was common to all parts of England and Wales and which 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 which is largely an unwritten law as opposed to statutory law which is codified.

2. The distinctive feature of common law is that it represents the law of the courts as expressed in judicial decisions. Judges decide cases found in precedents provided by past decisions, in contrast to the civil law system, which is based on statutes and prescribed texts.

Unit 4 : The Principles of Liability in Tort

Unit Structure

4.1 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 all 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.

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

Explain the principle of damage.

4.3 The Principles of Liability in Tort

4.3.1 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 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.

Tort law, liability and damages

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. This principle has been restated and applied by the courts. See the case of *Rite Foods Ltd & Anor v. Adedeji & Ors* (2019) LPELR-47698(CA). In *Oceanic Bank v. Abeokuta Commercial & Ind. Co. Ltd* (2014) LPELR-22937(CA), the court held that as no breach was found to have occurred, the issue of damages cannot therefore arise. The principle is *damnum sine injuria*, i.e, where there is no breach or wrong there can be no damages.

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 *damnum sine injuria* that is, damage without injury. Examples of damages without legal injury are:

1. Trade competition
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 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 for 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 - 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.

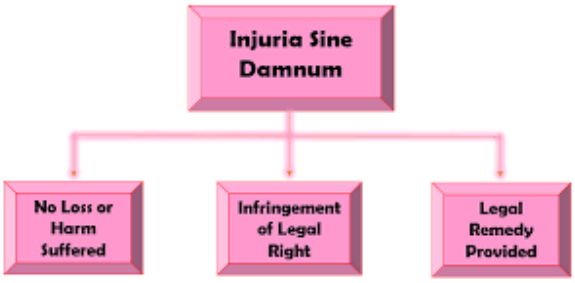
The corporation applied to court for an injunction to restrain him from collecting the underground water in his borehole. The court held that an injunction would not lie. The defendant was entitled as an owner to draw from his land the underground water. His "malice" if any, in trying to force the purchase of the land was irrelevant. No lawful use of property can become illegal even if done with an improper motive.

There is no tort of perjury.
There is no tort of 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. 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. 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.

Self-Assessment Exercise 1

Explain the Latin maxim *Damnum sine injuria* and list examples of damages without legal injury

3. 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. 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.

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

So, which torts are actionable *per se and why?*

We shall examine these torts briefly.

Defamation: Libel or slander

The tort of defamation aims at punishing and thereby discouraging the act of communicating false statements about a person that injure the reputation of that person. The Black's Law Dictionary 11th Edition at page 525 defines defamation as "malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person … A false written or oral statement that damages another's reputation" Thus to constitute defamation, the words themselves must be defamatory/disparaging in nature, the words must be false, there must be an intention to bring down the reputation of the subject defamatory words and people of right standing in society must hear or read the defamatory words. *Emmanuel v. Felix & Ors* (2022) LPELR-57960(CA) per Tukur, JCA [F-D] 8-11

The tort of defamation consists of libel and slander. Slander is spoken libel. It is slander because it is not in a written form and the difference between libel and slander is that the former is published in permanent form i.e. in writing, print, photograph, carving, statute or cartoon while the latter is spoken or gestures. Libel is actionable upon mere commission without the necessity of proving actual damage. As a general rule, slander is not actionable *per se*, *Udofia & Anor v Okon & Ors* (2018) LPELR-46154(CA) Par Nimpar JCA [F-A] 30-31;

Daura v Danhauwa (2009) LPELR-3714(CA) Okoro JCA [E-B] 7-8 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.

Self-Assessment Exercise 2

1. What elements constitute defamation?
2. Identify the main differences between libel and slander.

Trespass to Person

Trespass is an unlawful act committed against the person or property of another. Generally, trespass to person consists of three torts: assault, battery and false imprisonment. Assault is the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful of offensive contact. It is the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt to commit battery. Battery is the nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact. Assault and battery, each gives a right of action in itself. The Black's Law Dictionary 11th Edition, 141, 187 and 1810. It is trite that assault and battery qualify as both criminal and tortious acts. So it can arise in criminal or civil claim in tort. *FRSC & Ors v. Akpos* (2021) LPELR-52917(CA) per Nimpar JCA [E-F] 60. Although the term assault and battery is frequently used when a battery has been committed, one who commits a battery cannot also be punished for committing an assault, since the lesser offence or tort of assault blends into the actual battery. False imprisonment is the total deprivation of the liberty of a person; no matter how small the period is without lawful excuse or proper justification.

Any trespass to the person however slight gives a right of action to recover at least nominal damages. Even where there has been no physical injury, substantial damage may be awarded for the injury to the man's dignity or discomfort or inconvenience. When the liberty has been interfered with, damages are given to vindicate the plaintiff's right even though he has not

suffered any pecuniary damage. *Diamond Bank* v *Okpala* (2016) LPELR-41573(CA) Per Akomolafe-Wilson JCA [F-C] 25-26; *Okonkwo* v *Ogbogu* (1996) 5 NWLR (Pt. 449) 420, 435 [F-G].

Trespass to Chattel or Goods

Trespass to chattel or goods occurs where there is wrongful interference, either intentionally or negligently with the goods that are in possession of another. *Fat-Sanny (Nig) Ltd* v Saba (2020) LPELR-51402(CA) Trespass to chattels of 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 Exercises 3

1. What is trespass?
2. Explain the nature of trespass to land.
3. What is your understanding of the term nominal damages?

4.3.2 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. As a general rule, the damage must not be too remote from the tort otherwise the action will not succeed. Where an injury is the natural or reasonably foreseeable result of a tort, a court will usually award compensation for it.

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 was 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 damage? When is an injury too remote to be the result of a tort? How do we determine when 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.

The Test of directness of Damage

The test of directness of damage 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.

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 4

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 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 determining 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 defendant 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.

In Nigeria, foreseeability has held to mean that the defendant's conduct would have inflicted on the plaintiff the kind of damage in suit. That is what is implied in the statement that the duty

of care has to be 'owed' to the plaintiff. *Heritage Bank & Ors* v *Okorie* (2017) LPELR-42010(C) per Awotoye, JCA [B-D] 21-22. Also, in *Aluminium Manufacturing Company of (Nig) Ltd* v (2010) LPELR-3759(CA) it was held that one of the burden of proof of negligence on the Respondent/Plaintiff is to establish the foreseeability that the Appellant/ Defendant conduct would have inflicted on him the kind of damage that resulted and lead to the cause of action. Per Nwodo, JCA [F-C] 13-15.

So, how do you determine the liability of a tortfeasor? Also explain your understanding of the reasonable foreseeability test

4.4 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 of the law of assault.

4.5 References/Further Readings/Web Sources

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4.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**

D*amnum sine injuria means* damage without a legal wrong. It refers to a situation where encounters loss or damage which does not have a legal remedy. Examples of damages without legal injury are trade competition, defamation on a privileged occasion, lawful use of property or lawful conduct, and perjury.

Answers to **SAE 2**

1. To constitute defamation, the words themselves must be disparaging in nature, the words must be false, there must be an intention to bring down the reputation of the subject defamatory words and people of right standing in society must hear or read the defamatory words. *Emmanuel v. Felix & Ors* (2022) LPELR-57960(CA) per Tukur, JCA [F-D] 8-11.
2. Slander is spoken or gestures while libel must be published in permanent form i.e. in writing, print, photograph, carving, statute or cartoon. Libel is actionable upon mere commission without the necessity of proving actual damage. As a general rule, slander is not actionable *per se*

Answers to **SAEs 3**

1. Trespass is an unlawful act committed against the person or property of another. Generally, trespass to person consists of three torts: assault, battery and false imprisonment.
2. Trespass to land is a tort that is actionable *per se.* This implies that a right to sue arises for every unlawful entry or trespass to land, even though no actual damage was done to the land. Of course, the general rule of law is that where there is a wrong, there is a remedy, even though no specific damage was suffered. See *Ashby v. White* (1703) 1 ER 417.
3. 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 is that the law does not concern itself with trifles.

Answer to **SAE 4**

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.

Unit 5 Other Principles of Liability in the Law of Tort

Unit Structure

5.1 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.

5.2 Learning Outcomes

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

explain the principles of liability in the law of tort.

5.3 Other Principles of Liability in the Law of Tort

5.3.1 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.

5.3.2 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.

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.

Self-Assessment Exercise 1

Explain the principle in *Scott v Shepherd* (1773) 96 ER 525

5.3.3 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. This rule applies to all persons with unusual health conditions, including hemophiliacs, that is, persons who tend to bleed severely as a result of the inability of the blood to clot easily. 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.

Example Box 1

> 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.

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 preexisting disability, physical, mental, psychological or otherwise, a defendant did have to take a victim as he found him.

So Discuss; the “egg shell”, “thin skull” or “unusual plaintiff’s” rule is not without an exception.

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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.

5.3.4 The principle of Strict liability

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.

In *Mtn Nig. Communications Ltd v. Sadiku* (2013) LPELR-21105(CA), the Court of Appeal stated lucidly

> Strict liability as is applied in the instant appeal is rooted in Ryland vs. Fletcher (1866) L.R. 1 Ex. 265. The rule herein is that the occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape and is liable for all the direct consequences of its escape, even if he has not been guilty of negligence… it seems to me and I so hold that with or without negligence on the part of the appellant, the said appellant was under duty of care to ensure that there was no spillage of diesel from its storage tank to the extent of polluting the water-well and or causing any form of damage to the vegetation on the land. As enunciated in Ryland vs. Fletcher (supra), the appellant as a person in control of a substance such as diesel which can easily escape and cause damage, is placed under strict liability. To my mind, bringing to bear the tort of strict liability as was done by the learned trial Judge was unavoidable the same having flown directly from his findings. It had nothing to do with the lower Court making a case for the respondent or its jumping into the arena as is contended by the learned counsel for the appellant. Being consequential offshoot of the findings of facts by the learned trial Judge, he did not need to pause the judgment in order to call on the parties to address him on the tort of strict liability. Per Cordelia Ifeoma Jombo-Ofo, JCA (pp. 36 - 37 Paras F - F)

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.

See section 8 of the Consumer Protection Act which provides to the effect that where a consumer's right has been violated, the consumer shall in addition to the redress the state committee, subject to the approval of the Council, may impose, have a right of civil action for compensation or restitution in any competent court,

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; save where the relevant criminal law specifically ousts the requirement of a guilty mind.

So, what is a strict liability tort? Illustrate your understanding of strict liability tort with two examples

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 tortfeasor is 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 willful 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 willful 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 Exercises 2

1. What do you understand by "malice"?
2. In the law of Torts, what is the general rule on motive, malice or intention?

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.

Example Box 2

> 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.

Self-Assessment Exercise 3

List four torts where there is an exception to the general rule on motive, malice or intention

5. 4 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.

5.5 References/Further Readings/Web Sources

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donaldlange.com
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5.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**

The principle in Scott v Shepherd is that 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.

Answers to **SAEs 2**

1. Malice in simple term means acting from a bad motive or bad reason; doing something with ill will or wickedness of heart, spite or recklessness. It is doing something with a bad motive or bad reason. In legal terms, malice means doing a wrong thing intentionally or without lawful excuse, or doing any act with a bad, improper or illegitimate motive.

2. 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. See *Bradford Corporation v. Pickles* (1896) AC 587 and *Wilkinson v. Downton* (1897) 2 QB 57; (1895-9) All ER 984

Answer to **SAEs 3**

The three torts where there is an exception to the general rule on motive, malice or intention are: malicious prosecution, nuisance, defamation, and conspiracy.

MODULE 2 TRESPASS

Module Structure

Unit 1 Trespass to the person: Assault

Unit Structure

1.1 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.

1.2 Learning Outcomes

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

- define assault;
- understand the purpose of the law of assault; and
- describe the elements of assault.

1.3 Trespass to the person: Assault

1.3.1 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. See the case of *FRSC & Ors v. Akpos* (2021) LPELR-52917(CA). 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 and Nigeria, 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 victims. Section 319 of the Administration of Justice Act gives the court the power to order payment of compensation in a criminal case. Section 324 gives the injured person discretion to accept or refuse compensation, but payment of compensation is bar to further liability. 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.

The Black's Law Dictionary 11th Edition at p. 141 defines assault as the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful of offensive contact. It is the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt to commit battery.

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. The act must imply personal violence, but contact is unnecessary. 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.

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?

For further reading click on this link :

https://www.google.com/search?client=firefox-b-e&sa=X&sca_esv=558970703&biw=709&bih=772&sxsrf=AB5stBj4zRd6tMlmyZqcYyoQGhRztbYNig:1692679081656&q=Assault+(tort)&stick=H4sIAAAAAAAAAOOQUeLUz9U3MMkrzzM3kimpLEgtVshPUyjJLyopVsjMU8hITcwpyUhOLEqN4k_OSSwuRsifYgRrNcswT6s8xcgBYpsmF6dDhY0q8sryoGyw6TAlpklGvxhlQvDY1MDCuIiVz7G4OLE0p0RBA6RCcwIb4y02SYZbK3pUArp_8zz5u-y8aFbVYjWGcyr5gkYJAG2QPe7IAAAA&ved=2ahUKEwid1IX7uO-AAxWERUEAHQO1CeEQ-BZ6BAgSEA4

1.3.2 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 is 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.

So, What is the purpose of the tort of assault?

1.3.3 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. This was the decision of the court in

In *R v St. George* (1840) 173 ER 921. See also *Logdon v DPP* (1976) Crim LR 121.

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 an 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. See *Thomas v National Union of Mine Workers* (1985) 2 All ER 1.

Self-Assessment Exercise 2

What two elements must a plaintiff prove to succeed in a claim for assault?

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1.4 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.

1.5 References/Further Readings/Web Sources

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1.6 Possible Answer to Self-Assessment Exercises

Answer to **SAE 1**

An assault is threatening to harm or apply force to another person with the present ability to carry out the threat. It refers to any act which makes another person to fear the immediate application of unlawful force.

Answer to **SAE 2**

To succeed in a claim for assault, the plaintiff must prove: that there was a threat to apply force, and 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

Unit 2: Battery

Unit Structure

2.1 Introduction

2.2 Learning Outcomes

2.3 Battery

- 2.3.1 Definition of Battery
- 2.3.2 The Purpose of the Law of Battery
- 2.3.3 Elements of battery

2.2.4 Summary

2.2.5 References/Further Readings/Web Sources

2.2.6 Possible Answers to Self-Assessment Exercises

2.1 Introduction

In this unit, we shall examine battery as another form of trespass to the person.

2.2 Learning Outcomes

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

- define battery;
- understand the purpose of the tort of battery; and
- understand the elements of battery and how to prove battery

2.3 Battery

2.3.1 Definition of Battery

Battery

The Black's Law Dictionary 11th Edition at p. 187 defines battery as the nonconsensual touching of, or use of force against, the body of another with the intent to cause harmful or offensive contact. According to C.F. Padfield, battery is *"applying force however slight to the person of another, hostilely* or *against his will."* Kodilinye defines battery as "*the intentional application of force to another person." Like* Assault, battery gives a right of action in itself. In other words, batter is actionable per se.

In view of the above definitions, it may be explained that battery is the application of force on a person without his consent and without legal justification. It is contact, including the slightest, merest or the least undesirable touch, with another person.

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.

Self-assessment Exercise 1

What is Battery?

2.3.2 The Purpose of the Tort of Battery

The purpose of the tort 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.

Note also that the words of section 34 of the 1999 Constitution namely 'inhuman treatment, torture, and degrading treatment suggest something continuous and rather more permanent that an occasional assault and battery. See *Okorocha v IGP & Ors* (2021) LPELR-55042(CA) Per Ugo, JCA [E-B] 17-19. Complaints of battery and assault are mere torts and not by any means breach or contravention of fundamental right to dignity of the human person under section 34 of the 1999 Constitution. *Nnanna v Sa'id & Anor* (2022) LPELR-57396 (CA) Per Ugo, JCA [E-E] 43-48

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.

Example Box 1

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.

So, what harm does the tort of battery seek to prevent?

2.3.3 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, willfully, 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.

Self-assessment Exercise 2

What are the elements that a plaintiff needs to prove to succeed in a claim for battery?

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., the 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 on 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.

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.

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.

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 to 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, in 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, the 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 the 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.

2.4 Summary

This unit has taught the learners:

a. What is battery
b. the purpose of the tort of battery;
c. the elements of battery;
d. and how to prove battery

2.5. References/Further Readings/Web Sources

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2.6 Possible Answers to Self Assessment Exercises

Answers to **SAE 1**

Battery is the intentional and direct application of any physical force to the person of another. It is the intentional application of force to another without his consent.

Answers to **SAE 2**

For a plaintiff to succeed in a claim for battery, he/she must prove the application of force and the intention to apply force.

Unit 3 : False Imprisonment and Intentional Harm to the Person

Unit Structure

3.1 Introduction

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

3.2 Learning Outcomes

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

- define false imprisonment;
- explain the purpose of the tort of false imprisonment; and
- enumerate the defences and remedies for trespass to the person.

3.3 False Imprisonment and Intentional Harm to the Person

3.3.1 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 section 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)

In *Onuchukkwu v Fidelity Bank* (2017) LPELR-50015 the Court of Appeal held thus

> In simple terms, the tort of false imprisonment is the unlawful, wrongful and so unjustified restrain of a person's personal right and liberty to move freely and the tort is committed by any act which prevents the exercise of such right by a person. The law is that a person can be falsely imprisoned even if not within the confines of an enclosure or walls of a room and or that he may not even be aware of it. Per Garba, JCA [B-E] 24.

See also *Ojo v. Lasisi* (2003) 7 NWLR (819) 273; *Ezeadukwa vs. Maduka* (1997) 8 NWLR (578) 635

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.

(i) Compelling a person to remain where he does not wish to remain or to go to where he does not wish to go.

(ii) Restraint need not be in any cell or prison but may be in the open street.

(iii) There need not be battery.

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

(v) 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.

(vi) The restraint must be total or complete. See *Bird v Jones* (1845) 7 QB 742; 115 ER 668.

Is False Imprisonment the same thing as unlawful arrest and detention?

Ekanem JCA held in *Zenith Bank v Iyamu* (2021) LPELR-54150(CA) [D-D] 10-11 thus:

> … In Clerk & Lindsell on Torts, 13th Ed. P.681, it is stated that: "A false imprisonment is complete deprivation of liberty for any time, however short, without lawful excuse. "Imprisonment" is no other thing but the restraint of a man's liberty... " In Kodilinye and Aluko's, The Nigerian Law of Torts (1999) 2nd Ed. Page 14, ? it is opined that: "False normally means "fallacious" or "Untrue" but in this tort it means merely "wrongful" or

"Unlawful." It is clear from the foregoing that in the context of the tort of false imprisonment, "false" means "wrongful" or "unlawful" while "imprisonment" is the restraint of a man's liberty. Thus if one is "falsely imprisoned" it can be said that he is "Unlawfully detained" and as in "unlawful detention". Again once a man is arrested, he is by that act imprisoned though it be in an open field. Therefore the term "false imprisonment" can for all practical purposes be used interchangeably with "unlawful arrest and detention."

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, in a man's own house, and in all places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to go at all times to all places wither he will without bail or otherwise so long as the restraint is complete. *Agbalugo & Anor v Izuakor* (2017) LPELR-43289 (CA) Per ABIRU ,JCA [D-A] 46-47

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.

3.3.2 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, Australia, 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 in spite of the plaintiff's entreaties to be allowed to leave. The plaintiff spent some time 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, 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 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. In *Onuchukkwu v Fidelity Bank* (2017) LPELR-50015) (CA), the Court of Appeal decided that even though there is no fixed period of restraint that may constitute the tort of false imprisonment, even a short period within which a person was actually prevented from freely exercising his right of movement from a particular area would suffice. Per Garba, JCA [A-C] 25

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 *Herring 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 ₦10,000.00 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, the 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 effected 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.

ABIRU, JCA held in *Agbalugo & Anor v Izuakor* (2017) LPELR-43289 (CA) [D-A] 46-48 thus

> … The position of the law is that an action for false imprisonment will not lie against a private individual who merely gave information which led the police on their initiative to arrest a suspect and this is because every private individual has the right to report a crime or a suspected crime to the police - Isheno Vs Julius Berger (Nig) Plc (2008) 6 NWLR (Pt 1084) 582 … To succeed in an action for false imprisonment, a plaintiff must show that it was the defendant who was actively instrumental in setting the law in motion against him. In other words, the plaintiff must show that the defendant did not only lodge a complaint against him to the Police, but also that he was actively instrumental to his arrest and detention"

See also *First Bank of Nigeria Plc & Ors Vs Attorney General of Federation & Ors* (2013) LPELR-20152(CA).

So, is it necessary for the person who is restrained to know at the material time that he was detained, restrained, confined, or being prevented from leaving a place?

3.3.3 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:

a. 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.

b. 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:

a. He is not acting hostilely to the patient;
b. There is implied consent by the patient; and
c. 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.

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 N.W.L.R. 549.

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. (For example see section 32(1) of the Police Act 2020 and section 13(1)(b) Economic and Financial Crime Commission Act). 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 Ukpai v Omoregie & Ors (2019) LPELR-47206(CA); *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 section 35 of the Nigerian Constitution, a person may be lawfully deprived of his personal liberty or his fundamental rights otherwise restricted in certain circumstances. These include;

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

b. In a connection with infectious disease, or unsoundness of mind;

c. In connection with immigration law;

d. 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 proper 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 as 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 judgment, and also any evidence which tends to aggravate the damage to reputation is admissible up to the moment when damages are assessed by court.

10. 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.

Self-Assessment Exercise 2

How and to what extent is consent a defence to trespass to person in sport games?

3.3.4 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 judgment, 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;

So, what is the purpose of the issuance of a writ of habeas corpus in a suit for trespass to person?

3.4 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. Defences to trespass to the person
5. Remedies for trespass to the person.

3.5 References/Further Readings/Web Sources

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3.6 Possible Answers to Self Assessment Exercises

Answer to **SAE 1**
False imprisonment is denying a person freedom of movement or personal liberty without his consent and 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.

Answer to **SAE 2**
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. 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.

Unit 4 Trespass to Chattels

Unit Structure

4.1 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.

4.2 Learning Outcomes

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

- Define chattel;
- Outline the differences between trespass to chattel, conversion and detinue;
- Explain the elements of trespass to chattel;
- List the persons who may sue for trespass to chattel; and
- Enumerate the remedies for trespass to chattel.

4.3 Trespass to Chattels

4.3.1 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 chattel may be defined as a direct and wrongful interference with a chattel in the possession of the plaintiff, such interference being either intentional or negligent. 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. The interest of the plaintiff which the law protects are:- (1) his interest in retaining the possession of the chattel; (2) his interest in the physical condition of the chattel and (3) his interest in protecting the chattel against intermeddling. Trespass to chattels may take various forms such as destroying damaging or wrongful moving them from one place to the other. *SPDC v Okonedo* (2007) LPELR-8198(CA)

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 damage has been done to a chattel, a plaintiff is entitled to prove it and recover damage for it as the case may be.

Self-assessment Exercise 1

What interest of the plaintiff does the law seek to protect in the tort of trespass to chattel?

4.3.2 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.

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.

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 unauthorised 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.

So, what must a plaintiff show/prove to maintain an action for trespass?

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.

4.3.3 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 2

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.

For further reading click on this link

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4.4 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.

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4.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**

The interest of the plaintiff which the law seeks to protect are:- (1) his interest in retaining the possession of the chattel; (2) his interest in the physical condition of the chattel and (3) his interest in protecting the chattel against intermeddling.

Answer to **SAE 2**

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: owners, bailees, lenders, assignees, trustees, finders, custodians, caretakers, adverse possessors, executors, and administrators of estates; etc.

Unit 5 Conversion

Unit Structure

5.1 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.

5.2 Learning Outcomes

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

- Define conversion;
- Differentiate between conversion and trespass; and
- Enumerate the defences and remedies for conversion.

5.3 Conversion

5.3.1 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 interference, 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. See generally *Trade Bank PLC v. Benilux (Nig) Ltd.* (2003) LPELR - 3262(SC); *Ukpai & Anor v Ajike* (2018) LPELR-44269(CA)

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

Self-assessment Exercise 1

Who can sue for conversion?

5.3.2 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.

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.

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. Contrast 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. The 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.*

So, 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 All ER 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 of 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 feet 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**

5.3.3 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.

In *Ukpai & Anor v Ajike* (2018) LPELR-44269 (CA) the Court of Appeal held that

> Also dwelling on "jus tertii" vis-a-vis possession the learned author (Winfield and Jolowicz on Tort (17th edn) said at paragraph 17-18 on page 764 thus: - "Once a system of law

accepts possession as sufficient foundation for a claim for recovery of personal property it is faced with the question of how far a defendant should be allowed to raise the issue that a third party has a better title to the property than the claimant - the jus tertii. There are arguments either way. On the one hand, refusal to admit the jus tertii allows recovery by a claimant who may have himself wrongly dispossessed the true owner and also expose the wrongdoer to the risk of multiple liability. On the other hand, it may be argued that a person who has dispossessed another should have no right to raise such issues concerning the relationship between the dispossessed and some other party having a claim over the goods, for there is a serious risk of abuse and of the interminable prolongation of actions. The common law compromised. If claimant was in possession at the time of the conversion, the defendant could not set up the jus tertii, unless he was acting under the authority of the true owner. Where, however, the claimant was not in possession at the time of the conversion but relied on his right to possession, jus tertii could be pleaded by the defendant. To this rule there was an exception where the defendant was claimant's bailee, for the defendant was regarded as being estopped from denying the claimant's title unless evicted by title paramount or defending the action on behalf of the true owner.

Self-Assessment Exercise 2

What defences are available to a defendant in an action for conversion of a chattel?

5.3.4 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 equipment.

In the circumstance, what are the available remedies available to a plaintiff in a claim for conversion of a chattel?

5.4 Summary

In this unit, we discussed:

a. What is conversion and examples of conversion
b. The difference between conversion and trespass
c. Those who may sue for conversion
d. The various types of defences and remedies for conversion

5.5 References/Further Readings/Web Sources

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UpCounsel
https://www.upcounsel.com › *lectl-trespass-to-chattels-...*

5.6 Possible Answers to Self Assessment Exercises

Answer to SAE 1

An owner can sue for conversion. Also, 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.

Answer to SAE 2

The following defences are available to a defendant in an action for conversion of a chattel: (a) Jus tertii, that is, the title or better right of a third party; (b) subsisting bailment; (c) subsisting lien; (d) temporary retention; (e) limitation of time.

Unit 6 : Detinue

Unit Structure

6.1 Introduction

In this unit, we consider the tort of detinue.

6.2 Learning Outcomes

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

- define detinue; and
- explain the differences between conversion and detinue.

6.3 Detinue

6.3.1 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:

Example Box 1

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.

In *UBA Stockbrokers Ltd & Anor v. Ugwu* (2021) LPELR-53189(CA), the Court of Appeal held as follows:

> Detinue is a common law action to recover personal property wrongfully taken or withheld by another. The essence of detinue is that the defendant holds on to property belonging to the plaintiff and fails to deliver the property to the plaintiff when a demand is made. The cause of action in detinue is the refusal of the defendant to return the goods to the plaintiff after the plaintiff must have made a demand for them. Per Abiru, JCA [E-B] 24-25

See also Enterprise Bank Ltd v Aroso (2014) 3 NWLR (Pt 1394) 256, 298

Self-assessment Exercise 1

What is the tort of detinue?

6.3.2 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 *Ihenacho v Uzochukwu* (1997) 2 NWLR pt 487, p. 257 SC.

In *West Africa 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's 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*.

So, what condition(s) must a plaintiff satisfy to maintain an action for the tort of detinue?

6.3.3 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.

For further reading click this link below :
https://portal.abuad.edu.ng › Assignments › 16...

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 replace 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 trespass 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.

Self-assessment Exercise 2

What defences are available to a defendant in an action for detinue?

6.4 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; and
d. defence and remedies for the tort of detinue

6.5 References/Further Readings/Web Sources

Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishment (1998), Lagos.
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https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjs1e-9mPWAAxVwUEEAHdGIAHcQFnoECCYQAQ&url=https%3A%2F%2Fwww.upcounsel.com%2Flectl-trespass-to-chattels-and-conversion-tort-law-basics&usg=AOvVaw22WvI_GkV4cJdBKzmQQi-w&opi=89978449

6.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In summary, the tort of detinue is the wrongful detention of the chattel of another person, the immediate possession of which the person is entitled.

Answer to SAE 2

In an action for detinue, a defendant may plead that: (a) he has mere possession of the goods; (b) that the plaintiff has insufficient title as compared to himself; (c) 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; (d) innocent delivery; (e) subsisting bailment; (f) subsisting lien on the chattel; (g) temporary retention of the chattel to enable steps to be taken to check the title of the plaintiff; (h) inevitable accident; (i) reasonable defence of a person or property, such as when one beats or injures a dog that was attacking him or another person; (j) 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.

MODULE 3: NEGLIGENCE

Module Structure

Unit 1.	Meaning, nature and proof of negligence
Unit 2	Standard of care
Unit 3	Proof of negligence and the doctrine of *res ipsa loquitor*

Unit 1 : Meaning, Nature and Proof of Negligence

Unit Structure

1.1 Introduction

During the first half of the 19th Century, negligence began to gain recognition as a separate and independent basis of tort liability. Its rise coincided in a marked degree with the industrial revolution; and it very probably was stimulated by the rapid increase in the number of accidents caused by industrial machinery, and in particular by the invention of railway. It was greatly encouraged by the disintegration of the old form of action, and the disappearance of the distinction between direct and indirect injuries, found in trespass and case … intentional injuries, whether direct or indirect, began to be grouped as a distinct field of liability, and negligence remained as the main basis for unintended torts. Negligence thus developed into the dominant cause of action for accidental injury. W. Page Keeton et al, Prosser and Keeton on the Torts (5th edn. 1984) 28 at 169 cited in Bryan A. Garner, *Black's Law Dictionary* (11th edn. 2019) 1245

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 *Donoghue v Stephenson* (1932) Ap 562. In this case, Negligence was fully recognized as an independent tort capable of extension into new category.

1.2 Learning Outcomes

The purpose of this unit is to enable the student to know;

- The definition of negligence
- The purpose of the tort of negligence
- The elements of negligence: proof of negligence

1.3 Meaning, Nature and Proof of Negligence

1.3.1 Definition of the Tort of Negligence

Black's Law Dictionary defines negligence as the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below

the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or failure to do what such a person would do under the circumstances. Bryan A. Garner, *Black's Law Dictionary* (11th edn. 2019) 1245; *Ayadi v Mobil Producing (Nig) Unltd* (2016) LPELR-41599(CA)

Lord Wright reasoning in this vein in *Lochgelly Iron & Coal Co v McMullan* (1934) AC 1 at 25 explained negligence thus:

> In strict legal analysis, negligence means more than a heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

In the same regard, Anderson B in *Blyth v Birmingham Water Work Co* (1836) Ex 761 at 784 defined:

> Negligence…. is the omission to do something which a reasonable man, guided by those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do.

The Nigerian Court of Appeal in *NEPA v. Auwal* (2010) LPELR-4577(CA) quoting the Supreme Court in *Otaru v. Idris* (1999) 4 SC (pt 11) 87 at 92, defined the tort of Negligence to be:-

> That NEGLIGENCE is the omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. Further, negligence consists of failure to exercise due care in the circumstances in which a duty of care exists. It was further submitted that a duty of care, namely that which is owed to persons so closely and directly affected by the act of another and who ought to be in his contemplation existed vide Donoghue V. Stephenson (1932) AC 562 at 580 - 581. Such that in the final analysis the tort of NEGLIGENCE involves (i) a careless act or omission and (ii) a duty to the person injured." Per OHN INYANG OKORO, JCA [A – E] 18

In summary, negligence is the breach of a legal duty to take care undesired by the defendant to the plaintiff, which results in damage. Negligence in torts means omission to do something which a reasonable man would do or do something which a reasonable man would not do. This unlike intentional tort where the defendant desired the consequences, here it is undeserved damage to the plaintiff. Generally, the tort of negligence arises when a person who owes another a duty of care fails in doing so, consequent upon which the other party suffers injury or damages. In such a situation, once it is proved that the person owes a duty of care to another which is breached, the person will be liable for negligence - per Ebiowei Tobi, JCA in *Sterling Bank v. Akintoye Akinbode* (2018) LPELR-50669(CA)

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.

Onaolapo v. Zte (Nig) Ltd (2022) LPELR-57592(CA)

> The law on the tort of negligence appears to be fairly well settled. Generally, once a Claimant pleads and leads evidence which, creditably and cogently, establishes a duty of care owed him by a Defendant, and the breach of that duty by the Defendant as well as the

> resultant damages, he is entitled to his claim for damages for negligence. Thus, the converse is also the case that once a Claimant fails to establish by credible evidence all or any of the essential elements of the tort of negligence, his claim must fail and should be dismissed. The Claimant must plead and prove that the injury caused him was as a result of the negligence of the Defendant, and nothing else or less would suffice!." Per Biobele Abraham Georgewill, JCA (Pp 37 - 37 Paras B - F)

In *Uta v Golfic Securities (Nig) Ltd & Ors* (2022) LPELR-57079 (CA), the Court of Appeal held thus "It is also accepted in law that there can be no action in negligence unless there is damage. Negligence is only actionable if actual damage is proved. The gist of the action is damage and there is even no right of action for nominal damages. Negligence alone does not give a cause of action. Damage alone does not give a cause of action. The two must co-exist. See also the SCN judgment in *IMNL v Nwachukwu* (2004) 13 NWLR (Pt. 891) 543.

Self-Assessment Exercise 1

What three things must be proved by a plaintiff to establish negligence in a case?

1.3.2 Duty of Care

It is not every careless conduct that is actionable negligence even where damage results. Liability will only ensue where there is a legal duty to take care. The term "duty of care" means the duty a person owes in law to be careful so that his conduct will not cause injury to another person. It is a legal duty owed to another person to ensure that a person's actions or omissions do not injure that other person. In *DHL v Eze-Uzoamaka & Anor* (2020) LPELR-50459 [C] 31, Ogbuinya JCA held that a dutu of car can be imposed by law or created by contract or trust. Citing also *IMNL v Nwachukwu* (2004) 13 NWLR (Pt. 891) 543.

The concept of duty of care, when it is owed and when liability will attach for its breach was established in the case of *Donoghue v Stephenson* (1932) AP 532. In that case, 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 hers who was the plaintiff in this case. The plaintiff had consumed 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 hospitalised 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 her action was not based on contract.

Lord Atkin said:

> The liability for negligence…is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay….The rule that you are to love your neighbor became in law, you must not injure your neighbor; and the lawyer's question who is my neighbor? Receives a restricted reply. 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. Who, then in law is my neighbor? The answer

> seems to be persons who are so closely and directly affected by my acts, that I ought reasonably to have them in contemplation as being so affected, when I am directing my mind to the acts of omissions that are called in questions.

So your neighbour does not mean those closer or nearest to you but those who you foresee likely to be affected by carelessness on your part.

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, 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 from a shop when he felt a hard object. He then found a decayed tooth embedded in the biscuit. The plaintiff became ill and sued 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. Constance Ngonadi* (1985) 1 NWLR 739 SC. The plaintiff's action appears to be based on negligence and breach of warranty 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 knew for what purpose the plaintiff bargained for and bought the fridge

2. Whether the defendant gave the plaintiff an oral warranty 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 defendant's men carried the refrigerator and carried 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 warranty 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 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 *inter alia*, where as in this case, a warranty was implied by statute and the plaintiff action was based on the breach of that warranty in order words, the warranty 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.

So, Discuss, 'The High Court and Supreme Court decision in the case of *Nigeria Bottling Company v Ngodagi* could be criticized on the strength that it was based on contract and not tort.'

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiSju7YpvWAAxUMXEEAHRFBC70QFnoECC4QAQ&url=https%3A%2F%2Filexlawschool.ac.uk%2Fwp-content%2Fuploads%2F2018%2F10%2FHQ13-Law-of-Tort-Sample-2018.pdf&usg=AOvVaw3vd-CNhEU1Y0Qazt08sl1Q&opi=89978449

1.3.3 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 the defendant must not only owe the plaintiff a duty of care, he must also be in breach of that duty.

Alderson B. described what constitutes breach of duty of care in *Blyth v Birmingham Water Works Co.* (1856) 11 Exch 781 at 784, where he stated that:

> Negligence is the omission to do something which a reasonable man, guided upon such considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The standard of assessment is objective and is devoid of the personal standard save that of the determining judge. See the case of *Glasgow Corporation v Muir* (1943) A.C. 448 at 547.

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 breached 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 "Risk Factor". This has four elements.

a. 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 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 proportional to the degree of risk involved if the duty of care should not be fulfilled. In *Glasgow Corporation v Muir* (1943) 2 ALL ER, the appellants allowed a church picnic party to have tea

room on a wet day. The members of necessity had to carry the tea through a passage where some children were buying ice cream and sweet. For unexplained reasons, some tea dropped and some children were burnt by it. It was held that the appellants were not liable in negligence in respect of the children's injuries because there was no reasonably foreseeable danger to the children from the use of the premises, which the appellants permitted. In *Bolton v Stone* (1951) AC 580, the court nevertheless held the defendant not liable taking into consideration such factors as the distance of the pitch to the ground, the presence of a seven feet wall and the fact that the injury to a person in the plaintiff's position was very slight and as such the cricket club was not negligent in allowing the game to go on their ground without taking extra precautions.

b. 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 remove 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.

c. 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. The courts will be seen to apply a lower standard of care where the defendant's activities have significant social value, although this will not usually justify all behaviour undertaken by the defendant. In all cases, one must balance the risk against the end to be achieved. Activities of a commercial nature such as to make profit are very different from activities to save life or limb.

d. 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 minimise 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 been negligent. The only other possible stop they could have taken would have been to close the factory, a position which will be too drastic.

Self-Assessment Exercise 2

What factors will the court take into account when assessing the standard of care expected of the defendant?

1.4 Summary

In this Unit you learnt about the essential element to establish to succeed in an action of Negligence:

1. The development of the tort of negligence
2. The existence of a duty of care by the defendant.

1.5 References/Further Readings/Web Sources

Bodunde Bankole: Torts: Law of Wrongful Conducts (1998) Libriservice Press, Lagos
G. Kodilinye: Nigeria Law of Torts (1999) Spectrum Publishers, Ibadan
John G. Fleming: The Law of Torts (1977) The Law Book co. Ltd. London.
Niki Tobi: Sources of Nigeria Law (1996) Mij Publishers.

Etheringtons Solicitors
https://etheringtons.com.au › what-is-the-tort-of-negli...

Villamanta Disability Rights Legal Service
https://www.villamanta.org.au › information

1.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**
To establish Negligence the plaintiff must proof three things; the existence of duty of care; the breach of that duty of care; and damage resulting from the breach.

Answer to **SAE 2**
When assessing the standard of care expected of the defendant, the court will take into account: likelihood of harm, seriousness of the injury that is risked; the importance of the utility of the defendant activity; and the cost and practicability of measures to avoid the harm

Unit 2 : Standard of Care

Unit Structure

2.1 Introduction

Negligence is conduct falling below the standard established for the protection of others against unreasonable risk or harm.

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 an 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.

2.2 Learning Outcomes

At the end of this unit, you should be able to:

- define the term reasonable man;
- discuss moral qualities and knowledge;
- state what skills
- explain need for expert
- discuss age and lunacy

2.3 Standard of Care

2.3.1 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 law's 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 conform. 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.

The Court of Appeal in *Oilserv Ltd v. L. A. Ibeanu & Company (Nig) Ltd & Anor* (2007) LPELR-5149(CA), defined a reasonable man to be:

> …a fair-minded man, rational in thought and orientation. He is a man endowed with reason. It includes the ordinary person seen on our streets, whose means of transport is the popular Okada or mammy wagon. It also includes the affluent, highly literate or otherwise. Per Olabode Rhodes-Vivour, JCA (Pp 18 - 19 Paras F - A)

In 1837, in the famous case of *Vaughn v. Menlove* 3 Bing. (N.C.) 467, 132 Eng. Rep. 490 (Court of Common Pleas 1837), an English court of common pleas firmly established that, in the common law, the reasonable person standard is objective, as opposed to subjective. In that case, a farmer piled a haystack near his neighbor's cabin, which subsequently caught fire and burned his neighbor's cabin down. The farmer argued that he should not be liable since he genuinely did not consider that the haystack may cause his neighbor's cabin to burn down. The court nevertheless held him liable, since the jury found that his actions were objectively unreasonable, thereby holding him to the standard of a reasonable person.

In *Daniel v FRN* (2013) LPELR- 22148 (CA), the Court of Appeal held

> There is a legal personality known as the reasonable man. He is sometimes also known as a reasonable person or a reasonable citizen. His opinion is usually consulted in Courts to solve legal problems. He is an ubiquitous fictional figure of the law ... That reasonable man in some English authorities is the man in the Clapham Omnibus . For those of us in Nigeria who may not know anything about the Clapham Omnibus and the sort of man that takes a regular ride in it, Kayode Eso JSC gave us the Nigerian equivalent of that reasonable man in Adigun vs. Attorney General of Oyo State (1987) 1 NWLR (Pt.53) 678 at 720 . Said his Lordship: "A reasonable person here may be a pleasant housewife shopping for meal in Sandgrouse ..., he may be the ordinary worker in the Kano Native city living on his "Tuwo" or he is the plain woman in Okrika dress". Now it is what a reasonable man in the class indicated above thinks about the Appellant's case in the lower Court while observing the proceedings before that Court that will be the true test of whether or not the Appellant is having a fair hearing or fair trial. Per DANIEL-KALIO, JCA [B=B] 33-36

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 many of the personal characteristics of the actor himself.

Click on this link :
https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ve

d=2ahUKEwj9sMyUqPWAAxVlWUEAHWNuAAIQFnoECDMQAQ&url=https%3A%2F%2Fwww.cloudlex.com%2Fglossary%2Fwhat-is-standard-of-care%2F&usg=AOvVaw3BLdw8fQXBxVV3xSOEn8sl&opi=89978449

Self-assessment Exercise 1

Who is a reasonable man in law?

2.3.2 Moral Qualities and Knowledge

A man is expected to have that degree of common sense or knowledge of everyday things which normal adult would possess. 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 fire caused by discharging oil from the ship into Sydney Harbour, because their chief engineer 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 if he 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.

2.3.3 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 a 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.

So, what amount of care should a skilled person show in order to avoid liability in negligence?

2.3.4 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 acted "to the best of his own judgment" if his "best" is below that to be expected of a man of ordinary intelligence.

2.3.5 Age and Lunacy

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 arrows.

Moreover, a minor who engages in dangerous adult activities such as driving a car or handling industrial equipment, must conform 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 lunatics remains controversial. Some courts have 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 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.

Self-assessment Exercise 2

Explain the standard of care expected of children.

2.4 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.

2.5 References/Further Readings/Web Sources

Bodunde Bankole: Torts: Law of Wrongful Conducts (1998) Libriservice Press, Lagos
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Niki Tobi: Sources of Nigeria Law (1996) Mij Publishers.

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2.6 Possible Answers to Self-Assessment Exercises

Answer to **SAE 1**
In law, a reasonable man is a hypothetical person of legal fiction crafted by the courts who approaches any situation with the appropriate amount of caution and then sensibly takes action. It is a standard created to provide courts with an objective test that can be used in deciding whether a person's actions constitute negligence. This does not mean they must be perfect**.**

Answer to **SAE 2**
A child, whether as plaintiff or defendant, is only expected to conform to the standard appropriate for children of the same age, intelligence and experience. If unable to understand the nature and likely consequences of his actions, negligence is not attributed to him at all; but given perception of the risk, he must display the judgment and behaviour proper for a child with like attributes. Some safeguard to the public is afforded by the obligation of parents and school authorities to observe reasonable care in the supervision of children under their control. Moreover, a minor who engages in dangerous adult activities, such as driving a car or handling industrial equipment, must conform to the standard of the reasonably prudent adult.

Unit 3 : Proof of Negligence and the Doctrine of *Res Ipsa Loquitor*

Unit Structure

3.1 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 from the breach. The damage must not be too remote.

3.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the circumstances of negligence act
- Know the plea *Res Ipsa Ioquitor*
- Know the appropriate condition under which *Res ipsa loquitor* will apply.

3.3 Proof of Negligence and the Doctrine of Res Ipsa Loquitor

Res Ipsa loquitur is a Latin phrase which means 'the thing speaks for itself'. The term is used to refer or describe anything that is plain, clear, or self-explanatory and needs no further explanation, proof or clarification. *Res Ipsa Loquitur* is a rule of the law of evidence whereby the mere fact that a thing happened raises an inference of negligence on the part of the defendant, so that there is a prima facie case and he has to make his defence. The principle of *res ipsa loquitur* as a rule of evidence does not apply in criminal law. The doctrine of *res ipsa loquitur* does not apply when the facts of what happened are sufficiently known, but the rule only applies when there is no explanation.

In the law of evidence, the general rule is that he who alleges a thing or a state of facts has the onus or duty to prove what he asserts. In other words, he who alleges a fact has a duty prove it. Therefore, as a general rule in actions for negligence, it is the plaintiff who must prove that the defendant has by his act or omission been negligent in the discharge of a legal duty of care he owed to the plaintiff, and that thereby he has suffered injury. However, in some cases, a plaintiff can prove that an accident or negligence had taken place and that he has suffered harm, yet he may be unable to show how the accident, negligence, or wrong happened, because he had not seen how it happened. He only knows that he has been injured. Ordinarily, the plaintiff's claim ought to fail as he has been unable to give evidence of the negligence of the defendant. In such an instance, plaintiff may rely on the principle known as *res ipsa loquitur* meaning 'the thing speaks for itself' to assist the plaintiff in establishing his claim of negligence against the defendant.

Self-Assessment Exercise 1

Explain the doctrine of *res ipsa loquitor*?

3.3.1 Proof of Negligence: *Res Ipsa Loquitor*

The burden of proving negligence ordinarily rests on the plaintiff, for he who alleges must prove. He must not only show that the defendant owes him a duty of care, but also that the duty was breached as a result of which he suffered foreseeable damage. This he can do by adducing legally admissible evidence. However, sometimes the plaintiff may not have known the cause of the accident beyond the accident itself. In such a situation he may rely on the doctrine of *res ipsa loquitor*, which literally means, the thing speaks for itself. The court is prepared to infer that the defendant was negligent without hearing detailed evidence from the plaintiff as to what the defendant did or did not do. *Res ipsa loquitur* means that, in some circumstances, the court will be prepared to draw an inference of negligence without hearing detailed evidence, as the events of the case would not normally occur in the absence of negligence. See the case of *NPA v. Rahman Brothers Ltd* (2010) LPELR-8962(CA).

To prove negligence, the claimant must show that the defendant breached their duty of care: that the defendant failed to act as a reasonable person would in their position. Where it is not possible for the claimant to prove exactly what the accident's cause was, the court will presume breach if the defendant was in control of the situation and the accident was not one which normally occurs without carelessness. See the case of *NBC Plc* v. *KPA & Anor* (2021) LPELR-54677(CA)

For the doctrine of *res ipsa loquitur* to be applied to any case, three conditions must be satisfied. These are:

1. There must be an absence of explanation of the occurrence by the plaintiff.
2. The thing that caused the harm must have been under the management or control of the defendant, or his servant; and
3. The accident or harm must be one which in the ordinary course of things, does not happen without negligence on the part of the defendant.

See the case of *UTA v. Golfic Securities (Nig) Ltd & Ors* (2022) LPELR-57079(CA) where the above three conditions were stated.

The Absence of Explanation by the Plaintiff

Whenever the court is able to find out from the evidence adduced how and why the occurrence or injury took place, then there is no need for the application of *res ipsa loquitur* and the presumption of negligence. See the case of *Julius Berger (Nig) Plc v. Nwagwu* (2006) LPELR-8223(CA). Therefore, when the facts of the incidents are sufficiently known, the question ceases to be one where the thing speaks for itself, and the solution is to be found by the court determining whether, on the facts as established the defendant is or is not, negligent.

Scott v London and st Katherine Cockes (1855) 3 H of L 596. The plaintiff a custom officer was passing through the door of the defendant warehouse when 6 bags of sugar fell on him. The judge of first instance directed a discharge verdict for the defendant on the ground of lack of negligence, the court of Appeal ordered a retrial and it was in that case that the rule *res ipsa loquitor* was formulated.

The Appeal Court ordered a retrial and it was that case that the maxim or rule *Res Ipsa 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 defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

The facts relating to the accident must not be known, because once the facts of the accident are known then *res ipsa loquitor* fails.

See *Barkway v SmithWales Transport Co. Ltd* (1950) 1 All ER 392.
The claimant was injured when a bus drove off the road because of a latent, undetectable defect in the tyre that made it burst. There was evidence that the bus company ought to have made drivers report impacts which could cause this sort of defect, and had not done so. The claimant sued the defendant bus company in the tort of negligence. The House of Lords held that this was not a case where the doctrine of *res ipsa loquitur* applied. The House of Lords held that doctrine required the cause of the accident to be completely unknown. It was not applicable in a case where all the facts relating to the accident are known and the judge is merely being asked to decide between two or more competing interpretations of events. As such, the claimant retained the burden of proving negligence as usual.

See *Anichebe v Oyekwe* (1985) NWLR 100. There a lorry being driven by the defendant crushed the brother of the plaintiff. The defendant claimed that the accident happened because the U-bolt of the lorry broke and that he was unable to avoid the accident that happened. Although the Court held tha t there was an explanation by the defendant, it was not sufficient to discharge the inference of negligence raised by the happening of the accident therefore *res ipsa loquitor* apply and the defendant was held liable. See *Okeke v. Obidife* (1985) 1 All NLR 50.

Kuti v Gbodo (1962) N MLR 419. The plaintiff 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 *res 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 defendant while the train was in motion and was injured. There was 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 doors of the train are open continuously.

The Thing Was Under the Management or Control of the Defendant or His Servant
Where the thing that caused the injury was not under the management or control of the defendant or his servant, then the doctrine is inapplicable. See *Esson v LNE Ry* (1944) KB 421 CA. The question whether or not the thing that caused the harm was under, the management or control of the defendant or his servant is to be decided based on the circumstances of each case. A common example of a person having the management or control is a driver. A driver is presumed to have control of his vehicle and the surrounding circumstances to warrant the applicable of the rule in a case of negligent driving.
Also where the thing caused injury is under the control of several servants of a defendant and the plaintiff cannot identify the particular servant that is responsible, for instance during a surgery

operation in hospital when a patient is under anaesthesia, the doctrine will still apply to make the defendant vicariously liable for the act of the unidentified servant.

The Thing Does Not Ordinarily Happen Without Negligence by the Defendant

The harm must be one that does not ordinarily happen if proper care is taken by the defendant. Thus, the accident or injury must be one, which in the ordinarily course of things does not happen without negligence by the defendant. Negligence is readily presumed where human experience shows that the type of experience does not usually happen unless the defendant has been negligent. In other words, the harm must be one which as a matter of common experience does not happen without negligence by the person having the management or control of the thing that caused the injury. If the thing does not occur without negligence on the part of the defendant, then in the absence of an explanation of the occurrence, the court will readily draw an inference of negligence on the part of the defendant.

The summary of application of *res ipsa loquitur* to the tort of negligence was rightly captured by the SCN in *Miss Felicia Ojo v Dr Gharoro & Ors* (2006-03) Legalpedia – 28392(SC) thus:

> The doctrine of *res ipsa loquitur* is premised or predicated on the mere fact of the event happening, which is based on two rebuttable presumptions and I repeat two rebuttable presumptions, viz: (1) That the event happened as a result of a duty of care somebody owes his neighbour, (b) And that somebody is the defendant". (Per Niki Tobi JSC)
>
> "……In its very nature, the doctrine can only apply to negligence liability. In so far as nuisance rests on negligence, it can apply to nuisance also. The doctrine applies
>
> (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control;
>
> (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition:
>
> (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the question of the defendant's negligence must be determined on that evidence." (Per Oguntade JSC quoting with approval the opinion of Clerk and Lindsell on Torts, 13th Edition, paragraphs 966 and 967 at pp. 568 and 569)

The court has applied the doctrine of *res ipsa loquitur* and presumed negligence in many cases which include the following:

1. Things falling from a building and injuring the plaintiff.
2. Accident due defective machines, objects, vehicles, structure and so forth.
3. Motor vehicle veering off and mounting a pavement.
4. Aircraft which crashed immediately after taking off.
5. Swab left in the body of a patient after an abdominal operation.
6. Having four stiff fingers and a useless arm after treatment of the hand and arm.
7. Clothing containing harmful sulphite which inflicted dermatitis on the wearer.
8. Motor vehicle knocking down a person walking on the roadside from behind.

Strabag Construction Nig. Ltd v Ogarekpe (1991) 1 NWLR pt 170, p. 733 CA.
The plaintiff respondent technician was an employee of the defendant appellant company. While the plaintiff and two others were on top of a tower being installed at a considerable height, the crane on which they were hoisted up suddenly collapsed and they fell down suffering serious injuries. He sued for damages and pleaded *res ipsa loquitur*. The court of appeal held: that the doctrine of *res ipsa loquitur* applied and that the appellant company was liable for negligence.

The doctrine of *res ipsa loquitur* is applicable in almost every area of tort, provided the requirements for its application are present. However, one area of tort where the doctrine is usually applied is in traffic accident. For instance where:

1. A petrol tanker ran into an electric pole and burst into flames, inflicting burns on the plaintiff who sat in a shop on the side of the road. See *Ifeagwu v Tabansi Motors Ltd* (1972) 2 ECSLR 790.
2. A bus going in the opposite direction swerved, broke through the central barrier and crashed into the plaintiff's car. See *Jibowu v Kuti* (1972) 2 UILR 367.

Alao v Inaolaji Builders Ltd (1990) 7 NWLR pt 160, p. 36 CA.
A petrol tanker driven by the 1st defendant appellant in the course of his duty as a driver and agent of the 2nd defendant appellant fell on its side and caught fire which spread and burnt down the plaintiff respondent company's site where road construction equipment and machinery are parked. The construction company sued for damages arising from the accident. The Court of Appeal held: that the defendants appellants were liable. In the absence of explanation as to why the accident occurred the doctrine of *res ipsa loquitur* applied.

Ifeagwu v Tabansi Motors Ltd (1972) 2 ECSLR 790.
The plaintiff was sitting in his brother's roadside shop in a village in the Onitsha-Enugu highway when a petrol tanker on its way to Enugu ran into a nearby electricity pole, overturned, burst into flames. The plaintiff suffered burns and he sued the defendant who were the employers of the tanker driver for negligence and relied on *res ipsa loquitur*. The court held: that the doctrine applied and the defendant was liable.

So, will the doctrine of *res ipsa loquitor* be applicable where the thing that caused the injury was under the management or control of the defendant or his servant?

The Effect of Proving *Res Ipsa Loquitur*
Where the doctrine of *res ipsa loquitur* is successfully pleaded by a plaintiff and is applied by court, the effects of the doctrine are as follows:

1. It affords prima facie evidence of negligence on the part of the defendant.

The least effect is that where the doctrine is accepted by court, it provides prima facie evidence of negligence on the part of the defendant. In which case, the defendant can no longer escape liability, even though he makes a 'no case' submission. He has to proceed to defend himself by adducing sufficient evidence in explanation to rebuts the inference of negligence. Where the defendant rebuts the inference, the plaintiff has to adduce evidence to establish his claim, otherwise it will fail.

2. It shifts the burden of proof to the defendant.

Secondly, the total effect of *res ipsa loquitur* is that it casts the burden of proof on the defendant, to establish by evidence that he has not been negligent. For instance by proving;

a. That he had observed the reasonable care required of him in the circumstances; or
b. That the harm was due to a cause which did not involve negligence on his part, such as inevitable accident, *novus actus interveniens*, fault of the plaintiff, fault of stranger, and so forth; or
c. By pleading such other appropriate defence that may afford him legal excuse.

The Court of Appeal stated how the plea of *res ipsa loquitor* can be raised in court in the case of *United Cement Company Of Nigeria Ltd & Ors v. Isidor & Ors* (2016) LPELR-41148(CA)

> It is pertinent to equally postulate, that the doctrine of *res ipsa loquitur* is essentially predicated upon pleadings *vis-a-vis* evidence. Essentially, the principle of *res ipsa loquitur* is raised in one of two ways. First, it may be pleaded or raised by expressly reciting the maxim itself. Second, it may alternatively be pleaded or raised to the effect that the plaintiff intends to rely upon the occurrence of the wrong or injury itself as evidence of negligence.

Where the defendant is unable to discharge the onus of proof cast on him, by establishing that he was not negligent, the plaintiff's claim will succeed, for the court will uphold the plea of *res ipsa loquitur* and make a finding of negligence against the defendant. Therefore, it must be borne in mind that the mere fact that the doctrine of *res ipsa loquitur* applies does not imply that the plaintiff will succeed.

Self-Assessment Exercise 2

What is the effect of a successful plea of the doctrine of *res ipsa loquitor*?

3.4 Summary

In this unit, we learnt about

a. The burden of proving negligence ordinarily rests on the plaintiff
b. Sometimes the plaintiff may not have known the cause of the accident beyond the accident itself. In such a situation he may rely on the doctrine of *res ipsa loquitor*

3.5 References/Further Readings/Web Sources

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The Criminal Procedure of the Northern States of Nigeria.

3.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In tort law, *res ipsa loquitor* is a principle that allows plaintiffs to meet their burden of proof with what is, in effect, circumstantial evidence. The plaintiff can create a rebuttable presumption of negligence by the defendant by proving that the harm would not ordinarily have occurred without negligence, that the object that caused the harm was under the defendant's control, and that there are no other plausible explanation.

Answer to SAE 2

A successful plea of the doctrine of res ipsa loquitor will: affords prima facie evidence of negligence on the part of the defendant; and shift the burden of proof to the defendant.

MODULE 4 : Continuation of Negligence

Module Structure

Unit 1

Unit Structure

1.1 Introduction

Originally, no duty of care and liability was owed to a person who suffered nervous shock as a result of the negligent conduct of another person. This was because care was taken by the courts to prevent fraudulent claims. The problem of medical prognosis and the fear of creating indeterminate liability gave rise to the judicial view that it will be in the public interest to restrict the scope of recovery for injury by shock.

1.2 Learning Outcomes

At the end of this unit, you should be able to:

- Know what nervous shock is
- Know the appropriate application of the principle of negligence to nervous shock

1.3 Continuation of Negligence

Nervous Shock is a shock to nerve and brain structures of the body. It is a term used to denote psychiatric injury or illness, inflicted upon a person by intentional or negligent actions or omissions of another. It is most often applied to psychiatric disorders triggered by witnessing an accident, for example an injury caused to one's parents or spouse.

Nervous Shock cases may arise out of intentional acts of commission or omission, or unintentional or negligent acts of commission or omission. In case of intentional acts it is not even necessary to prove malice. In the case of *Wilkinson v Downston* (1897) 2 QB 57**,** as a practical joke, Mr Downton told the plaintiff Mrs Wilkinson, that her husband has been seriously injured in an accident and was lying in a ditch with broken bones. The effect of Downston statement was a violent shock to her nervous system resulting in weeks of suffering and incapacity. Wilkinson sued. The trial court found in her favour. Downston appealed on the grounds that damage was merely nervous shock out of a practical joke and there was no cause of action. The appeal court held that a party can recover for outrageous conduct that causes physical harm or mental distress. However, But it is the cases relating to unintentional or negligent acts that has given rise to an enormous body of judicial precedents.

Self-Assessment Exercise 1

What do you understand by the term ‘nervous shock’?

The existence of the duty of care and liability for nervous shock provided that the plaintiff was put in fear for his or her own safety was first recognized by court in 1901 in the case of *Dulieu v White* [1901] 2 KB 669. Injury to health from nervous shock is a bodily harm which attracts the award of damages in appropriate circumstances. A plaintiff may recover damages where a nervous shock caused an illness. This means, shock which produces any medical condition that is recognizable can be actionable. See the cases of *Hambrook v Stokes* (1925) 1 KB 141; *Dooley v Cammel-Laird* (1951) 1 Lloyd Rep 271; *Chadwick v British Railways Board* (1967) 2 All ER 945.

Nevertheless, the courts have been reluctant in applying the ordinary principles of negligence to shock cases without some qualifications to nervous shock liability. Lord Macmillan in *Bourghill v Young* (1943) AC 92 at p. 103 stated:

> In the case of mental shock, there are elements of greater subtlety than in the case of ordinary physical injury and those elements may give rise to debate as to the precise scope of legal liability.

In *Dulieu v White,* the claimant was pregnant and behind the bar in her husband's public house. A horse and cart crashed into the pub. The claimant was not physically injured but feared for her safety and suffered shock. She gave birth prematurely nine days later and the child suffered developmental problems. The court held that an action could lie in negligence for nervous shock arising from a reasonable fear for one's own immediate safety. *Kennedy J stated thus:*

> If impact be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact? It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself.

The 'impact theory' propounded by Kennedy, L.J. in *Dulieu v White* was abandoned in *Hambrook v Stokes Bros* (1924) All ER 110 .
The defendants' servant left a motor lorry at the top of a steep and narrow street unattended, with the engine running, and without having taken proper precautions to secure it. The lorry started off by itself and ran violently down the incline. The plaintiff's wife, who had been walking up the street with her children, had just parted with them a little a point where the street makes a bend, when she saw the lorry rushing round the bend towards her. She became very frightened for the safety of her children, who by that time were out of sight round the bend, and who she knew must have met the lorry in its course. She was almost immediately afterwards informed by bystanders that a child the description of one of hers had been injured. In consequence of her fright and anxiety she suffered a nervous shock which eventually caused her death, whereby her husband lost the benefit of her services. In an action by the husband under the Fatal Accidents Act. The court held that, on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children' s safety and not by fear for her own. Thus, claim for nervous shock is recoverable, if; shock resulted from what one saw or realised by one's own unaided senses and not from something which someone told him or her; and Shock was due to reasonable fear of immediate personal injury either to oneself or her/his children

Bourhill v Young (1942) 2 All ER 396
The observations of Atkin L.J as obiter dicta in *Hambrook v Stokes* were dealt with by the House of Lords in. In this case a motorcyclist was killed in a road accident for which he was responsible. A pregnant woman, who had got off a tram at scene of the accident (having heard the noise of an accident) claimed that when she reached the scene of the accident she saw blood on the road and as a result suffered shock which put her into premature labour - resulting in the loss of the baby. She subsequently brought a claim in relation to nervous shock and the resulting loss/damage. The House of Lords Court denied her claim because it was not reasonably foreseeable that someone not closely connected to the victim would suffer shock. There was insufficient proximity between the motorcyclist and the claimant. There was not a duty of care, owed by the motorcyclist to the claimant and she was not present at the scene of the accident (she had arrived after the accident had occurred. Hence, close degree of proximity is necessary to establish a claim; and foreseeability of injury an essential ingredient of duty of care.

In *Hinz v Berry* (1970) 2 QB 40 the emphasis was on the 'recognisable' psychiatric illness. The details are: Mr and Mrs Hinz went for a day out with their family in a Bedford Dormobile. They had four children of their own and fostered four other children. Mrs Hinz was also pregnant with her fifth child. They stopped in a lay-by to have a picnic. Mrs Hinz went across the road with one of the children to pick bluebells. Mr Hinz was in the dormobile making tea with the other children. A jaguar car driven by Mr Berry then came hurtling at speed. A tyre burst and the driver lost control and smashed into the dormobile. Mrs Hinz witnessed the horrible scene. Her husband died and the children were badly injured. As a consequence of this she became morbidly depressed. The court held she was entitled to recover as she had demonstrated a recognised psychiatric condition as opposed to feelings of grief and sorrow.
Lord Denning M.R. stated:

> In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant.

In *McLaughlin v O'Brien* (1982) 2 QB 40 the proximity factor was further expanded and clarified. The claimant's husband and three of her children were involved in a serious road traffic accident in which their car was struck by a lorry due to the negligence of the defendant lorry driver. Unfortunately one of the children was killed on impact. An ambulance took the injured parties to hospital. Another of the claimant's sons was a passenger in a car behind the family. The driver took him home and told his mother of the incident and immediately drove her to the hospital. She saw her family suffering before they had been treated and cleaned up. As a result she suffered severe shock, organic depression and a personality change. She brought an action against the defendant for the psychiatric injury she suffered. The Court of Appeal held that no duty of care was owed. She appealed to the House of Lords. The appeal was allowed and the claimant was entitled to recover for the psychiatric injury received. The House of Lords extended the class of persons who would be considered proximate to the event to those who come within the immediate aftermath of the event

Lord Wilberforce stated:

> Experience has shown that to insist on direct and immediate sight or hearing would be impractical and unjust and that under what may be called the " aftermath " doctrine, one who, from close proximity comes very soon upon the scene, should not be excluded…. and

> by way of reinforcement of " aftermath " cases, I would accept, by analogy with " rescue " situations, that a person of whom it could be said that one could expect nothing else than that he or she would come immediately to the scene—normally a parent or a spouse, could be regarded as being within the scope of foresight and duty. Where there is not immediate presence, account must be taken of the possibility of alterations in the circumstances, for which the defendant should not be responsible. Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts.

In *Page v. Smith* (1996) 1 AC 155, the claimant had suffered from ME (*Myalgic Encepahlomyelitis*) over a period of time and was in recovery when he was involved in a minor car accident due to the defendant's negligence. The claimant was not physically injured in the collision but the incident triggered his ME and had become chronic and permanent so that he was unable to return to his job as a teacher. He was successful at his trial and awarded £162,000 in damages. The court held that provided some kind of personal injury was foreseeable it did not matter whether the injury was physical or psychiatric. There was thus no need to establish that psychiatric injury was foreseeable. Also the fact that an ordinary person would not have suffered the injury incurred by the claimant was irrelevant as the defendant must take his victim as he finds him under the thin skull rule.

In *White v Chief Constable, South Yorkshire Police* (1991) 4 All ER 907 the emphasis was on the categorisation of 'victims'. This case arose from the disaster that occurred at Hillsborough football stadium in Sheffield in the FA cup semi-final match between Liverpool and Nottingham Forest in 1989. South Yorkshire Police had been responsible for crowd control at the football match and had been negligent in directing an excessively large number of spectators to one end of the stadium which resulted in the fatal crush in which 95 people were killed and over 400 were physically injured. The Claimants based their claims on the grounds that as employees, the defendant owed them a duty of care not to cause them psychiatric injury as a result of negligence, alternatively they claim as rescuers, which they argued promoted them to primary victims as oppose to secondary victims.
The court held that the claimants were not entitled to recover for the psychiatric injury. The position of the court was based on the following:

i. A rescuer, not himself exposed to physical risk by being involved in rescue was a secondary victim and as such, not entitled to claim.
ii. To qualify as a primary victim, the claimant, even if he is a rescuer has to be in the zone of physical danger.
iii. Both rescuers and employees are not to be given any favourable treatment.

All the cases stated above are cases in which people are caught up in serious , life threatening situations by acts of negligence, and the consequent shock suffered by others including the victims. It is also possible, and there are cases where the nervous shock is a result of witnessing damages to property. This can be seen in the decision of *Attia v British Gas Corporation* [1988] QB 304 CA. This case arose from a horrific train crash in Lewisham in which 90 people were killed and many more were seriously injured. Mr Chadwick lived 200 yards from the scene of the crash and attended the scene to provide some assistance. He worked many hours through the night crawling beneath the wreckage bringing aid and comfort to the trapped victims. As a result of what he had witnesses he suffered acute anxiety neurosis and received treatment as an inpatient for 6 months. The court settled the legal issue that nervous shock arising out of witnessing damages to property is actionable.

So, can nervous shock arise out of witnessing damage to property?

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1.4 Summary

In this unit, we learnt about

a. The definition of nervous shock
b. The attitude of the courts to the application of principles of negligence to nervous shock

1.5 References/Further Readings/Web Sources

Ese Malemi, Law of Torts (Princeton, Lagos 2008)

F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwi69OfqqvWAAxUCQEEAHRqqAtMQFnoECDgQAQ&url=https%3A%2F%2Fwww.lawteacher.net%2Ffree-law-essays%2Ftort-law%2Ftort-negligence-shock.php&usg=AOvVaw3gYFHFgt6dXbCzC5jdnR5M&opi=89978449

1.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

Nervous Shock is a shock to nerve and brain structures of the body. It is a term used to denote psychiatric injury or illness, inflicted upon a person by intentional or negligent actions or omissions of another. It is most often applied to psychiatric disorders triggered by witnessing an accident, for example an injury caused to one's parents or spouse.

Unit 2 : Causation and Remoteness of Damages

Unit Structure

2.1. 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.

2.2. Learning Outcomes

The purpose of this unit is to enable you to:

- understand the term cause-in-fact i.e. whether the defendant's culpable conduct was a causally relevant factor;
- the 'But for' Test;
- remoteness of damage.

2.3. Causation and Remoteness of Damages

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).

2.3.1. 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 the "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 *Bernett v. Chelsea and Kessington 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"

In determining questions of causation, the court is not interested in what actually took place between the plaintiff and the defendant but what would have happened if the defendant's breach of duty is removed from the facts or set of events surrounding the accident and possibly replaced by a set of conduct not involving breach of duty. Thus the plaintiff is expected to prove that the injury would have been avoided if not for the breach of duty. See *Wilsher v Essex Area Health Authority* (1988) AC 1074.

The burden of proving causation rests on the plaintiff throughout the case. It never shifts. If he fails to show that the defendant's negligence materially contributed to the damage, his action fails.

Self-assessment Exercise 1

Explain the burden of proof on the plaintiff in relation to questions of causation?

2.3.2. Remoteness of Damage

Damages may even be denied where the plaintiff establishes a causal link between the breach of duty and his damage. This will be on the ground that the breach of duty, though the factual, was not the legal cause of damage. Thus, damage will be regarded as being too remote. That the defendant is liable only for those consequences resulting from his breach of duty is settled law. However, if only true in theory, the consequences of a conduct amounting to a breach of duty may be endless and/or far-reaching and it will be unjust to hold the defendant liable and *infunctum* for all the consequences of his conduct. The concept is an attempt by the courts to place a limit on the extent of a person's liability for injuries resulting from his negligent conduct.

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 forseeable that the plaintiff would as a result of the accident sustain 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.

So , will the defendant be liable in all cases where the plaintiff establishes a causal link between the breach of duty and his damage? Discuss.

2.4. 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 etc.

2.5. References/Further Readings/Web Sources

Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
Fidelis Nwadialo: the Criminal Procedure of the Southern States of Nigeria, Mij Publisher, Ltd, Lagos (1996).
John G. Fleming: The Law of Torts (1977), The Law Books Co. Ltd publisher, London. Sweet & Maxwell.
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damage%2FC5544F08AD0AE9BC8FE69FCCA5F18D50&usg=AOvVaw2vJgRk2Za2Tb3jUnOM0ZR6&opi=89978449

2.6. Possible Answers to Self-Assessment Exercises

Answer to SAE 1

The burden of proving causation rests on the plaintiff throughout the case. Thus the plaintiff is expected to prove that the injury would have been avoided if not for the breach of duty. See *Wilsher v Essex Area Health Authority* (1988) AC 1074. In determining questions of causation, the court is not interested in what actually took place between the plaintiff and the defendant but what would have happened if the defendant's breach of duty is removed from the facts or set of events surrounding the accident and possibly replaced by a set of conduct not involving breach of duty.

Unit 3 : **Examples of Duty of Care in the Law of Negligence**

Unit Structure

3.1 Introduction

The case of *Donoghue v Stevenson, supra* have settled the position of law: "the categories of negligence are never closed". As a result, the various kinds of negligence are not exhaustible and the situations in which a duty of care may arise are many.

3.2 **Learning Outcomes**

At the end of this unit, you should be able to:

- Give examples of duty of care in the law of negligence
- Some duty situations which are governed by special rules or which have assumed a particular level of prominence

3.3 **Examples of Duty of Care in the Law of Negligence**

3.3.1. Road Users

All road users and by extension, other means of transport such as shipping at sea and railways, owe a duty of care to guide against causing injury to other road users or their property. On the road, he owes a duty of care to other drivers, passengers in other vehicles, cyclists, pedestrians as well as people's properties. He can fulfill this duty by obeying traffic rules and signals. It also extends to not taking drugs or alcohol while driving. In each case, whether the defendant has observed the required standard of care is a question of fact.

Esiegbe v Agholor (1993) 9 NWLR pt 316, 128
Bourhill v Young
Odebunmi v Abdullahi (1997) 2 NWLR pt 489, 526
Wright v Lodge (1993) 4 All ER 299 CA

Self-Assessment Exercise 1

While Out Shopping, Kate's 7-Year-Old Daughter Slips Out Of Her Hand And Runs Into The Road Causing A Serious Accident. Will Kate Be In Breach Of Her Duty Of Care?

3.3.2. Chattel Manufacturers

A producer or chattel manufacturer owes a duty of care to the ultimate consumer and if the consumer is harmed by any defect in the chattel, he will be liable. This position was first established in *Donoghue v Stevenson.*

A manufacturer includes producers, repairers, masons, assemblers and suppliers who do something to the product. The chattel would include items used internally or externally and capable of causing harm or injury whether given free or purchased.

Osemobor v Niger Biscuit (1973) 1 CCHC J at 71.
In this case the plaintiff was eating some biscuit which he bought from a shop when he felt a hard object. He then found a decayed tooth embedded in the biscuit. The plaintiff became ill and sued 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.

So, where supplies are given free, would chattel manufacturers still owe a duty of care to the consumer?

3.3.3. Negligent Misstatement resulting in Economic Loss

Negligent misstatement may have the effect of causing physical damage to any person who relies on it or causing financial or economic loss to the person. A duty of care exists where there is a special relationship between the parties. A negligent misstatement may give rise to an action for damages for economic loss. When a party seeking information or advice from another – possessing a special skill – and trusts him to exercise due care, and that party knew or ought to have known that the first party was relying on his skill and judgment, then a duty of care will be implied. Also, where an advice is given purely on a social occasion, no duty of care will arise because it would not be forseeable by the defendant that the plaintiff would rely on the advice nor reasonable for the plaintiff to do so.

Hedley Byrne and Co Ltd v Heller and Partners, supra
Hedley Byrne were advertising agents placing contracts on behalf of a client on credit terms. Hedley Byrne would be personally liable should the client default. To protect themselves, Hedley Byrne asked their bankers to obtain a credit reference from Heller & Partners ('H&P'), the client's bankers. The reference (given both orally and then in writing) was given gratis and was favourable, but also contained an exclusion clause to the effect that the information was given 'without responsibility on the part of this Bank or its officials'. Hedley Byrne relied upon this reference and subsequently suffered financial loss when the client went into liquidation.

The House of Lords ruled that damage for pure economic loss could arise in situations where the following four conditions were met:

(a) a fiduciary relationship of trust & confidence arises/exists between the parties;
(b) the party preparing the advice/information has voluntarily assumed the risk;
(c) there has been reliance on the advice/info by the other party, and
(d) such reliance was reasonable in the circumstances.

The House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605 also refined the Hedley Byrne test. Lord Bridge set out the three requirements to be found before a relationship of sufficient proximity would be established in a misstatements case:
'The salient feature of all these cases is that the defendant giving advice or information was fully aware of the nature of the transaction which the plaintiff had in contemplation, knew that the advice or information would be communicated to him, directly or indirectly and knew that it was very likely that the plaintiff would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.'
In Caparo itself, reliance on the information was not reasonable because it was supplied for one purpose and could (and should not) be relied upon for any other purpose.

Self-assessment Exercise 2

Would an advice given purely on a social occasion amount to a negligent misstatement?

3.3.4. Bailment

A bailee who is in charge of goods entrusted to him by the bailor owes that bailor a duty of care towards those goods. Here the onus of proof is on the bailee to show that any loss or damage to the goods bailed was not due to his own negligence.

See the following cases:
Panalpina World Transport Ltd v Wariboko (1975) 5 ECSLR 460
Koko v Nigerian Ports Authority (1973) NCLR 342
Nigerian Ports Authority v Ali Akar and Sons (1965) All NLR 272 SC
Hill Station Hotel Ltd v Adeyi (1996) 4 NWLR pt 442, 294 CA

3.3.5. Employer

An employer owes a duty of care to his employees and may be liable in negligence where an employee suffers an injury in the course of his work, if there has been a breach of that duty. The position under Common Law was highlighted in the case of *Wilsons and Clyde Coal Co. v. English* [1938] AC 57. In the instant case, the defendants had employed the complainant, Mr English. He was working on a repair to an airway on the Mine Jigger Brae, which was used as part of the haulage system. He was going to the bottom of the mine pit when the haulage was started. Although he had tried to evade the danger through a manhole, he was trapped by machinery and it crushed him to death. The defendants and employers, Wilsons & Clyde Co Ltd, tried to claim that it was Mr

English's own negligence that had resulted in his death; he could have taken an alternative route or alerted the employee in charge of the machinery for it to be stopped.

It was held that the defendants had delegated the organisation of a safe working system to one of their employees on the site and they had taken all reasonable steps to ensure they entrusted this duty to an experienced employee. Thus, they were held not to be liable for damages. The complainant appealed on the issue of whether employers had a non-delegable duty of care towards the safety of workers.

The House of Lords decided that Wilsons & Clyde Co Ltd, as an employer, had a duty of care to ensure a safe system of work and this duty could not be fully delegated to another employee. Thus, the defendants always remain responsible for a safe workplace for their employees and are vicariously liable for any negligence of another. This duty includes; providing proper materials, employing competent workers, providing a safe place of work and providing valuable supervision. The defendants were liable for damages.

See the cases of:
Koiki v NEPA (1972) 11 CCHCJ 127
Strabag Construction Nig. Ltd v Ogarekpe (1991) 1 NWLR, Pt 170, p. 733
Western Nigeria Trading Co v Ajao (1965) NMLR 178
Walker v Northumbe
rland CC (1994) NLJ 1659
Davie v New Merton Board Mills (1959) AC 604
Obakoro v Forex Co Inc. (1973) 3 UILR 91.

So, does the duty of care owed by an employer to an employee extend to employing competent workers?

3.3.6. Occupier's Liability

An occupier may be defined as a person in control of premises. In *IITA v Amrani* (1994) 3 NWLR pt 332, 296 an occupier was defines as "a person who has sufficient degree of control over premises to put him under a duty of care towards those who come lawfully into the premises." A degree of control is *prima facie* sufficient if it is such that the defendant ought to realise that a failure on his part to use care may result in injury to a person coming under the premises. An occupier could be a landlord or the tenant where he lets out the property. No duty of care is owed to trespassers. Visitors and invitees are to be safe and prevented from injury. Where the invitee uses the place in an unauthorised way, the occupier will not be liable.

3.3.7. Professional Liability

Professional negligence occurs when a professional (lawyer, insurance broker, accountant, architect, realtor, financial advisor, etc.) fails to fulfil the professional duties or obligations that they were hired by their clients to fulfil. When someone agrees to perform professional services for someone else who needs these services, the hired professional must exercise "reasonable care" in providing these services.

The law of professional negligence has developed in the following professional fields: accountants and auditors, bankers, architects, engineers, legal practitioner, medical practitioners, etc.

JEB Fasteners Ltd v Marks (1983) 1 All ER 583
The court held that auditors preparing company accounts owe a duty of care to any person whom they ought reasonably to foresee might rely on the accounts of the company to his injury.

Clayton v Woodman (1962) 2 QB 533
An architect was held liable in negligence for giving wrong instruction to a bricklayer which resulted in the collapse of a wall occasioning injury to the bricklayer.

For legal practitioners, and with regards to the tort of negligence, they are in a special position in that the legal practitioner owes a fiduciary duty towards his client and so has always been liable for any negligent mis-statement made or negligent advice given to the client. Also, the legal practitioner when acting as a barrister or advocate in the course of judicial proceedings enjoys complete immunity from actions in negligence proceedings and the immunity extends to pre-trial work. See the cases of *Saif Ali v Sidney Mitchell & Co.* (1978) 3 All ER 1033, 1039; *Rondel v Worsley* (1969) 1 AC 191.

Medical practitioners owe certain duties to their patient which include duty to provide adequate counselling, duty to warn the patient on the risks of the treatment, duty to carry out a proper diagnosis, and duty to administer proper treatment. The nature of a medical practitioner's professional duty of care was stated by Lord Hewart CJ, in *R v Bateman* (1925) All ER 45 at 48:

> If a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patent or client to use due caution in undertaking the treatment.

Barnett v Chelsea & Kensington Hospital [1969] 1 QB 428
Mr Barnett went to hospital complaining of severe stomach pains and vomiting. He was seen by a nurse who telephoned the doctor on duty. The doctor told her to send him home and contact his GP in the morning. Mr Barnett died five hours later from arsenic poisoning. Had the doctor examined Mr Barnett at the time there would have been nothing the doctor could have done to save him. The court applying the "but for" test, held that the hospital was not liable as the doctor's failure to examine the patient did not cause his death.

Cassidy v Ministry of Health [1951] 2 KB 343
The claimant was a patient at a hospital run by the defendant who required routine treatment to set the bones in his wrist. Due to negligence on the part of one of the doctors, the operation caused his fingers to become stiff. The claimant sued the defendant in the tort of negligence on the basis of vicarious liability. The court held that the evidence disclosed a prima facie case of negligence on the part of the defendant medical personnel, which had not been rebutted and the defendants were accordingly liable.

Self-Assessment Exercise 3

What is the legal basis for professional liability in negligence?

3.4 Summary

In this unit, we learnt about

a. Some duty situations which are governed by special rules or which have assumed a particular level of prominence

3.5 References/Further Readings/Web Sources

Ese Malemi, Law of Torts (Princeton, Lagos 2008)

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)

F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

3.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

While Kate will owe a duty of care to other road users, it is unlikely (so long as she was keeping an eye on her daughter) that she will be in breach of her duty of care.

Answer to SAE 2

Where an advice is given purely on a social occasion, no duty of care will arise because it would not be forseeable by the defendant that the plaintiff would rely on the advice nor reasonable for the plaintiff to do so.

Answer to SAE 3

Professional liability in negligence is based on the principle that when someone agrees to perform professional services for another who needs these services, the hired professional must exercise "reasonable care" in providing these services.

MODULE 5 : Defences To The Torts of Negligence

Module Structure

Unit 1	Consent/*Volenti non fit injuria*
Unit 2	Contributory Negligence
Unit 3	Necessity or Emergency
Unit 4	Novus actus interveniens and Mistake
Unit 5	Limitation of Action and Illegality

Unit 1 : Consent/Volenti Non Fit Injuria

Unit Structure

1.1. Introduction

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 maxim 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.

1.2. Learning Outcomes

The purpose of this unit is to enable you to:

- define and discuss the meaning of *volenti non fit injuria*;
- comprehend the implication of *volenti non fit injuria* on a plaintiff and the defendant.

1.3. Consent/*Volenti non fit injuria*

Volenti non fit injuria or consent refers to situations in which the claimant can be regarded as having consented to a risk which then manifests itself. Consent is a complete defence - if consent is found, a claim will be defeated.

Consent defences can be broken down into two categories. In the first are situations of negligence where a claimant agrees that the defendant will not be held liable for any injuries they might incur whilst undertaking a particular activity. So an individual might sign a waiver in which they consent to any risk of injury that might occur when they bungee jump. In the second are where the claimant effectively tells a defendant to do something. So an individual who tells another to burn down his house cannot sue that person for damaging his property.

The Court of Appeal in *Dare & Anor v. Fagbamila* (2009) LPELR-8281(CA) stated:
The principle of volenti non fit injuria has been the subject of a lot of misconceptions. This is a common defence in actions of negligence. It emphasises the necessity for knowledge and consent. The question primarily is whether the plaintiff agreed to the breach of the duty of care by the defendant towards him or, at least, to waive his right of action arising out of such breach. The defence has both these applications. The first of which negatives the wrongfulness of the defendant's conduct, while the second prevents the plaintiff from recovering without affecting the fact that the defendant has committed a wrong. But whatever the application, voluntas emphasises the need for knowledge of the risk in the plaintiff. The law is that if a defendant desires to succeed

on the ground that the maxim *volenti non fit injuria* is applicable, he must obtain a finding of fact that the plaintiff voluntarily and freely, with full knowledge of the knowledge of the risk he ran, impliedly agreed to incur it. Therefore, there must be knowledge before there can be consent." Per Jummai Hannatu Sankey, JCA (Pp 22 - 23 Paras E - D)

Self-assessment Exercise 1

What are the two circumstances/situations that consent as a defence can apply?

Consent is made up of three factors. The claimant must have a knowledge of the nature and extent of the risk they consented to, the claimant's consent must be voluntary, and they must be shown to have agreed to the risk.

a. Knowledge of Risk

Before consent can be effective, a claimant must know what it is that they are consenting to. This is subjective, so the courts will ask what a claimant knew at the time consent occurred.

Morris v Murray [1991] 2 QB 6
The claimant had been drinking with the defendant all day (to the point at which the defendant had consumed roughly seventeen servings of whiskey). The defendant, who had a pilot's licence, suggested that they take his light aircraft for a flight. The claimant agreed and drove to the airfield. In a perhaps predictable turn of events the plane crashed, killing the defendant and seriously injuring the claimant, who brought a case against the defendant's estate. The defence argued that the claimant had consented to the risk, since he must have known how glaringly dangerous the flight would have been. This argument was successful - the claimant was held to have known of the risk but continued on regardless, and thus the defence of consent applied.

It can thus be seen that whilst knowledge is subjective, there is no need for an explicit expression on the part of the claimant that they are aware of the risk they are running. Instead, the court will infer the likely knowledge of the claimant (although they will of course pay attention to any explicit evidence that the claimant knew of a particular risk).

Since this requirement is subjective, the defence will fail if the defendant was not aware of a risk, even if they should have been. Thus in *Smith v Austin Lifts Ltd* [1959] 2 Lloyd's Rep 583 the claimant was injured by a risk that he reasonably should have known about. Nonetheless, a consent defence failed, because the claimant wasn't aware of the extent of the risk he was exposing himself to.

b. Voluntariness

Key to the employment of a consent defence is that the claimants must have been given true freedom of choice before they can be said to have consented. This can be seen in *Bowater v Rowley Regis Corp.* [1944] KB 476. The claimant was employed by the defendant as a road sweeper. Part of this work involved using a horse-drawn cart to collect sweepings. He was ordered by his foreman to use a horse which was known for misbehaviour. The claimant protested, but his protests were ignored. A few weeks later the horse bolted, throwing the claimant from his cart and injuring him. The defendant raised a consent defence. The defence failed - the claimant could not be regarded as willing since he had no real choice in the matter, and thus consent did not apply.

This case also demonstrates a couple of other points. Firstly, employees can rarely be described as consenting to risk, where that risk comes about as part of their employment. Since the actions of employees are usually dictated by a manager, it is the manager who is effectively making the choices in such scenarios. This can be seen in *Smith v Baker & Sons* [1891] AC 325. The claimant was injured on a building site when a stone fell from a crane. Whilst he was aware of this risk, and continued to work on the site, this was not effective consent - he had no control over the risk, and thus no choice over whether he was exposed to it or not (outside of his general consent to employment on the site). This principle also fits into wider legal views of the employer-employee relationship, which tend to emphasise the duty of employers to avoid harm and their ability to bear losses via organisational coffers or insurance policies. There exists an exception to this principle, however, where an employee is paid 'danger money' to undertake a particularly risky activity - since such payments are predicated on an employee consenting to undertake a particularly risky activity, this can be considered effective consent (unless of course, the choice was between taking on the extra risk and becoming unemployed).

Secondly, freedom of choice does not mean merely 'it was possible to avoid the risk'. So in *Bowater* the employee had the freedom to refuse the order to use the dangerous horse and potentially run the risk of dismissal or disciplinary action. Still, it would be disingenuous to assert that the claimant had a free choice between using the horse and not. To put it another way, a choice between fighting a bear or jumping off a cliff is not a freely made choice.

c. Agreement

Agreement can take one of two forms - express and implied.
Express agreements include explicit forms of consent such as the eponymous consent form, or else an explicit agreement between claimant and defendant. So a paintballing accident, for example, which is not caused by negligence but results in the loss of an eye, can be excluded via the proper contract terminology. Express agreements are, overall, much simpler than implied agreements, since they will usually make it clear what the consent pertains to.

Implied consent includes situations in which a claimant can reasonably be held to have consented to a particular risk, but do not make this consent explicitly known (after all, the phrase 'I consent to that risk' is hardly a common phrase in everyday life). However, the courts are relatively reluctant to imply consent unless it is very clearly (but not explicitly) in place, since this is effectively putting words into the claimant's mouth. The situations in which it tends to be found are those in which a claimant is aware of an obvious danger but presses on regardless. This can be seen in *Imperial Chemical Industries Ltd v Shatwell* (also discussed in employers' statutory breach).

Imperial Chemical Industries Ltd v Shatwell [1965] AC 656
In defiance of express instructions and statutory regulation, the two claimants tested mining explosives in a quarry in an unsafe manner. They could have undertaken a safe test had they just waited for a colleague to return with a longer detonator wire. The explosives detonated early, and the claimants were injured. They then brought a case against their employer. The courts allowed a consent defence to succeed, on the basis that the claimants were clearly in full knowledge of the risks and decided to press ahead anyway.

However, unless a danger is staggeringly clear (thus in *Imperial Chemical Industries*, there were explicit warnings in place) the courts will not imply consent. This can be seen in a series of cases where passengers have knowingly ridden in the vehicles of drunk drivers.

Thus in *Dann v Hamilton* [1939] 1 KB 509, the defendant went drinking in a variety of different pubs with the claimant and a third party. The trio got into the defendant's car (defendant driving), but after a short while the third party declared the defendant to be drunk, and got out. The claimant stated that she would accept the risk of an accident occurring. A negligently caused accident did occur, injuring the claimant. Nonetheless, a consent defence was not accepted - the claimant was not held to have consented to absolve the defendant from any acts of negligence. The same principle can be seen in *Owens v Brimmell* (discussed in contributory negligence.) Again, although the claimant passenger knew that the defendant driver was drunk, a consent offence did not apply.

These cases can be contrasted with *Morris v Murray* (drunken pilot), in which the danger was held to be so incredibly obvious and extreme that consent could succeed. Thus, unless a danger is overwhelmingly apparent and grievous, consent will usually not be implied by the courts.

What three factors would need to be proved for the defence of Consent to be applicable to a defendant?

1.4 Summary

In this unit, we learnt about:

a. Definition of volenti non fit injuria
b. The three factors that must apply for consent to be valid

General Defences to the law of Torts

1.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

1.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

Consent defences would apply firstly to situations of negligence where a claimant agrees that the defendant will not be held liable for any injuries they might occur whilst undertaking a particular activity, and secondly where the claimant effectively tells a defendant to do something that results in the claimant suffering damage to his property.

Unit **2 :** **Contributory Negligence**

Unit Structure

2.1 Introduction

Contributory negligence is one of the principal defences to an action in negligence and suggests the negligence of the plaintiff which combines with the negligence of the defendant to bring about injury to the plaintiff.

2.2 Contributory Negligence

At the end of this unit, you should be able to:

- Explain what contributory negligence is.
- Main elements of contributory negligence.
- Cases where a lower standard is expected for contributory negligence
- Apportionment in contributory negligence

2.3 Contributory Negligence

One of the most commonly used defenses to negligence claims is to show contributory negligence on the part of the plaintiff. Contributory negligence occurs when a plaintiff's conduct falls below a certain standard necessary for the plaintiff's protection, and this conduct cooperates with the defendant's negligence in causing harm to the plaintiff. In plain English, this means the plaintiff most likely would have avoided injuries had he or she not also been negligent.

Contributory negligence is basically the negligence of the plaintiff himself which combines with the defendant's negligence in bringing about the injury to the plaintiff. 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.

Example 1

Where a factory worker suffers serious burns to his face after his welding torch malfunctions. However, he failed to flip down his mask before using the torch, which would have prevented the injury.

The basic essence of contributory negligence is that the plaintiff's carelessness contributed to his damage. A contributory negligence defence is quite simply an argument that the claimant, through

some action or omission of their own, contributed manifestly to their own injuries, and that this fact should be reflected in the awarded damages.

In *Eastchase Aluminium Products Ltd v. Ugwu & Anor* (2016) LPELR-40936(CA), the court stated:
Basically, the essential characteristic with regard to the principles of contributory negligence, is to the effect that the party charged must be primarily liable for the negligence if any, that gave rise and caused the damage or injury. The principle of contributory negligence is founded upon the application of common sense to the simple facts of life. These are facts which reveal the action or inaction of a person who although was not primarily responsible for an accident or the cause of an injury, had by his own conduct created a situation which favoured the cause of the accident and or resulted in the injury which had occurred; be it in the form of damages or otherwise. Thus, contributory negligence as a defence to a claim is essentially predicated on negligence. It applies to cases where a plaintiff has, through his own negligence, contributed to cause, the damages he incurred as a result of defendant's negligence. Indeed, a plea of contributory negligence is tantamount to a tacit admission of the defendant's primary responsibility for the complaint of negligence and thereby relieves the plaintiff of the burden of proving negligence. See S.C.C. (Nig.) Ltd. & Ors. vs. Mrs. Igueriniovo (2004) All FWLR (Pt.189) 1133 @ 1148-1149." Per Massoud Abdulrahman Oredola, JCA (Pp 14 - 15 Paras C - B)

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 for his own safety.

There are two main elements of a contributory negligence defence. Firstly, the claimant must be at fault (their conduct having fallen short of the expected standard of care). Secondly, once fault has been established, the extent of blame must be apportioned.

Jones v Livox Quarries [1952] 2 QB 608
The claimant worked in a quarry owned by the defendant. He decided to hitch a lift on the back of an excavator by standing on the tow bar, unbeknown to the driver, and a policy was in place forbidding this behaviour. A dump truck, driven recklessly by another employee, went out of control and hit the back of the excavator, crushing the claimant’s legs, leading to amputation.

Whilst the dump truck's driver was to blame for the accident, the court held that the claimant was 20% to blame for his injuries - he had acted negligently, and had acted against orders.

Thus, contributory negligence is not based on being in the wrong place at the wrong time, but rather on whether the claimant had acted reasonably in the circumstances, with 'reasonable' defined as taking action to avoid foreseeable harm. It should be noted that reasonable behaviour is not based on acting to prevent any and all foreseeable accidents, but rather just taking precautions to avoid generally foreseeable harm. All that can be asked of claimants is that they take reasonable precautions to self-protect themselves, since the nature and extent of the tort that affects them will be determined by the behaviour of the defendant who has harmed them. What is reasonable will depend on the context.

Claimants will be expected to wear seatbelts whenever they get into a car, regardless of length or road conditions.

Froom v Butcher [1976] 1 QB 286
The claimant was involved in a negligently caused car accident, in which the claimant was not wearing a seatbelt. A lengthy discussion of contributory negligence ensued, with Lord Denning coming to the follow conclusion (in reference to failures to wear seatbelts):

> Sometimes the evidence will show that the failure made no difference. In such case the damages should not be reduced at all. […] At other times the evidence will show that the failure made all the difference. In such cases I would suggest that the damages should be reduced by 25 per cent. […] Often enough the evidence will only show that the failure made a considerable difference. In such case I would suggest that the damages […] should be reduced by 15 per cent.

It is perhaps odd that situations in which the entire harm of the accident can be attributed to non-seatbelt wearing only attract a 25% reduction in damages. However, it should not be forgotten that whilst a claimant has a responsibility to wear a seatbelt, they have a greater right to not be hit by a negligent driver. Of course, this only refers to non-seatbelt wearing - it may well be a case that a claimant contributes to an accident in more than one way, and so the contribution will be greater.

The same principle applies for motorcycle drivers who do not wear helmets, as per *O'Connell v Jackson* [1971] 3 WLR 463. The claimant was injured whilst riding his motorcycle without a helmet. A negligent driver moved into his lane and struck him. The court used the Highway Code as their benchmark for responsibility, and noted that it told motorcyclists to wear helmets. Since the motorcyclist did not contribute to the accident, and the lack of a helmet only caused some but not all of his injuries, damages were reduced by 15%. This case also demonstrates the utility of codes of conduct and guidelines: it can generally be held that someone undertaking a job or activity has read any relevant guidance or codes of practice that pertain to it (after all, that's why they exist.) Thus such codes or guidelines can form a useful demonstration of what constitutes reasonable behaviour.

The courts should consider each instance of contributory negligence on the basis of its own facts and circumstances. This principle can be seen at work in the case of *Owens v Brimmell* [1977] QB 859. The claimant knowingly got into a car with the defendant, with whom he had been drinking with at a pub. He also failed to wear his seatbelt. The defendant negligently caused an accident in which the claimant was injured. Tasker Watkins J noted (at 867) that a substantive body of case law existed regarding such situations, but ultimately, that:

> whether [the law] can be relied on successfully is a question of fact and degree to be determined in the circumstances out of which the issue is said to arise.

Thus, not every situation involving a seatbelt has to be decided according to *Froom*. Of course, a prudent judge will still attempt to maintain the continuity of the law unless the case at hand can be sufficiently distinguished.

The relevant standard of care can change depending on the characteristics of the claimant. Thus, children will be expected to act less carefully than adults.

Gough v Thorne [1966] 1 WLR 1387.
Three siblings aged seventeen, thirteen and ten were waiting to cross a road. A lorry driver slowed down, and beckoned them to cross. They did so, but then a car overtook the lorry via a narrow gap, and hit the two youngest siblings. At trial, the thirteen year old was held to have contributed a third to her injuries, for not checking the road for any other oncoming traffic. On appeal this decision was struck out on the basis that her behaviour was acceptable for a thirteen year old, although negligent if undertaken by an adult.

It should be noted that unless very young, children will rarely be held to be blameless, thus in *Morales v Ecclestone* [1991] RTR 151 an eleven year old was held 75% responsible for running out into a road without looking and getting hit by a car.

The situation that the claimant is in will also change the relevant standard of care, so rescuers attending to an event will be held to a lesser standard of care and those who act quickly when placed in an emergency situation will not be handled as if they were capable of rational, calculating thought. Thus in *Jones v Boyce* [1816] 171 ER 540, the defendant negligently drove a horse-drawn coach in which the claimant was a passenger. The claimant thought the coach was about to crash, and so jumped from it to avoid the danger, injuring himself. The coach did not crash. Nevertheless, the claimant was not held to have contributed to his injuries - whilst he had acted unreasonably by normal standards, he had acted reasonably for someone put in a position of perceived danger.

However, there is a limit to when ‘emergency’ behaviour will be considered reasonable. Thus in *Sayers v Harlow* [1958] 1 WLR 623 the claimant was negligently locked in a toilet cubicle which had no inside handle. In a desperate attempt to escape the claimant stood on the cubicle’s toilet roll holder which gave way, injuring her. The courts held that her behaviour was unreasonable, and thus applied a 25% reduction to the claimant’s damages.

Self-Assessment Exercise 1

What must a defendant prove in a defence of contributory negligence?

Apportionment
The present position of law is that contributory negligence is a partial defense in an action for negligence and has the effect of reducing the damage recoverable by the plaintiff by the percentage of his contribution. This position is statutorily recognised in Nigeria. The effect of a successful plea of contributory negligence would be the apportionment of blame between the culprits/parties and consequently the apportionment of liability or damages recoverable in the suit. That is all a

successful plea of contributory negligence is about. It means that the parties must share the blame and consequently the damage.

The Court of Appeal in *Learn Africa Plc v. Oko* (2018) LPELR-45181(CA) stated:

> Where the plea of contributory negligence succeeds, the Court would apportion blame between the parties. The principle is that the measure of damages is to be apportioned according to the proportion, in which the parties are responsible. See Ololo v. Nig. Agip Oil Ltd. (2001) 13 NWLR (PT. 729) 88. I am of the view that the fact that a Defendant is setting up that defence, is a sign post to the fact that he has apparently seen the need to contend that the blame should not be his alone but that of the victim also…The conclusion of the Court below that the plea of contributory negligence if anything is a tacit admission that Appellant was primarily guilty of negligence fell short of the expectation of the law on this issue of contributory negligence. The Court below ought to have given attention to that plea because it is his defence and make a finding on whether the plea was successful or not. This was not done so the sum of N20m general damages cannot be allowed to stand without occasioning a miscarriage of justice. Where a plea of contributory negligence is made the Court must resolve it." Per Stephen Jonah Adah, JCA (Pp 26 - 28 Paras C - C)

However, it should be noted that the contributory negligence must be pleaded, if the defendant is to rely on it. The onus of pleading such negligence lies on the defendant. See *Walkelin v. L & S. W. Ry* (1886) 12 AC 41 at 47. In determining the extent of the plaintiff's contribution, the court have wide discretionary powers since what is just and equitable are not defined by the statutes. The criteria used were neither static nor absolute. In some cases, the courts stress the causation factor. See *Harvey v Road Haulage Executive* (1952) 1 K.B 120.

In *Stepney v Gypsum Mines Limited* (1953) All ER 633 at 682, Lord Reid stated that in determining what is just and equitable, "a court must deal broadly with the problem of apportionment and in considering what is just and equitable, must have regard to the blameworthiness of each party. But the claimant share in the responsibility for the damage cannot, I think be accessed without considering the relative importance of his act in causing the damage apart from his blameworthiness".

The SCN in *Ololo v Agip* [2001] 13 NWLR (Pt. 729) 88, stated as follow:

> The measure of damages be apportioned according to proportions in which the parties are responsible for the damage taking into account both causation and blameworthiness and the amount recoverable must be reduced to such an extent as the court thinks fit having regard to the plaintiff's share of in the responsibility for the damage.

In this regard, what is important is the assessment of the extent of the plaintiff's contribution, the importance of his act as distinct from his fault in causing the damage.

Moreover, in interpreting the phrase 'having regard to the claimant's share of responsibility to the damage' under statute blameworthiness is the central factor. Thus, Denning L.J (as he then was) in the case of *Davies v Swan Motors* (1969) 2 KI. B 291 stated that:

> Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff nevertheless the amount of reduction does not depend solely on the degree of causation… This involves a consideration of the causation potency of a particular factor but also its blameworthiness.

Thus the blameworthiness of the plaintiff determines the extent to which damage due to him will be reduced.

The court sometimes adopt a comparative approach in sharing the damage between the plaintiff and the defendant. Thus, the one with greater measure responsibility will have to bear greater liability.

In *Darwan v Nutt* (1961) 1 WLR 253, where the issue was the appropriate method of apportioning damages between the defendant driver and the plaintiff and her husband, the court stated that:

> In the case of a driver who was most reluctant to drive and practically refused to do so, and finally succumbed to the urgent entreaties, and possibly the bribe of the passenger. I think that one could very properly apportion a measure of a greater degree of responsibility to the passenger.

In this case, damage was reduced by seventy percent since the plaintiff's blameworthiness in persuading a reluctant person to drive outweighed that of the defendant. See *Owens v Brimell* (1977) 2 WLR 943.

There is no hard and fast rule for apportioning damage and it seems a lot of discretion is left to the court by the statutes. This appears to make the likelihood of abuse too glaring. However, bearing in mind that a discretion can only be exercised both judicious and judicially, the factors governing their exercise limits the extent to which they can unnecessarily be applied.

What factor(s) will affect/reduce the damage recoverable by a claimant/plaintiff where a defence of contributory negligence is raised by the defendant?

2.4 Summary

In this unit, we learnt about

a. Nature and main elements of contributory negligence.
b. Cases where a lower standard is expected for contributory negligence.
c. Apportionment in contributory negligence.

2.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjE-d-1r_WAAxXnQUEAHUT3AnoQFnoECCsQAQ&url=https%3A%2F%2Fwww.armstronglegal.com.au%2Fcommercial-law%2Fnational%2Ftort-law%2Fcontributory-negligence%2F&usg=AOvVaw0Kl07aDWRwe5OR08iavV9M&opi=89978449

2.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

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.

Unit 3 : Necessity or Emergency

Unit Structure

3.1 Introduction

When the plaintiff brings an action against the defendant for a specific tort, proving the existence of all the essentials of that tort, the defendant would be liable for the same. The defendant may, however, in such a case, avoid his liability by using any of the defences available against the tort that he has committed. One of such defences is necessity or emergency.

3.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the defence of necessity or emergency under tort

3.3 Necessity or Emergency

The complete defence of necessity applies in cases of trespass (personal, property or goods). It is a justification defense for a person who acts in an emergency hat he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's action. In some cases even damage intentionally done may not involve the defendant in liability when he is acting under necessity to prevent a greater evil. The defence of necessity, if successfully raised enables a defendant to escape liability for the intentional interference with the security of the plaintiff or property on the ground that the acts complained of were necessary to prevent greater damage to the plaintiff, his property, to the defendant himself or to the community at large. Bryan A. Garner, Black's Law Dictionary, (11th edn 2019) 1243

In raising the defence of necessity, it is essential to show the presence of the following to prove the necessity defence:

a. The damage caused was less than the harm that would have occurred otherwise.
b. The person reasonably believed that his actions were necessary to prevent imminent harm.
c. There was no practical alternative available for avoiding the harm.
d. The person did not cause the threat of harm in the first place.

When a person asserts a necessity defence, it is up to the court's discretion to decide if it can be applied in the given situation or not and if the person can be excused from all liability or not. It is very difficult to invoke this defence as it becomes very difficult to prove whether there was a necessity or not. In most cases, such emergency situations arise when other persons are not present and so proving the need to break the law for a certain urgency is hard.

In the case of *Cope v. Sharpe* (No 2) [1912] 1 KB 496, the defendant entered the plaintiff's land to prevent the spread of fire to the adjoining land and prevent the damage which could have been caused. The plaintiff, in this case, sued the defendant for trespass but since the defendant's act was considered to be reasonably necessary to save the property and from real and imminent danger, the court held that the defendant was not liable for trespass as he has committed an act of necessity.

In *I.M.N.L v. Nwachukwu* (2004) LPELR-1526(SC), the Court decoded that tt is also obvious that negligence is only actionable if actual damage is proved. There is no right of action for nominal damages in the tort of negligence. In *Munday Ltd. v. L.C.C.* (1916) 2 K.B. 331 at 334 Lord Reading, C.J. stated:- "Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist." Per Dahiru Musdapher, JSC [B – D] 22

Example Box 1

Someone is driving on the M1 Motorway and his or her vehicle was struck by lightning. Because of the lightning strike, the driver lost control of the vehicle, ended up changing lanes and hitting another car which caused the accident injuries to the plaintiff. In this scenario, if the defendant can show that his loss of control of the vehicle was really because of the lightning strike and for no other reason and there was nothing that the defendant could have done to prevent that accident, then, this particular defence will succeed.

Necessity Defence

Self-Assessment Exercise 1

When raising the defence of necessity, what factors must be proved by the defendant?

When there is a case of necessity or emergency, a medical practitioner would be justified to administer treatment or carry out necessary operation without consent. However, what amounts to an emergency is a question of fact, to be determined by court based on the facts of each case. However, there are some

guiding rules as to what is an emergency or when an emergency exists, to justify trespass to the person of a patient by giving medical care without consent. Indicators of an emergency are many and include:

1. Medical care must be essential and urgent in the circumstances. In other words, lack of medical care must endanger the patient's life or limb; or
2. The patient must be unfit or incapable of giving consent; and
3. The relatives who are in position to give consent must not be easily accessible.

There are two types of defence of necessity: private necessity and public necessity. In the realm of intentional torts, private necessity usually involves trespassing or damaging another person's property to protect yourself, your property, or a small number of people. Furthermore, you usually have the right to continue trespassing or using the person's property for as long as the emergency is still ongoing. The defence of private necessity is a partial defence which is available to the defendant. This means the defendant who commits trespass and claims the defence of private necessity, must still pay for any harm caused to the plaintiff's property by his trespass. However, the defendant is not liable for nominal or punitive damages.

Public necessity, on the other hand, means any action taken by public authorities/officials or private individuals to avert a public calamity which had a tendency to harm the public at large. This is applied when any trespass is done by a person to protect a greater community. Public necessity is an absolute defence which means that the persons who have trespassed are not required to pay any compensation to the owner of the property. Generally, public employees like firefighters, police, and army personnel claim public necessity.

So, what indicators of an emergency would justify trespass to the person of a patient without consent by a medical care practitioner?

3.4 Summary

In this unit, we learnt about

a. The defence of necessity in tort
b. Requirements for proof of necessity of defence

3.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjasZHrsPWAAxVwVEEAHdtaBxUQFnoECB4QAQ&url=https%3A%2F%2Fwww.studysmarter.co.uk%2Fexplanations%2Flaw%2Fuk-criminal-law%2Fdefence-of-necessity%2F&usg=AOvVaw1Xnkt8r3UW1Bvv2gSBBMzT&opi=89978449

3.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In raising the defence of necessity, the defendant must prove:

a. The damage caused was less than the harm that would have occurred otherwise.
b. The person reasonably believed that his actions were necessary to prevent imminent harm.
c. There was no practical alternative available for avoiding the harm.
d. The person did not cause the threat of harm in the first place.

Unit 4 : Novus Actus Interveniens

Unit Structure

4.1 Introduction

Causation ordinarily consists of two elements that determine whether or not a party can be held liable for the damages caused to another. These elements are factual causation and legal causation. However, another element of causation that is often overlooked is that of *novus actus interveniens*. *Novus actus interveniens* is Latin for a "new intervening act".

4.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the defence of *novus actus interveniens* under tort

4.3 Novus Actus Interveniens

4.3.1 Novus Actus Interveniens

In a tortious action for negligence, *Novus actus interveniens* is any intervening act that can sever the legal connection between a defendant's actions and the harm suffered by the plaintiff, with the effect that the defendant cannot be deemed legally responsible for the plaintiff's harm or damage. A *novus actus* breaks the causal chain between the initial wrongdoer's action and the liability that is imputed to him or her as a result thereof. There is a new act intervening, when for instance, after a medical personnel’s breach of duty by a wrongful act or omission, an independent event takes place which causes the death of the plaintiff, aggravates his injury or causes other injury or damage to the plaintiff. The new act intervening may be the:

1. The action of the plaintiff, in which case, it may become the new sole cause, or be a contributory cause only;
2. The act of a third party.

A requirement for an act or omission committed after the initial wrongdoer's act to constitute a *novus actus* is that the secondary act was not reasonably foreseeable. If the subsequent event was reasonably foreseeable at the time of the initial wrongful act, it is not to be considered as a *novus actus* capable of limiting the liability to be imputed on the initial wrongdoer.

Self-assessment Exercise 1

What is *Novus actus interveniens* in an action for negligence?

In the case of *Haynes v. Harwood* [1935] 1 KB 146, the defendant owed a two-horse van which was left unattended by his servant on a busy street. A kid threw stones on the horses due to which they bolted on the street carrying the van with them. A police constable while trying to stop them suffered several injuries for which he claimed compensation. Now, the important question that arose, in this case, was whether this act of intervention by the rescuer is *novus actus interveniens*, which breaks the chain of causation so that the initial negligence of the defendant be considered to be remote cause of the rescuer's injury? Here, it was held that the rescuer's act was not a kind of act that could make the defendant's negligence a remote cause for the plaintiff's injury. The defendant pleaded that his negligence is a remote cause while the child's mischief was the proximate cause for the damage, however, the Court observed that such a mischief on the part of a child was reasonably foreseeable due to which it could not be considered a *novus actus interveniens* and defendant was held liable.

In another case of *Lynch v. Nurdin* 1 QB 29, (1841) Arn and H 158, the defendant left his horse cart on the road. Certain children started playing with it and one child jumped on the cart setting the horse in motion, due to which he suffered injuries. The Court held that although the misconduct of the child was *novus actus interveniens*, the proximate cause of the accident was defendant's negligence because such mischievous behaviour on the part of children could very well be apprehended especially when you have left an open opportunity for them to do so.

In the case of *Tanimu & Anor v Rabiu & Ors* (2016) LPELR-45469(CA) the Court of Appeal held that

> ...where the candidate is no longer a candidate contesting an election but is ensconced in his legislative office, the person challenging his contesting the election on the ground of the alleged falsity of affidavit or document cannot succeed for the simple reason that there is no candidate contesting an election to speak of. The erstwhile candidate has crossed the Rubicon of electoral contest and is now an elected member of the legislature. The cause of action abates due to a *novus actus interveniens*, that is, an act or event that breaks the causal connection between a wrong or crime committed by the defendant and subsequent happenings thereby relieving the defendant from responsibility for those happenings. In the circumstances therefore, the proverbial horse has bolted from the stable and shutting the stable to prevent its escape has become a pointless exercise." Per DANIEL-KALIO ,JCA [A-F] 31

A *novus actus* is not confined to either factual or legal causation only, and can interrupt the causal chain at either point. In respect of factual causation, a *novus actus* interrupts the nexus between the wrongful act of the initial wrongdoer and the consequences of his act to such an extent that it frees him of the liability of his actions. However, when assessing *novus actus* in respect of legal causation, regard must be had to the aspects of policy, fairness, reasonableness and justice in order to determine whether liability for the initial wrongful act can still be imputed to the initial wrongdoer, and whether the causal

chain has been broken. A *novus actus* therefore disrupts the "directness" aspect of the initial act and the subjective test of legal causation cannot be fulfilled.

As a *novus actus* is an "independent" intervening act, it can be occasioned by anyone or anything other than the initial wrongdoer. This general category also includes the injured party him or herself, another third party or even an act of God. Therefore, an injured patient who walks on a slippery floor after having been injured thereafter occasioning further surgery will have created his own *novus actus*, or where a storm caused further and greater damage to a property after it has been damaged by a wrongdoer will also be viewed as a *novus actus*.

Novus actus is often utilised as a defence by initial wrongdoers who wish to prove that their liability is limited or non-existent and should be imputed on another party. This must be distinguished from contributory negligence. If an act or omission occurs before the incident that gives rise to the injury, then that is classified as contributory negligence, such as when a passenger in a motor vehicle fails to wear a seatbelt, he or she is contributory negligent. Whereas an independent act that occurs after the damage-causing incident is a *novus actus*, such as when a passenger is hospitalised after a motor vehicle collision and sustains further injuries in hospital.

However, in some instances, the court may hold both the defendant and the doer of the new act intervening liable as joint tortfeasors, that is, each was contributory negligent and both of them contributed to the occurrence of the injury.

Is there a difference between contributory negligence and novus actus?

4.4 Summary

In this unit, we learnt about

a. The defence of *novus actor interveniens* and circumstances under which it will be applicable.

4.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)

Ese Malemi, Law of Torts (Princeton, Lagos 2008)

F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwid0ZiqsvWAAxViSkEAHYoLD_4QFnoECCQQAQ&url=https%3A%2F%2Fwww.mills-reeve.com%2Finsights%2Fpublications%2Fnovus-actus-%25E2%2580%2593-intervening-acts-as-an-element-of-ca&usg=AOvVaw1KQVD0QI8E4ypiJ1aZgzLI&opi=89978449

4.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

A *novus actus interveniens* in an action for negligence is an act that breaks the causal chain between the initial wrongdoer's action and the liability that is imputed to him or her as a result thereof.

Unit 5 : Limitation of Actions and Illegality

Unit Structure

5.1 Introduction

A defendant in a tort action in negligence can also set up the defence of limitation of action, where the action is statute barred or illegality of the action. These will be discussed below.

5.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the defences of limitation of action and illegality in relation to the tort of negligence

5.3 Limitation of Actions and Illegality

The law dictates that there is a limit on how much time can pass after a claim arises before it becomes inactionable. This is generally ascribed to two factors. Firstly, the more time that passes after a claim arises, the harder it is to deal with them. Injuries heal, damage is repaired, and records of events are destroyed or forgotten by witnesses. This makes such claims onerous and expensive to deal with. Secondly, defendants have a right to eventually consider themselves finished with a particular dispute or conflict, and it is just to expect claimants to bring a case in a timely manner (and to prevent them from holding the potential claim over the heads of defendants, or using it as a tool to economically harm someone when they are most vulnerable).

The limitation period is a creation of laws, which vary from jurisdiction to jurisdiction. The statute of limitation for each state stipulates the time frame within which actions can be initiated, and each subject has its own statute. For example, sections 7 and 8(1) of the Limitation Act, Abuja provides respectively that actions in damages for negligence and slander must be commenced within 3(three years) of its occurrence

In *INEC v Ogbadibo Local Government & Ors* (2015) LPELR-24839 (SC) the SCN set out the yardstick for determining whether ac action is statute-barred as follows:

i. The date when the cause faction occurred;
ii. The date of commencement of the suit as indicated in the writ of summons

iii. Period of time prescribed to bring the action, which must be ascertained from the relevant law in question

Illegality, sometimes referred to as '*ex turpi causa*' (from a foul cause), is a complete defence essentially asserting that the claimant's harm occurred whilst in pursuit of a illegal endeavour. The *Black's Law Dictionary* (11th edn 2019) 896 defines illegality as an act that is forbidden by law. This should not be regarded as a rule that prevents all claims from succeeding - if this were the case then every road user not wearing a seatbelt or speeding would have their claims in tort barred. Instead, the defence tends to only by applied by the courts when it is just to do so, and as a prerequisite the harm must be closely linked to the criminal act that the claimant is engaged in.

See *Cummings v Granger* [1977] QB 397. The claimant was a burglar who was in the process of robbing a scrap yard. Unbeknownst to the claimant, an untrained Alsatian was loose in the yard to deter intruders. The dog bit the burglar, who then sued the defendant. The claim was denied by the courts on the basis that the claimant was in the process of a criminal enterprise, and his injury could be connected to it.

In the case of *Jegede & Anor v INEC & Ors* (2021) LPELR-55481 (SC) [E-F] 174, Peter-Odili JSC while delivering his dissenting judgment said "...The situation on ground calls to mind the admonition of Eko JSC in *Nwosu v APP & 3 Ors* (2020) 16 NWLR (pt. 1749) 28 thus: "No person is allowed to benefit from illegality as illegality confers no right." By the same token, the Supreme Court is now called upon to authenticate an illegality and cloth it with legality which power this Court does not have.

Self-assessment Exercise 1

What benchmark would the courts use to determine whether an action is statute-barred?

The three primary elements of an illegality defence were identified by Sir Stuart-Smith were:

a. The harm must be linked inextricably to the claimant's criminal enterprise,
b. The defence must be justified by public policy, and
c. The criminal conduct must be sufficiently serious.

It is notable that Stuart-Smith notes that the defence is rooted in public policy - this essentially means it is a defence which is available to the judiciary to use, rather than one which the defendant can actively rely upon. Whilst this provides the judiciary with a lot of discretion, it also allows the defence to be used even when the defendant has themselves acted poorly. In essence, it allows the court to throw out a claim because it would be unjust to allow the claimant to use tort law in such a manner.

So, will all claims for negligence fail due to the defence of illegality?

5.4 Summary

In this unit, we learnt about

a. The defence of limitation of action and illegality in an action for negligence.

5.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

5.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

In *INEC v Ogbadibo Local Government & Ors* (2015) LPELR-24839 (SC) the Supreme Court of Nigeria set out the standard for determining whether ac action is statute-barred as follows:

a. The date when the cause faction occurred;
b. The date of commencement of the suit as indicated in the writ of summons,
c. Period of time prescribed to bring the action, which must be ascertained from the relevant law in question

MODULE 6 : Damages

Module Structure

Unit 1

1.1 General Introduction

Unit Structure

1.1 Introduction

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 different kind of damages that exist in the law of tort.

1.2 Learning Outcomes

At the end of this unit, you should be able to:

- Explain the different kind of damages

1.3 General Introduction

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. In *Ibikunle & Anor v Air France* (2015) LPELR-15773 (CA) the Court of Appeal held that compensatory damages, certainly such damages will not be available to them because compensatory damages are awarded to indemnify a person for a particular loss suffered as a result of the conduct of the Respondent, it provides a plaintiff with monetary amount necessary to replace what was lost and nothing more. Per Abubakar, JCA [E-A] 37-38

2. Nominal Damages also termed contemptuous damages or diminutive 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.

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. *Ugwu & Ors v NB PLC* (2020) LPELR-50858(CA); *Salini Nig. Ltd v Lifewire Industries Ltd & Anor* (2019) LPELR-51433(CA)

Note that in the case of tort not actionable per se, for example, negligence, if the plaintiff fails to establish a loss, the action will be dismissed. The practical significant of nominal damages is that the plaintiff thereby establishes a legal right. The judgment has the effect of a declaration of a legal rights and may deter future infringement or may enable the plaintiff to obtain an injunction to restraint a repetition of the wrong.

Note further that where a party acts contemptuously towards the Court, it is open to the Court to set aside the act. The Court may, upon proper application, commit the contemnor for the contempt pursuant to Section 72 of the Sheriffs and Civil Process Act and its inherent power. The remedy for contemptuous conduct does not include award of damages by the Court in favour of the opponent of the contemnor. *Okhizumate & Anor v Ukabi & Ors* (2021) LPELR-54139(CA) Per Ekanem, JCA [C-E] 28.

Self-Assessment Exercise 1

What is the difference between compensatory damages and nominal damages?

3. 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 *Think Ventures Ltd & Ors v Spice and Regler Ltd & Anor* (2020) LPLER-50296(CA), the Court of Appeal held thus: Exemplary damages has been described as an intermix of general and punitive damages. While speaking on the nature of exemplary damages, the Supreme Court in *Eliochin (Nig) Ltd & Ors v. Mbadiwe* (1986) LPELR-1119 (SC) held as follows:

> ...The primary object of an award of damages is to compensate the plaintiff for the harm done to him or a possible secondary object is to punish the defendant for his conduct in inflicting that harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which go by various names to wit; exemplary damages, punitive damages; vindictive damages, even retributory damages can come into play whenever the defendant's conduct is sufficiently outrageous to merit punishment as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law and the like. Per Aboki, JCA [A-F] 38-39

According to the Black's Law Dictionary (11th edn 2019) 491, exemplary or punitive damages are also termed vindictive damages, presumptive damages, added damages, aggravated damages, speculative damages, imaginary damages, smart money, punies, punitory damages. But exemplary damages, to some extent, are distinct from aggravated damages whereby the motives and conduct of the defendant aggravating the injury to the plaintiff would be taken into consideration in the assessment of compensatory damages. In *Julius Berger (Nig) Plc & Anor v Ugo* (2015) LPELR-24408 (CA the Court of Appeal per Oho, JCA held that exemplary (or punitive) damages are intended not primarily to compensate the plaintiff but rather to punish the defendant and to deter him from similar behaviour in the future. Exemplary damages are punitive damages and it is awarded where a party to the suit can show or establish by evidence that the injury or loss suffered is due to the malicious act of the party against whom he is claiming 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 contempt of the plaintiff's right or disregard of every principle which actuates the conduct of a gentleman. See *J.M. Johnson v. Mobil* (1959) WNLR 128 at 134 and *F.R.A. Williams v. Daily Times* (1990) 1 NWLR Part 124 at 31. It is now established that exemplary damages may be awarded only in the following three circumstances, namely: (a) Where the plaintiff has suffered from oppressive, arbitrary or unconstitutional action by a servant of the Government. See *Rookes v. Barnard* (1964) A.C. 1129 AT 1226; *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. See *Drane v. Evangelou* (1978) 1 W.L.R. 455; *Cassell & Co. Ltd. v. Broome* (1972) A.C. 1027. Aggravated Damages, on the other hand, 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 and not the injury sustained.

Although compensatory damages and punitive damages are typically awarded at the same time by the same decision-maker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as 'quasi-criminal' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing. A jury or judge assessment of the extent of a plaintiff's injuries is essential a factual determination, whereas its imposition of punitive damages ia an expression of its moral condemnation. Black's Law Dictionary (11th edn 2019) 491

In earlier case *J.M. Johnson v. Mobil* (1959) WNLR, 128 at 134 and *William v. Daily Times* (1990) 1 NWLR (Pt 124) 31 the courts had described the conduct of the defendant as being 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.

Other instances where exemplary damages may be awarded include:

(a) where the plaintiff has suffered from oppressive, arbitrary or unconstitutional action by a servant of the government. See *Rookes v. Barnard* (1964) A.C. 1129, 1226, per Lord
Devlin; *Garba v. Lagos City Council* (1974) 3 CCHCJ 297, 309;

(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. *Drane v. Evangelou* (1978) 1 W.L.R. 455

So, highlight instances where exemplary or punitive damages would be most suitable to be awarded by the courts

4. General and Special Damages

Both of these are species of compensatory damages. General damages are that which the law implies or presumes to have occurred from the wrong complained of. They are presumed to flow from the immediate, direct and proximate result of the wrong complained of. All the Court need do in exercising its discretion is to calculate what sum of money will be reasonable in the circumstance of the case … it may however be unwise for a plaintiff to rely heavily on inferences and presumptions of

damages, for a failure to produce any evidence at all may result in an award of small or even nominal damages. This is because the proper approach in such circumstances is to regard an injuria or wrong as entitling the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such judgment will be for nominal damages only ... Quantum of damages like any other issue in our civil procedure is a matter of evidence; where one gives no evidence that can help in the assessment of damages, he is normally entitled to nominal damages. *Salini Nig. Ltd v Lifewire Indusries Ltd & Anor* (2019) LPELR-51433(CA) Per Idris JCA, [F-B] 55-59.

Special damages have been defined as those damages which are the actual but not the necessary result of the injury complained of which in fact, follow as a natural and proximate consequence in the particular case, that is, by reason of special circumstances and conditions. Special damages are such as the law will not infer from the nature of the fact. They do not follow in ordinary cause. They are exceptional in their character and they must be claimed specifically and proved strictly. See generally *Ahmed & Ors v. CBN* (2012) LPELR - 9341 (SC); *Kopek Construction Ltd v. Johnson Koleole Ekisola* (2010) LPELR - 1703 (SC); *Calabar East Co - Op Thrift & Credit Society Ltd & Ors v. Ikot* (1999) LPELR - 826 (SC); *Yalaju & Ors v. Adidi & Ors* (2022) LPELR-56693(CA) Per Obaseki-Adejumo, JCA [E-D] 43-44.

The burden to specifically plead and strictly prove special damages is on a party who claims it, although the tendering of documentary evidence in the form of receipts in proof of special damages could be a good mode of discharging the burden on the claimant, it is however not an indispensable or exclusive means of poof of special damages. See *Produce Marketing Boaro v. A.O. Adewunmi* (1972) 11 SC 111/24, where it was held: "The pleadings and evidence in the claim for special damages must be such that they are of such character and quality for assessment and quantification." Also in the case of NBB Co. Ltd v. A.C.B. Ltd, the Supreme Court had stated the requirement as follows: "It is trite law that where the claimant specifically alleges that he suffered special damages, he must per force, prove it. The method of such proof is to lay before the Court concrete evidence demonstrating in no uncertain terms easily cognisable, the loss or damage he has suffered and being claimed. A damage is special in the sense that it is easily discernible and quantified. See generally *FCDA & Anor v. MTN & Anor* (2016) LPELR- 41248(CA) Per Garba JCA." Per MUSTAPHA ,JCA [F-E] 6-7.

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.

1.4 Summary

In this unit, we learnt about

a. The various kind of damages in the law of tort
b.

1.5 References/Further Readings/Web Sources

Gilbert Kodilinye and Oluwole Aluko, the Nigerian Law of Torts (Spectrum, Ibadan, 1996)
Ese Malemi, Law of Torts (Princeton, Lagos 2008)
F C Nwoke, Law of Torts in Nigeria, (Mono Expressions, Jos, 2003)

1.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

Compensatory damages are intended to compensate for injury while nominal damages are awarded to commemorate the plaintiff's vindication in court.

Unit 2 : Assessment of Damages in Particular Torts - Negligence

Unit Structure

2.1 Introduction

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).

2.2 Learning Outcomes

At the end of this unit, you should be able to do:

- Assessment of damages under the tort of negligence

2.3 Assessment of Damages in Particular Torts - Negligence

Damages in the tort of negligence falls 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

In personal injury cases, two main factors have to be taken into consideration in assessing damages in cases of liability. These are (a) the financial loss resulting from the injury (b) the personal injury, involving not only pain and suffering, but also the loss of the pleasures of life *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-E] 16. The personal injury otherwise known as non-financial or future financial losses are in the nature of general damages. See *Rite Foods Ltd & Anor v Adedeji & Ors* (2019) LPELR-47698(CA) Per Ogakwu, JCA [B-D] 23-26

(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 judgment. 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. 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).

With regards to assessment of damages in cases where loss is of a financial nature, the SCN held in *Soetan & Anor v Ogunwo* (1975) LPELR-3089 (SC) thus

> "We take the view that where, as in this case, the loss is in itself of a financial character, the assessment of damages is primarily a matter of arithmetic. It seems to us that in such cases, the plaintiff, subject to the rule that special damages should be strictly proved, is entitled in principle to full indemnity and no more. In other words, such plaintiff is not entitled to be doubly compensated under the guise of general damages. It has been well said that a Court of law is not a donor of charities; it gives to either party only that which the justice of his case demands." Per Ibekwe, JSC [C-E] 11

The term "strict proof" in a claim for special damages means exactly what it connotes i.e. strict proof of the quantity and value of each item of property allegedly damaged." *Oyegade & Ors v Oyelowo & Anor* (2012) LPELR-7893(CA) Per Alagoa, JCA [B-E] 26

(ii) *General damage*

The court of Appeal held in *Ogundipe v Nitel & Ors* (2015) LPELR-24920(CA) that the term general damages covers all losses which are not capable of exact quantification. 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.

Per Ndukwe-Anyanwu, JCA [A-D] 25; See also *Lagos City Council v. Ogunbiyi* (1969) 1 All NLR. 297

"In respect of assessment of damages for personal loss, which involves pain and suffering, and the loss or dimunition of the enjoyment of life, the term "personal loss" denotes every kind of harm and disadvantage which flows from a physical injury, other than the loss of money or property. It therefore necessarily includes the loss or impairment of the integrity of the body; pain and suffering both physical and mental loss of the pleasures of life, actual shortening of life, and mere discomfort or inconvenience." *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-E] 18

In assessing damages both the, financial and personal loss factors should be taken into account and compensation given for both types of loss. However damages should only be given for every admissible factor. Although the Judge directs his mind to the factors which are established on the facts the award of damages is made in a single global sum. This was the approach adopted in *Agaba v. Otobusin* (1961) All NLR 299 and *Lagos City Council v. Ogunbiyi* (1969) 1 All NLR. 297. This has been the approach in the English Courts as far back as in 1879 in Phillips v. South Western Rail

Co. (1879) 4 Q.B.D. 406 at p. 407 and more recently in *H. West & Son Ltd. v. Shephard* (1964) A.C. 326. The Courts of this country have adopted the same approach. In this last mentioned case Lord Pearce said, "if a plaintiff has lost a leg, the court approaches the matters on the basis that he has suffered a serious physical deprivation, no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increases the assessment..... These considerations are not dealt with as separate items but are taken into account by the Court in fixing one inclusive sum for general damages." *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [E-D] 18-19

Considering all the elements together before arriving at a single global sum is done to avoid the possibility of over compensation by making more awards for the same factor and to consider the effect of the injury sustained as a whole. In *Agaba v Otobusin* (2961) 1 All NLR 299, 302, Bairamian F.J said: "With respect to the learned Judge, it is clear that he has, unwillingly, granted compensation more than once for what are substantially the same matters, besides being overgenerous and over-looking what should be the dominant point, namely - that the plaintiff has not suffered any disability to his earning capacity; ... " See *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [G-B] 19-20.

It must be recognised and conceded that the fullness and the adequacy of damages awarded as compensation will in each case depend on proved solid facts of the case and a just and fair assessment of the effect of the injury complained of. Damages are assessed as a lump sum and once for all, not only in respect of loss accrued before the trial but also in respect of prospective loss – see British Transport Commission v. Gourley (supra). It is the duty of the Court to award as perfect a sum as was within its power based on the established facts, accuracy and certainty are often unattainable *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [B-F] 17

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. See Taylor CJ in *Anumba v. Shohet* (1965) 2 All NLR 183, 186. The rule, however, is that even in such cases, where the original position could not be restored the Court must endeavour to give a fair equivalent in money, so far as money can be an equivalent for the loss or injury suffered. But that is another matter." *Soetan & Anor v Ogunwo* (1975) LPELR-3089 (SC) Per Ibekwe, JSC [F-B] 10-11

Soetan & Anor v Ogunwo (1975) LPELR-3089 (SC) Per Ibekwe, JSC [E-C] 11-12

"It is admittedly the practice that awards in similar cases within the jurisdiction is taken as a guide in the assessment of the damages - See *Rushton v. National Coal Board* (1953) 1 Q.B. 495, *Ward v. James* (1966) 1 Q.B. 273. Although the award of damages is basically a conventional figure derived from experience and from awards in comparable cases, allowance ought to be made for increases in the rate of earning and for inflation in the value of money earned, and the possibility of early retirement. Again the tendency of wages to rise are also matters to be taken into account. However since some of those are factors which are merely speculative, it is safer in the assessment of future earnings to base damages on the rate in force at the time." *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-F] 22. See also *Ejisun v. Ajao* (1975) N.M.L.R. 4, 7.

Again, with regard to the nature of a claim for damages in personal injury cases. The Court of Appeal held in *Julius Berger (Nig) Plc & Anor v. Ugo* (2015) LPELR-24408(CA) thus:

As it relates to the question of pain and suffering, this head of claim or head of damages cover past, present and future; pain, physical and mental anguish including fear of future treatment or anguish caused by life expectancy being shortened. See the case of WISE vs. KAYE (1963) 1 QB. 639. In the case of loss of Amenities of life, it will be important to note that as a head of general damages this relates to the curtailment of a plaintiff's enjoyment of life and the inability to pursue hobbies. Usually any injury which prevents the Claimant from pursuing the activities, such as leisure, sports and pastimes, or natural function, which he or she was pursuing before or prevents or impairs the use of his or her natural faculties or senses or any part of his or her body- can all be compensated for as loss of amenities. See the case of WEST vs. SHEPARD (1964) AC 326 … Loss of amenities also includes inability to pursue an enjoyment occupation. See case of UBA LTD & ANOR. vs. MRS. NGOZI ACHORU (1990) SC.33/1988; COOK vs. J.L. KIER & CO. (1970)1 W.L.R. 774 It is well settled that the heads of claim for pain and suffering, and for loss of amenities of life are two distinct and separate claims arising from the same damage and injury. Per Oho, JCA [A-E] 92-93

Self-Assessment Exercise 1

In personal injury cases, what two main factors have to be taken into consideration in assessing damages?

(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 Fatal Accident Law or the Tort Law of each state. For instance, the applicable law in Lagos State is the Fatal Accidents Law, Chapter F2 Laws of Lagos State, 2015 and in Oyo State Tort Law, Cap 124 Laws of Oyo State of Nigeria 1978

Persons entitled to benefit

Section 1of the Fatal Accidents Law of Lagos State provides to the effect that

(1) Where after the coming into operation of this law, the death of a person is caused by wrongful act, neglect or default, and the wrongful act, neglect or default is such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

(2) Every action under this section shall be for the benefit of the members of the immediate family of the deceased person and will

According to section 8(1) of the Fatal Accidents Law of Lagos State, immediate family for a deceased person not subject to a system of customary law includes the widow or widow(s) as the case may be; the widower, any parent, and any child. For a deceased person subject to a system customary law but not being Muslim Law, in addition to the already mentioned persons, the surviving brother,

sisters, stepbrothers and stepsisters. For a deceased person subject to a system customary law known as Muslim Law, in addition to the already mentioned persons, the person entitled to share in the award of diya prescribed by Muslim Law for involuntary homicide. Parent includes grandfather, grandmother, stepfather and stepmother.

Section 8(2) of the Fatal Accidents Law of Lagos State provides to the effect that for the purpose of this law, a person is deemed to be the parent or a child of the deceased person notwithstanding that the person was only related to the deceased illegitimately; and in deducing relationship under this section an illegitimate person will if acknowledged as his by the reputed father, betreated as the legitimate offspring of the mother and reputed father. As fact back as 1990, the SCN held in Jenyo & Anor v Akinreti & Anor (1990) LPELR-1605(SC) that under the Fatal Accident Act (which was applicable in Lagos), damages are awarded to compensate the defendants of the deceased for loss of actual or prospective pecuniary benefits derived from the relationship between them. Per Abubakar Bashir Wali JSC [F-G] 40. The defendants in this context will refer to the immediate family of the deceased person.

Who can sue or bring the claim?
The claim shall, (a) if the deceased person was not subject to a system of customary law, be brought by and in the name of the executor or administrator of the deceased person; or (b) if the deceased person was immediately before his death subject to a system of customary law relating to estate, be brought at the option of his immediate family, by and in the name of such person as the court is satisfied is under the customary law, entitled or empowered to represent the deceased person or his estate. (3) If there is no executor or administrator, or where there is an executor or administrator but no action is brought by the executor or administrator within six months after the death of the deceased person, then action may be brought by and in the names of all or any of the persons for whose benefit the action would have been, if it had been brought by the executor or administrator; and every action brought shall be for the benefit of the same persons and be subject to the same regulations and procedure, as nearly as may be as if it had been brought by an executor or administrator. Jenyo & Anor v Akinreti & Anor (1990) LPELR-1605(SC) Per Agbaje, JSC [E-E] 15-17 See generally section 1 (2) (a) and (b) and (3) of the Fatal Accidents Law of Lagos State. Note that section 2(1) of the Fatal Accidents Law of Lagos State provides that the action under the law must be brought within three years after the death of the deceased person.

Assessment and apportionment of damage
4(1) of the Fatal Accidents Law of Lagos State provides that subject to the provisions of this section, the Court may, in assessing and apportioning damages in an action brought under this law, award such damages as it may think proportionate to the injury resulting from the death of the deceased person to the persons respectively for whom and for whose benefit such action is brought; and the amount so recovered, less the costs not recovered from the defendant, shall be apportioned in such shares as the court directs amongst the persons entitled: Provided that where the deceased person was, immediately before his death, subject to any system of customary law relating to estate, the court shall have regard to the particular system of customary law, and decide which members (if any) of the immediate family of the deceased person are entitled to share in the damages, and shall apportion the shares amongst the persons entitled. (2) No account shall be taken of any sums paid or payable on the death of the deceased person under any contract of assurance, and the award of damages may include reasonable funeral expenses of the deceased person incurred by the persons for whose benefit the action is brought." *Jenyo & Anor v Akinreti & Anor* (1990) LPELR-1605(SC) Per Agbaje, JSC [E-E] 15-17.

Measure of damage

The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing the damages, all circumstances which may be legitimately pleaded in diminution of the damages must be considered *Grand Trunk Ry. Co. of Canada v. Jenning*. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death... The general principle that the right of the individual defendant under these acts is for damages to be assessed on a balance of loss and gain, which is established by long standing authority, would prima facie seem to apply to this case... There is no question here of what my 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 basic figure which will generally be turned into a lump sum by taking a certain number of year's 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. Per Agbaje, JSC [E-F] 24-25 citing *Davies v Powell Duffryn Associates Collieries Ltd* (1942) AC 601, 611-612 ; See also *Alliu Bello v. Attorney General of Oyo State* (1986) LPELR-764(SC); *Ibolukwu v. Onoharigho* (1964) 1 All N.L.R. 215, 217.

The formula 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. *Alliu Bello v. Attorney General of Oyo State* (1986) (1986) LPELR-764(SC) [A-B] 45. In *Julius Berger (Nig) Plc & Anor v Ugo* (2015) LPELR-24408(CA), the Court of Appeal decided the principles that guide the court in a claim for damages as result of non-financial or future financial losses as follows:

"This head of claim is yet another item of general damages … This head of damages represents the loss to the plaintiff which cannot be precisely quantified. It includes all non-financial or future financial losses. Items of this head of general damages need not and should not be specifically pleaded, but some evidence of such damages is required. A claim for future expenses, whether for on-going medical expenses or not, is a claim for general damages for which the 'Multiplier' and 'Multiplicand' approaches have been employed in the assessment of damages where future ongoing medical expenses have been claimed by the injured party. These approaches have been known to apply to personal injury cases and as well as fatal accident cases in Nigeria. See *Osholake v. Lagos City Council* (1972) 12 CCH CJ 56; *Ibolukwu v. Onoharigho* (1964) 1 ALL N.L.R. 215, 217; and *Owolo v. Olise* (1967) F.N.L.R. 179. In personal injuries cases, the multiplicand is an estimation of the plaintiff's annual loss or earnings whereas in fatal accident claims it is an estimation of the annual value of the dependency … In other words, it is usually that sum which represents the amount which the deceased would have spent on his family if he were to have been alive. Generally, the multiplicand in fatal accident claims is usually lower than in personal injury claims. Furthermore, in choosing the appropriate multiplicand 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. The multiplier also is therefore likely to be lower than in personal injury cases. Per Oho, JCA [F-D] 101-105; See *Owolo v. Olise*(1967) F.N.L.R. 179.

In *Ibolukwu v. Onoharigho* (1964) 1 ALL N.L.R. 215, AT P.217 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 led in the case did not support the view that the deceased spent her whole income on maintaining her husband and children, and spent nothing on herself".

In the case of *Julius Berger (Nig) Plc & Anor v. Ugo* (2015) LPELR-24408(CA), what the Cross Appellant claims from the Cross Respondents under this head of damages is a claim for future medical expenses including cost adaptations or aids and travel expenses where applicable. The usual components of any such calculations will involve what was available to Court in terms of financial figures (pre-trial) easily totaled and awarded as special damages on the one hand, and what would be the annual cost of treatment. That is; (multiplicand) x multiplied by the number of years of treatment (multiplier) will be required and awarded as General damages.

In the case of *Ifeanyichukwu Osondu Co. Ltd v. Akihgbe* (1999) 11 NWLR (Pt.625) 1, the Supreme Court, per Uwaifo, JSC said; "... Money actually spent before the time of hearing a claim for damages for injuries suffered comes under special damages, while prospective expenditure is money which has not yet crystallized in actual disbursement. The latter does not qualify as special damages but is claimable as part of General damages. In this case the trial Court erred in rejecting the Respondent's claim of N45,000 for future treatment oversea as too remote and the Court of Appeal rightly overruled the trial Court on that point..." Perhaps, what the Great Denning had to say on the subject in the English case of *Croke v. Wiseman* (1982) 1 WLR 71 AT 78 may serve as the required icing on the cake as far as the Cross Appellant's claim under this head of Claim is concerned. He said; "...there should be ample provision for the cost of keeping this boy (sic) the Respondent in the future so that he should have the best possible care for the rest of his expected life. This is always done by finding first the multiplicand and afterwards the multiplier." See generally, *Julius Berger (Nig) Plc & Anor v. Ugo* (2015) LPELR-24408(CA) per Oho, JCA [F-D] 101-105

So, how are damages assessed and apportioned in cases of fatal accidents?

(c) Damage to Property

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**.** 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 or damage 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)..

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 by Onyeama, J.S.C., as he then was, in the leading case of *Kerewi v. Odegbeson* (1965) 1 All N.L.R. 95, at p. 99) to be either the value of the car, if it was a total loss, or loss of earning during repairs and the cost of the repairs if it was not; 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, 144. See also Soetan & Anor v Ogunwo (1975) LPELR-3089 (SC) Per Ibekwe, JSC [E-C] 11-12

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 *SPDC Nig Ltd v. Ambah* (1999) LPELR-3202(SC) the SCN held that where there is a claim for total destruction of property, as in this case where the Respondent's car is a write off, the measure of damages will be the value of the property at the time of its destruction … This is based on the principle of restitutio in integrum. Per Wali, JSC [D-E] 20. The court went further to cite the case of *Anambra State Environmental Sanitation & Anor v. Ekwenem* (2009) LPELR-482 (SC) where it held that computation of damages is not however uniform. It varies between total loss calling for replacement of damaged property and repairs. While replacement is static, repairs are subject to vagaries of unpredictable market forces. Cost of repairs should not be unjust to the one who suffered legal injury and so therefore cannot be confined to the time when the damage occurred. For this reason, it was emphasised in court decisions that assessment of damages must take into consideration the current market situation. The Courts must take into consideration the economic strength on decline of the currency (which in this case is the Naira) and its purchasing power. Per Adekeye, JSC [C-F] 30; *Reynolds Construction Co. Ltd v. Odigie* (2018) LPELR-44776 (CA) Per Oseji, JCA [C-F] 40. While supporting the leading Judgment of Adekeye JSC, Muntaka-Coomassie, JSC added in his supporting judgment thus "Consequently, for the actual loss, the right measure of damages is the value of the property at the time of the destruction plus such further sum as would compensate the owner of the properties destroyed for loss of earnings and the inconvenience." See [C-E] 36.

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 judgment 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.

Self-Assessment Exercise 2

What is the measure of damages in cases where the plaintiff's vehicle is totally lost or destroyed by the defendant's negligence?

2.4. Summary

In this unit, we learnt about:

(a) the quantum of damages in which a plaintiff is entitled to in a given case;
(b) the mode of assessment of damages; and
(c) several examples of the types of damages that we have e.g. nominal damages, general and special damages etc.

2.5. Reference/Further readings/Web Sources

Bodunde Bankole Tort: Law of Wrongful Conduct: Lipservice Punishmnt (1998), Lagos.
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2.6 Possible Answers to Self-Assessment Exercises

Answer to SAE 1

The two main factors taken into consideration in assessing damages in cases of liability for personal injury cases are: (a) the financial loss resulting from the injury (b) the personal injury, involving not

only pain and suffering, but also the loss of the pleasures of life. See *Samson Ediagbonya v Dumez (Nig) & Anor* (1986) LPELR-1011(SC) Per Karibi-Whyte, JSC [C-E] 16.

Answer to SAE 2

The measure of damages in cases where the plaintiff's vehicle is totally lost or destroyed by the defendant's negligence was laid down by Onyeama, J.S.C., as he then was, in the leading case of *Kerewi v. Odegbeson* (1965) 1 All N.L.R. 95, at p. 99) to be either the value of the car, if it was a total loss, or loss of earning during repairs and the cost of the repairs if it was not.

Unit : 3 Occupier's Liability

Unit Structure

3.1 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 governed by statute particularly under the Law Reform (Tort) Law of Lagos State 2015 (LRTL 2015) in Lagos State. In other states where no such statute exists the common law continues to operate including its reformation in *BRB v Herrington infra*.

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.

3.2 Learning Outcomes

The purpose of this unit is to enable you to:

- define the concept occupier's liability;
- identify the law (tort) or statute that governed occupier's liability in Lagos and in other parts of Nigeria;
- identify the liability of a plaintiff to:
  (a) a trespasser ;
  (b) a contracting party;
  (c) an invitee; and
  (d) a licensee.

3.3 Occupier's Liability

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjx1bWNtfWAAxUNVkEAHbqNBsUQFnoECCsQAQ&url=https%3A%2F%2Fwww.oxfordreference.com%2Fview%2F10.1093%2Foi%2Fauthority.20110803100244597&usg=AOvVaw3LAH5DCOgOxmo8sKetOiGc&opi=89978449

Who is an Occupier?

The word occupier means one who has control of the premises. Thus an occupier need not be an owner. Exclusive occupation is not necessary. The foundation of occupier's liability is occupational control .i.e. control associated with and arising from presence in and use of or activity in the premises. See also *Wheat v. Lacon & Co Ltd* [1966] AC 552. In *Nig. Airways v Abe* [1988] 4 NWLR (pt. 90) p.

524 the court stated that occupier's liability is the tort that governs liability of an occupier, controller or manager of a premises, fixed or immovable structures including any vessel, vehicle or aircraft and the duty of care he owes to any person who comes into or enters such property. In most cases claims are made against local authorities and other public bodies who have duty for road maintenance pavements and other public places and against organizers of sporting and recreational facilities for personal injury suffered from the latent condition of the premises.

Statutory regulation of the liability of an occupier is now common in most jurisdictions. In Lagos State for example, the Law Reform (Tort) Law of Lagos State 2015 applies to regulate occupier's liability. In other states where no such statute exists the common law continues to operate.

Definition of Premises
Premises does not include only lands and buildings but also any fixed or move-able structure including any vessel, vehicle or aircraft.

Occupiers Liability under Common Law
At common law, there existed the problem of variation in the standard of care required with regard to persons on premises. The liability of an occupier to persons injured on such premises depends largely on the legal status of the injured. There were essentially three categories at common law and these are:
a) Invitee
b) Licensee
c) Trespasser

Invitee: an invitee is defined in *Pearson v Lemaitre* (1843) 134. ER 742 as person who comes into the occupier's premises with his consent on a business in which the occupier and the entrant have a common interest. A typical illustration of this would be where a customer who enters a shop with a view to purchasing an article. An occupier is liable to this category of persons for injuries arising not only from the danger known to the occupier but also for those dangers which the occupier ought to have known.

Licensee: This is described as a person who enters or come upon permission of the occupier in respect of a matter in which the occupier has no specific interest. For example, in exercising a public right such as visiting a recreational ground or a part. To this class of person (i.e. licensee) the occupier at common law is only obliged to give warning of any positive act of misfeasance that may inure the licensee.

Trespassers: These are persons come upon premises without the invitation of the occupier and their presence on the premises of known to the occupier and their presence on the premises if known to the occupier is practically objected to. At common law, the initial attitude was that occupiers owed no duty of care whatsoever towards trespassers. This state of affairs received statutory attention is England. The first statute in England which brought to coming upon premises is the British Occupiers Liability Act 1957. The English statute was subsequently amended in the year 1984.

Self-Assessment Exercise 1

Who would you describe as an occupier for the purpose of liability under the law of tort?

The Common Law on Trespassers before *BRB v. Herrington*

Until 1972 when the case of *British Railways Board v Herrington* (1972) 2 W.L.R 537 it was decided that an occupier duty towards a trespasser under common law, was a duty to refrain from deliberately or recklessly causing harm to a trespasser. The general rule of common law was that an occupier owed no active duty to a trespasser. Thus, under common law, a trespasser entered the premises or property of another person at his own risk until the case of *British Railways Board v Herrington (supra)* was decided.

Under common law, where a trespasser was known to be present on the property, the occupier was under a duty not to inflict injury on him recklessly or intentionally. Therefore, an occupier was under a duty not to create dangers intentionally to injure a trespasser.

The Duty to Notify or Warn the Public and Trespassers of Dangers

Under the common law, and to date, an occupier has the duty to warn the public of dangers on his land. In the case of *Illot v Wilkes* (1820)5 KB 674, Bayley J. explained the law thus:

> Although it may well be lawful to put those instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons, for many trespassers are comparatively innocent, it is necessary to give a much notice to the public on guard against the danger.

With regards to children, an occupier has to exercise greater care. In the words of Lord Denning MR in *Pannet v McGuinness* (1972) 2 QB 599:

> A wandering child or a straying adult stands in a different position from a poacher or a burglar. You may expect a child, when you may not expect a burglar.

The Common Law rule that a trespasser enters a premises at his own risk as was decided in series of cases including *Addie & Sons Ltd v Dumbreck* (1929) A.C 358 was harsh on trespassers, including children trespassers especially those who suffered serious injury or even death. In 1972 this common law rule was abolished by the House of Lords in the case of *British Railway Board v Herrington*, supra where the House of Lords established the duty of common humanity, as the new duty of care owed by an occupier to a trespasser.

In the case, the House of Lords stated that whereas an occupier does not owe a general duty of care to a trespasser, but a duty to refrain from deliberately or recklessly injuring him, he does owe a duty of "Common Humanity" a limitless duty, which is a duty to act "in accordance with common standards of civilized behavior" for the safety of a trespasser.

British Railway Board v Herrington:

The fence guarding a railway line had broken down and the gap in the fence was being used as a short cut to cross the railway line. The plaintiff respondent, a boy of six walked over the broken down fence, came into contact with the electrified rail line and was injured. The plaintiff sued by his next of friend

alleging a failure and negligence by the defendant appellant railway board to maintain the fence, when they knew that children were likely to come onto the rail line without realizing the danger that live rails posed. The House of Lords held: that the defendant appellant board was liable to the plaintiff. The defendants were guilty of reckless disregard for the safety of the plaintiff, in that they knew that children had been seen on the line, because the fence was broken, and therefore they were likely to do so again, in which case they would be exposed to hidden and mortal danger, and yet the defendants took no steps to repair the fence.
In this case, the House of Lords stated that whereas an occupier does not owe a general duty of care to a trespasser, but a duty to refrain from deliberately or recklessly injuring him, he does owe a duty of 'common humanity' a limitless duty, which is a duty to act 'in accordance with common standards of civilized behaviour' for the safety of trespasser.

Contractual Modification of the Statutory Common Duty of Care

The statutory common duty of care of an occupier can be restricted or excluded by an agreement with a visitor, for instance, Mr 'A' puts up a signpost, stating clearly that he, the occupier will not be liable to any person who enters this premises, nor of any loss of property kept around, in front, or inside the premises, however the loss was caused.

Common Duty of Care
The English Occupier's Liability Act 1957 and the LRTL 2015 imposes upon the occupier a duty of care. The occupier must take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

The common duty of care is set out in section 2(2) of the Occupier's Liability Act 1957 and section 4(1)(2) of the LRTL 2015. Section 2(2) of the occupier's liability act 1957 defines the common duty of care as: the duty to take such care as in all circumstances of the case. Case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by the occupier to be there.

Section 4(2) of LRTL 2015 defines the common duty of care thus:

> The common duty of care is a duty to take such care in all the circumstances of the case as reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which is being invited or permitted by the occupier to be there.

Thus the standard of care varies according to the circumstances.

Before proceeding further click on these links

Claims.co.uk
https://www.claims.co.uk › land-law › occupiers-liability

LexisNexis
https://www.lexisnexis.co.uk › legal › occupiers-liability

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjhw83Bt_WAAxWhQEEAHd1bCQsQFnoECBkQAQ&url=https%3A%2F%2Fvia.library.depaul.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D3882%26context%3Dlaw-review&usg=AOvVaw076SBK2H3R0Wt8Q4qn2aFy&opi=89978449

Child Visitors

Section 2(3)(a) of the Occupier's Liability Act 1957 and section 4(3)(a) of the LRTL 2015provides that an occupier must be prepared for children to be less careful than adults. As a result, a higher standard of care is expected from the occupier when children are visiting his premises. However, an occupier may reasonably expect that his child visitors can be accompanied by their parents or guardians, who will look after them. Therefore, it had been held that the occupier will have discharged his duty of care toward a child if he had made the premises reasonably safe for the child accompanied by the kind of guardian that he can expect them to be accompanied by in the circumstances. Understanding a child of that age may be expected to have. See *Tichener v. British Railway Board* (1983) 1 WLR 1427, *Taylor v. Glasgow City Council* (1922) 1 AC 44, *Jolley v. Sutton* (2000) 1 WLR 1082

Occupier's Liability

The Allurement Principle

It is in this context that it is necessary to consider the case in which courts have found occupiers liable to children who were attracted by traps onto certain parts of premises and injured there.

For example in *Glasgow Corp v Taylor* (1922) 1 A.C 44 a seven year old child was playing in public park when he noticed some attractive poisonous berries on a bush was not fenced off and the child picked this berries and ate them. He died later as a result. It was held that, the occupiers were liable because the berries constituted a 'trap' or 'allurement' to the child. It was also held in the case of *Jolley*

v London Borough of Sutton (2000) 1 WLR 1082, that an abandoned boat in a dangerous condition constituted an allurement to two boys.

An allurement will not necessarily make a child trespasser, a lawful visitor. As seen in the case of *Liddle v Yorkshire (North Riding)* (1934) 2 kb 101, it was held that the defendant in this case were not liable when a child who was a trespasser was playing on a high bank of soil trying to show to his friends how bees flew and he was injured. It was clear that the child was a trespasser as he had been warned off by the defendant on previous occasions. The pile of soil could not therefore make him a lawful visitor. It used to be the case that the courts were prepared to assume that in the case of very young children the responsibility was that of their parents to ensure that they were safe. It was clear to this case that, the child was a trespasser as he had been warned off by the defendant on previous occasions. The pile of soil could not therefore make him a lawful visitor. It used to be the case that the courts were prepared to assume that in the case of very young children the responsibility was that of their parents to ensure that they were safe.

In *Phibbs v Rochester Corporation* (1955) 1 QB. 450 a child aged only five was walking across the defendant's land when he fell into a trench. The child was a licensee because he played there often with other children and the defendant had done nothing to warn the children away. However, it was held that, even though as a licensee he was a lawful visitor, the occupiers of the land were not liable because, the parents should have been taken care of the child.
Despite these two cases, there are many cases in which the courts have been particularly lenient towards child trespassers and it is very unusual nowadays for a court to find that, there is no liability on the part of an occupier towards children on the grounds that, their parents should have taken care of them. Nevertheless, as a general principle, children should normally be supervised.

Duty Owed to Skilled Workmen
Section 2(3)(b) Occupiers' Liability Act 1957 and section 4(3)(b) LRTL 2015 provides that a person exercising a particular calling will guard against special risk ordinarily incidental to the particular calling and an occupier is entitled to assume so.. This applies to skilled professional workmen like an electrician, a carpenter etc. *In Roles v. Nathan* (1963) 1 WLR 1117 – Chimney sweeps killed by carbon monoxide (CO) fumes while sealing up a "sweep hole" in the chimney of a coke-fired boiler were held to have known about the danger and to have guarded against it as it was one of the dangers which could arise in the profession of chimney sweeping. As such the occupiers were not liable for not warning them of the danger. See also the case of *General Cleaning Contractors Ltd. v. Christmas* (1954) AC 180 where a window cleaner injured by a window while cleaning could not succeed against the occupier because the court held that, as a trained workman, he should have exercised reasonable care against the hazards of his profession.

A Visitor under Occupiers Liability Act 1957
See section 1(2) of the act which defines visitor as a person whom the occupier gives (or is to be treated as giving) an invitation or permission to enter or use the premise. Visitor is a person who have express or implied permission to enter into a premises by the occupier. A visitor who exceed the permission given to him by the occupier e.g. by going to a part in where he was told not to go by the occupier or

staying longer than he is supposed to stay there by making the visitor a trespasser and will not be within the scope of the Act (1957).

The duty under the occupiers liability Act 1957 is common to all types of visitors that is most categories of lawful visitors. Trespassers were still not owed a duty under this Act. Visitors does not include users of private rights of way see *McGeown v Northern Ireland Housing Executive* [1994] 3 All ER 53.

The question whether the occupier has fulfilled his duty to the visitor is thus dependent upon the facts of the case and though the purpose of the visit may be a relevant circumstance, it can no longer be conclusive as it so often was before when it governed the status of the entrant.

(a) An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leave him free to do so.
(b) An occupier must be prepared for children to be less careful than adults, it will be reasonable for the occupier to expect children to be on his premises unaccompanied, but it is submitted that the law is still as it was stated before the act by Delvin J in *Phipps v Rochester Corporation, supra* namely that one of the circumstances which must be taken into account in measuring the occupiers obligation is the degree of care for the children's safety which the occupier may assume will be exercised by the parents. The claimant in that case a boy aged 5 out blackberrying with his sister aged 7, and they walked across a large open space which formed part of a housing estate being developed by the defendants. The defendants had dug a long deep trench in the middle of the open space, a danger which was quite obvious to an adult. The claimant fell in and broke his legs on the fact that was held prudent would not have allowed two small children to go alone on the open space in question or, at least, he would have satisfied himself that the place held no dangers for the children. The defendants were entitled to assume that parents would behave in this manner and therefore, although the claimant was licensee, the defendants were not in breach of their duty to him.

An occupier would be liable in full to the child, but presumably could recover contribution from the guardian. In *Bates v Parker* 256 La. 1039, 241 So. 2d213 (1970) where a householder employs an independent to do work, be it of cleaning or repairing, on his premises, the contractor must satisfy himself as to the safety or condition of that part of the premises on which he is to work. In *Roles v Nathan, supra* two chimney sweeps were killed by carbon monoxide gas while attempting to seal up a 'sweep hole'' in the chimney of a coke-fired boiler being a light at the time but the occupier was not held liable for their deaths, partly at the least on the ground that paragraph 'a' applied as Lord Dening M.R said when a householder calls in a specialist to deal with defective installation on his premises he can reasonably expect the specialist to appreciate and guard against the dangers arising from the defect.

Categories of Visitors
1. Contractual visitors
2. Invitees
3. Licensees
4. Entrant as of right
5. Trespassers

The occupier of the premises owes each of these persons a duty of care. That duty differs in each case.

1. **Contractual entrants:** These are generally people who pay to enter. In such cases the court will look to the purpose for which the person has entered the premises and will infer on the occupier a duty to make the premises as safe as reasonable care and skill can make them.

2. **Invitees:** An invitee is not a person who is invited onto the premises rather an invitee is one whose visit will bring an economic benefit to the occupier. Invitees have an obligation to look out for their own safety but the occupier has a duty to use reasonable care to prevent injury or damage from unusual dangers of which the occupier knows or ought to know.

3. **Licensees:** A licensee who enters premises is one whose presence does not confer upon the occupier an economic advantage. The most common example is that of a guest in one's home or a viewer who attends a performance on a complimentary ticket. See the case of *Agura Hotel & Anor v. Diambaya* (2015) LPELR-41696(CA). The duty of the occupier to licensee is to protect them from concealed dangers that are known to the occupier. This is a more limited duty than that owed to invitees.

4. **Trespassers:** A trespasser is a person who comes into property without permission or stays on property without when requested to leave. An occupier owes a duty of care to trespassers but, as maybe expected, the duty is not as high as with other categories of visitors.

Persons who may be liable as an Occupier

The persons who may be liable for accidents, injuries and damages as an occupier of a premises include the following:

1. An owner or landlord
2. Tenants, by whatever name, designation; and interest in the land
3. An independent contractor, such as a builder, and so forth.

A plaintiff may claim under the Occupier's Act or under the law of negligence depending on which of the two laws will be more favourable to his claim. When an injured person sues an occupier, for liability on the ground of negligence, or state of his property, the main remedy of the plaintiff is an award for damages for the injury suffered.

Defences to Occupier's Liability

1. Warnings: Particularly important as they offer a simple inexpensive way to avoid potential liability. When a warning is given, such warning must however satisfy the requirement of reasonableness. An occupier may plead, that he sufficiently warned the entrant for his safety. See section 4(4)(a) LRTL 2015. Safety signs could be used to call attention of visitors. That would mitigate the liability as same would serve as act of carefulness. The absence or failure by a person in occupation to exercised the standard of what a reasonably prudent person would have exercise in a similar situation would denote carelessness and make such person liable. See the case of *British Airways v. Atoyebi* (2010) 14 NWLR (PT 6621).

2. Consent: This involves willingly accepting the risk, such as going sailing on a particularly choppy day, walking down a slippery pontoon. Section 4(5) of LRTL 2015 states "The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted by the

visitor". However, mere knowledge of a danger by a visitor may not be sufficient. For an occupier to successfully plead consent, the knowledge of the visitor must be enough to enable the visitor to be reasonable safe for the purpose for which the visitor is on the premises. Under section 4(3)(b) of the LRTL 2015 an occupier may expect that a person, in the exercise of his calling will appreciate and guard against any risk ordinarily incident to his profession, in so far as the occupier leaves him free to do so.

3. Individual responsibility. A good example is the sobriety of the claimant at the time of the accident - if it can be shown that the claimant was drunk at the time of the accident, this will at the very least, amount to a finding of contributory negligence; possibly even a finding of no liability whatsoever.

4. Exclusion clauses are always construed strictly against the person attempting to rely on them as the Courts do not favour such clauses. Although an exclusion clause may be ineffective as such, it may nevertheless prove to be effective as a warning notice thereby discharging the duty of care by drawing attention to a particular danger.

5. If you hire independent contractors that turn out to be incompetent you may well be liable for their actions. Conversely if you have acted reasonably in entrusting the work to an independent contractor, having taken all such steps as you ought reasonably to in order to satisfy yourself that the contractor was competent, then your defence to a claim against you may be to blame your competent independent contractor. See section 4(4)(b) LRTL 2015.

6. Act of stranger: An occupier may plead that the injury is entirely due to an act of God, Provided that the occupier is not guilty of continuing it by allowing the dangerous state of affair created by the stranger, by allowing the property to linger to be in that state for an unreasonable period of time without repairing it.

7. The Plaintiff is a wrongdoer or Trespasser: An occupier may plead that the plaintiff is a trespasser or wrongdoer. Where a plaintiff is a wrongdoer, for instance he may have no cause of action provided that the defendant is not guilty of implied consent, nor condonation, nor guilty of deliberately or recklessly harming him. Worse still, if the trespasser is a thief or other criminal and so forth, his case is far worse. He will have no cause of action at all, and he may also be charged and prosecuted for any crime he may have committed.

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

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So, what defences can be used in an action for occupier's liability?

3.4 Summary

Generally, in this unit, you learnt about:

(a) the concept occupier's liability;
(b) occupier's liability in Lagos and in other parts of Nigeria;
(c) understand the liability of a plaintiff to: a trespasser; a contracting party; an invitee; and a licensee.

3.5 References/Further Readings/Web Sources

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3.6 Possible Answers to Self-Assessment Exercises

Answer to SAEs 1

Occupier means one who has control of the premises and does not necessarily mean an owner. It also means a person who has possession, occupation, use or some degree of control of premises, fixed or movable structure.

1. The extent of an occupier's duty to invitees, licensees and trespassers are stated below:

Invitees: An invitee is not a person who is invited onto the premises rather an invitee is one whose visit will bring an economic benefit to the occupier. Invitees have an obligation to look out for their

own safety but the occupier has a duty to use reasonable care to prevent injury or damage from unusual dangers of which the occupier knows or ought to know.

Licensees: A licensee who enters premises is one whose presence does not confer upon the occupier an economic advantage. The most common example is that of a guest in one's home or a viewer who attends a performance on a complimentary ticket. The duty of the occupier to licensee is to protect them from concealed dangers that are known to the occupier. This is a more limited duty than that owed to invitees.

Trespassers: A trespasser is a person who comes into property without permission or stays on property without when requested to leave. An occupier owes a duty of care to trespassers but, as maybe expected, the duty is not as high as with other categories of visitors.