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LAW 324 LAW OF TORTS II

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LAW 324 LAW OF TORTS MODULE I: NUISANCE**UNIT 1: PUBLIC AND PRIVATE NUISANCE**

- 1.0 Introduction
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1.0 INTRODUCTION

Nuisance is a legal term which has no definite meaning. It generally covers acts unwarranted by law which causes inconvenience or damage to either the individual or the public in the exercise of rights common to all subjects, acts connected with the enjoyment of land, other environmental rights and acts or omissions declared by statute to be nuisance.

The distinction between Nuisance, some terms like trespass and Negligence which you have learnt last semester may be narrow.

In Scotland, the distinction between public and private nuisance is not recognized. It should be noted that apart from nuisances declared to be so by

statue, nuisance is not a ground for criminal proceedings. Only the party materially inconvenienced by actions may complain of them as a nuisance. Nuisance is a civil matter. It may be criminal sometimes as in public nuisance. In this unit we shall concentrate on public and private nuisance.

2.0 OBJECTIVES

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

- Define and recognize actions which can be classified as Nuisance.
- Identify public nuisance
- Identify private nuisance
- Explain the categories of private nuisance
- Understand the general nature of nuisance
- Differentiate nuisance from trespass, negligence and other terms.

3.0 MAIN CONTENTS

3.1 NUISANCE DEFINED

Nuisance is a term used to register or express one's condition of inconvenience or annoyance caused by a direct or indirect action of another person. It can also be said that nuisance is the negative effect of somebody's action or omission against the normal enjoyment of life by the complainant.

The Tort of nuisance has a restricted scope and not every inconvenience or annoyance is actionable.

The situations described as nuisance include:

- 1) Emissions of noxious gas or fumes from a factory.
- 2) Emission of noxious gas or fumes from moving lorries, trains or aircraft.
- 3) Noise from the crowing of cocks in the early hours of the morning.

- 4) The obstruction of public highway for social or religious activity.
- 5) The collapse of a building due to the vibrations of another company next door.

3.2 PUBLIC NUISANCE

A public nuisance is committed where a person carries on some harmful activities which affect the whole people or part of the people. An example of a public nuisance is where a manufacturing company causes or allows fumes or smoke to pollute the atmosphere in the locality or leakage of atomic waste can dastardly affect the environment causing damage to plants, animals and human beings.

The Attorney General usually acts for the public. A private person cannot sue in public nuisance except he proves that he suffers a 'particular damage' far above the general damage suffered by others. Public nuisance can be prosecuted as a criminal matter. See *Adeniran v. Interland Transport* (1991) 9 NWLR 155; *Yinusa Daodu v. WWPC* (1998) 2 NWLR 315

3.3 PRIVATE NUISANCE

Whereas public nuisance involves injury or interference with the right of the public at large, the law of private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof. See *Abiola v. Ijioma* (1970) 2 ALL NLR 268; *Hunter v. Canary Wharf Ltd* (1997) 2 N.L.R 684; *Cambridge Water Works Co. v. Eastern Leather*.

The main difference between public and private nuisance are therefore:

- 1) Public nuisance is a crime¹ and private nuisance is a civil wrong only.

¹ Penal Code SS. 192 and 194, Criminal Code S. 234, Under the Criminal Code the Offence is called "Common Nuisance".

- 2) To succeed in private nuisance, the plaintiff must have interest in land².
No such requirement in public nuisance.
- 3) Damages for personal injuries can be recovered in public nuisance³,
whether such a claim will lie in private nuisance is doubtful.

3.4 CATEGORIES OF PRIVATE NUISANCE

Private nuisance falls into three categories:

- i. Physical injury to the plaintiff's property e.g. where vibrations from the defendant's building operations cause structural damage to the plaintiff's house or where the plaintiff's pets are killed by fumes from the defendant's factory.
- ii. Substantial interference with the plaintiff's use and enjoyment of his land, e.g. where the plaintiff is subjected to unreasonable noise or smell emanating from the defendant's neighbouring land⁴.
- iii. Interference, easement and profits e.g. where the defendant wrongfully obstructs the plaintiff's right of way or right to light.

4.0 CONCLUSION

Nuisance is an action or omission on the part of the defendant that causes a lot of inconvenience, interference and damage to the plaintiff. It is actionable by the individual for damages or injunction against the defendant. The action can be taken by the individual plaintiff on his own behalf in private nuisance or by the Attorney-General on behalf of the state in public nuisance. The courts will always entertain such cases in order not to cause disaffection or chaos in the society.

² Malone v. Leakey (1967) 2 KB 141.

³ Castle v. St. Augustine's Links Ltd (1922) 38 T.L.R 615

⁴ Abiola v. Ijioma (1970) 2 ALL NLR. 268

5.0 SUMMARY

Nuisance is a situation wherein the action is bringing enjoyment and financial increase to one party and the other party is suffering from the same action or omission. Nuisance can be public or private. The plaintiff is the party who suffers from the act or omission causing nuisance. The private person brings an action in private nuisance on his own behalf and in his private interest. The Attorney-General brings an action in public nuisance on behalf of the state and in the interest of the society. He represents the whole people with the power and resources of the state. It has been said earlier that public nuisance is a crime. As such, it is the duty of the Attorney-General to initiate the institution of criminal cases against such persons for their acts or omission constituting public nuisance.

6.0 TUTOR-MARKED ASSIGNMENT

- 1) Differentiate between public and private nuisance.
- 2) Mr. Ojo has flourishing poultry supplying the community quality eggs and poultry products. His neighbour Mr. Chukwu is complaining threatening to sue Mr. Ojo to court and asking the court to stop Mr. Ojo from operating the poultry because of the bad odour therefrom coupled with the noise coming from the crowing of cocks especially at night time which always affects him and his household. What is Mr. Chukwu's chances of success if he carries out his threat? Advice him with the aid of decided cases.

7.0 REFERENCES/FURTHER READING

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MODULE I: UNIT 2:**THE BASIS OF LIABILITY IN PRIVATE NUISANCE**

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Injury and Interference

3.2 Reasonableness of the Conduct of Defendant

3.3 Who Can Sue?

3.4 Who Can Be Sued?

3.5 Defences

3.6 Damages

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

The law of private nuisance is designed to protect the individual owner or occupier of land from substantial and continued interference or disturbance in the enjoyment of one's property. Occasionally isolated nuisance can amount to a

nuisance. See *De Keyser* (1914) 30 T.L.R. 257. A private nuisance is any unlawful or unreasonable interference with another person's convenience, use and enjoyment of land or any right founding and concerning land. It is any interference with the reasonable comfort, convenience, occupation, health, use and enjoyment of one's land, or other property.

Generally, a private nuisance is the use of a person or his land or property unreasonably to the detriment of the people in the environment surrounding his land or property.

2.0 OBJECTIVES

At the end of the unit, students should be able to:

- Determine what act constitutes private nuisance.
- Determine classes of acts which amount to private nuisance.
- The nature of private nuisance.
- The parties to a case in private nuisance.
- Liability of parties.
- Defences of parties.

3.0 MAIN CONTENTS

The contending issue when studying the law of private nuisance is to strike a balance between the right of the owner or user of a property and the right of another person who suffers from the enjoyment of the usage either by the owner or another person.

In order to find solution to the striking of a balance some requirements have evolved:

3.1 INJURY AND INTERFERENCE

The injury or interference complained of will be considered by a court in the following one or a combination of factors:

- 1) Whether there is physical injury or sensible material damage.
- 2) Whether there is substantial interference with the use and enjoyment of the land.
- 3) Unreasonableness of the conduct of the defendant.
- 4) The malice or motive of the defendant.
- 5) The utility of the act of the defendant.
- 6) Duration of the harm or inconvenience.
- 7) Practicability of the relief sought by the plaintiff.
- 8) The carelessness of the defendant.

3.1.1 Physical Injury Or Sensible Material Damage

The plaintiff can successfully sue in private nuisance if he can prove that he had suffered or he is suffering real or sensible damage or inconvenience.

The nature of the injury suffered by the plaintiff will be examined by the court. The claim will succeed where a private nuisance is alleged to have caused damage to property directly or indirectly and only if the injury is sensible or substantial and can be perceived by any of human sense organs without the aid of science.

When a physical damage is substantial and can be easily seen and accessed, without the assistance of a scientific aid, there is no problem. However, where the damage cannot be easily seen, then expert evidence may be led including the aid of scientific apparatus to prove it.

Therefore, in determining what amounts to a sensible material damage to property, it is sufficient if the aid of science is used to identify such damage or inherent change in the property. Thus, in appropriate cases, scientific edifice is admissible to ascertain that actual damage has occurred in property occasioned by the defendant's conduct.

It will thus be easy for the court to conclude that there is private nuisance where damage is done by the defendant's conduct to the plaintiff's property or the defendant's action causing reduction in the plaintiff's property.

In *ST. HELEN'S SMELTING CO. v. TIPPING (1865) 11 HL Cases 645*, the plaintiff respondent, who lived in an industrial area, established that his trees and shrubs had been sensibly damaged by fumes from the copper smelting plant of the defendant appellant company and that the value of the property had been reduced... The House of Lords held that this was an actionable nuisance. The requirement of sensible material interference with the plaintiff's land was satisfied. It was irrelevant that the defendant was carrying on business in an industrial area.

In *IGE v. TAYLOR WOODROW (NIGERIA) LTD (1963) LLR. 140*

Vibrations from the construction activities of the defendant company who were driving piles into the ground in the preparation of a site for a high rise building, caused damage to the nearby building of the plaintiff. Whilst the action in negligence failed, the court held that the claim in nuisance succeeded. In this case, De Le Stang C.J said:

The person who uses his land in the exercise of his rights incurs no liability if he injures his neighbour, unless in so doing he is guilty of trespass, nuisance or negligence. In the present case, it is clear that... in the course of doing what was lawful, a nuisance was caused from which damage resulted. The fact that what was being done was in itself lawful was consequently no excuse.

See also *SHELTER v. LONDON ELECTRIC CO. (1958) 1 Ch. 287 C.A.*; *MATANIA v. NATIONAL PROVINCIAL BANK (1936) 2 ALL ER 633 C.A.*

3.1.2 Substantial Interference With The Use And Enjoyment Of Land

When interference with the use and enjoyment of the land is alleged, as a general rule, a plaintiff's claim would succeed if the interference is substantial. The classic rule which has been cited with approval in several cases in the Nigerian jurisprudence is the case of *VANDERPANT v. MAYFAIR HOTEL CO. LTD (1930) 1 Ch. 138* (Also see *TETTEY v. CHITTY (1986) 1 ALL ET 663*) where Luxmoore J. said:

Every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused. It is necessary to determine, whether the act complained of is an *inconvenience materially interfering with the ordinary physical discomfort of human existence*, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among English people.

The learned judge continued:

It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such noise as materially interferes with the comfort of a neighbour, when judged by the standards to which I have just referred, constitutes an actionable nuisance, and it is no answers to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the

existence of a nuisance is one of degree and depends on the circumstances of the case.

The application of these principles in Nigeria may be illustrated by the following cases:

In ***ABIOLA v. IJIOMA (1970) 2 ALL NLR 268*** the plaintiff and defendant occupied adjoining premises in a residential area in Surulere. The defendant kept poultry at the back of his house as a pastime.

The plaintiff sued the defendant claiming that excessive noise made by the chickens in the early hours of the morning disturbed his sleep and that foul smells from the pens interfered with his comfort. Dosumu J. of the High Court of Lagos held: That was actionable nuisance. The learned judge cited with approval the dictum of Luxmoore in ***VANDERPANT v. MAYFAIR HOTEL CO. LTD*** and said that:

In any organized society, everyone must put up with a certain amount of discomfort and annoyance from the activities of his neighbours; and in this case I have to strike a fair and reasonable balance between the defendant, who likes to keep poultry for his pleasure in his house, and a neighbour who is entitled to the undisturbed enjoyment of his property. The standard in respect of the discomfort and inconvenience which I have to apply in this case is that of the ordinary reasonable and responsible person who lives in this particular area of Surulere.

In ***TEBITE v. NIGERIA MARINE & TRAINING CO LTD (1971) 1 U.L.R 432***). The defendants had a workshop at 9 Robert Road where they carried on business of boat building and repairing adjacent to the plaintiff's chamber being a legal practitioner at No. 11 Robert Road, Warri. The plaintiff sued for nuisance alleging that "*by operating their machines continuously for several hours a day the defendants had persistently caused to emit from their workshop loud and*

excessive noise and notorious fumes which diffuse his premises and cause him much discomfort and convenience”.

The Learned Judge Atake J. examined the evidence and found that:

Robert road was not zoned by the planning authority for residential and commercial purposes only, but that it had become accepted over the years as being an exclusively residential and commercial area. It was clear also that the inhabitants of the district were “well above the lowest class in the community”. The defendant was an “extraordinary neighbour” who had opened a workshop and produced noise “which in my view is certainly a good deal more than any noise that can be produced even in the noisiest Nigerian district, and a noise completely out of character with that ordinarily produced by ordinary people in any neighbourhood in this country... The plaintiff, before the defendant arrived as his next-door-neighbour, had, in conformity with the standard then prevailing in Robert Road, enjoyed a reasonable amount of peace, comfort and quiet in his premises, ... but since the arrival of the defendant his comfort and work have been disturbed, and if they have been *materially* and *substantially* disturbed, he is quite entitled to succeed in this action. I have underlined ‘materially’ and ‘substantially’ because it is not sufficient in law that the plaintiff be merely disturbed occasionally by noise from the defendant’s operations.

In ***MORE v. NNADO (1967) F.N.L.R 156*** the plaintiff sued the defendant for nuisance occasioned by the latter’s excessive noise caused by playing stereograms unreasonably loudly until late every night in his neighbour’s palm wine bar. The plaintiff complained that as a result of which he had been compelled to seal up his louver windows with plywood sheets, and spend most of his time in the backyard of his house.

Oputa J. (as he then was) held that there was an actionable nuisance that entitled the plaintiff to relief. The learned judge held that “the degree of nuisance from the defendant’s premises was more than the plaintiff is expected to tolerate in the

circumstances”. Moreover, he was “satisfied that the defendant intentionally wanted to annoy” the plaintiff, and his evidence of malice strengthened the case against the defendant. Finally, His Lordship held that “in an actionable nuisance it is not necessary to prove any injury to health”, and that “a person who lives in a noisy neighbourhood is not precluded from maintaining an action in a nuisance from noise”. He can complain of any additional noise and bring an action if such additional noise is substantial.

3.2 REASONABLENESS OF THE CONDUCT OF DEFENDANT

The conduct of the defendant in respect of injury to property or in respect of interference with the enjoyment of land is vital to the success of an action of the plaintiff in his claims for relief. The court will consider the conduct of the defendant whether it is reasonable having regard to the ordinary usage, life style or practice of mankind in the particular community under reference. For a plaintiff to succeed in a claim for nuisance, the defendant’s conduct must be adjudged to be unreasonable having regard to the circumstances of the case.

There is no precise criterion for determining this issue of unreasonableness; a lot depends upon the circumstances of the individual case.

Therefore the right to enjoy one’s premises or property is subject to the right of his neighbour not to be unreasonably interfered with.

In the case of ***SEDLEIGH-DENFIELD v. O’CALLAGHAN (1940) AC 880 at 908***, Lord Wright explained the law thus:

A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbour not to be interfered with, it is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society.

In considering the reasonableness of the conduct alleged to be constituting nuisance, the court will apply the objective test. It is the test of the conduct of a reasonable man in that particular circumstance. That is a test of what a reasonable but neutral conduct of a member of the public would be in that instance. The courts have not defined the precise principles according to which the reasonableness of a conduct is determined. However, whether or not a particular act is reasonable or not is based on (a) a consideration of the nature and circumstances of the defendant's activity on the one hand and (b) the nature and extent of the interference in the plaintiff's enjoyment of his land.

In deciding whether the defendant's conduct is reasonable or not, the court will look at a number of criteria which include but not limited to:

- 1) The locality.
- 2) The utility of the defendant's conduct.
- 3) The plaintiff's abnormal sensitivity on his property.
- 4) The duration of the harm or injury.
- 5) The defendant's malice.

THE LOCALITY

A saying goes thus that one man's meat is another man's trouble. The standard of conduct and comfort protected by the law for a community varies from place to place. The nature, character or standard of a locality differs with those obtainable in another locality.

In cases of interference with the use and enjoyment of land but not in cases where there have been physical injury to property, the nature, character or circumstances of the locality where the activity has taken place may be taken into account.

The courts recognize that there is a national policy of allocating land for specific and different uses. Therefore, the court will determine whether a defendant is using his land for the purpose for which it was allocated. Whilst the normal life in a locality may be relatively quiet and peaceful, another locality may be bustling, noisy and boisterous. Therefore, what is nuisance differs from one locality to the other. One general exception is that there is no locality where the right of access to light for a building will be allowed to be interfered with as this will constitute nuisance in all localities. This is because, the right of access to light in one locality should also be ensured in other localities.

THE UTILITY OF THE DEFENDANT'S CONDUCT

The law allows a person to enjoy his property. Also the enjoyment of such properties can be of great benefit to community. The general rule is that the law will not allow a private nuisance to continue just because the defendant has shown that his conduct or act has social value, or is beneficial to the community.

The tort of private nuisance is therefore concerned with balancing of the interests of landowners or users and their neighbours or adjoining landowners and other dwellers.

The court as a general rule always put itself under caution in determining whether such conduct is nuisance and as a general rule will not compel a plaintiff to bear the burden alone of an activity which may be of benefit to others in the locality.

THE PLAINTIFF'S ABNORMAL SENSITIVITY ON HIS PROPERTY

The law of nuisance will normally protect a plaintiff who is a normal person and who suffers from an unreasonable conduct of the defendant. Where the conduct of the defendant is unreasonable he will be liable in nuisance to the plaintiff.

An unusually or abnormally sensitive plaintiff is not likely to succeed in a claim for nuisance. As a rule, the law does not protect a person who is unusually sensitive to the activities of others around him.

The standard of sensitivities or tolerance that the court applies is that of a “normal” neighbour, person or property. The maxim in latin is: *sic utere tuo ut alienum non laedas* meaning that “you should use your land in a way that will not harm other people”.

The two points being raised here are:

- 1) The law of nuisance will not protect a plaintiff who is abnormally or unusually sensitive to the conduct of the defendant.
- 2) The law of nuisance will not protect the defendant who is aware that the plaintiff is very sensitive to a conduct but carries out the conduct to affect him in an unreasonable manner.

In the case of ***ROBINSON v. KILVERT (1889) 41 Ch. D. 88***

The defendant was manufacturing paper boxes in a house and leased the floor above to the plaintiff who kept a stock of brown paper therein. The defendant heated his store with hot dry air which raised the temperature of the plaintiff's premises and the brown papers which were stored by the plaintiff's store lost its special quality and consequently its value.

The plaintiff sued for damages. The court held: that the defendant was not liable for nuisance. The brown papers lost its special quality and got damaged because of their particular sensitivity to temperature.

In conclusion, when a plaintiff or his property is unusually sensitive to a tolerable or reasonable act of the defendant, which is a normal and regular act, the plaintiff will not succeed in a claim for nuisance.

THE DURATION OF THE HARM OR INJURY

The duration, that is, how long should a nuisance or injury suffered by the plaintiff can be before he can bring a claim and succeed with it. The question of duration in the continuance of a nuisance can help a court to determine whether nuisance has occurred or not from the defendant's action.

The action for claim may arise based on the duration of the conduct causing injury or inconvenience in two instances.

- 1) If the injurious action continues without a specific term limit. For example, a big generator emitting constant noise and fumes into one's premises will constitute a nuisance.
- 2) A one time noise and dust arising from the demolition of a building next to one's property which is an isolated act of the defendant will not amount to a nuisance.

In the case of ***SEDLEIGH-DENFIELD v. O'CALLAGHAN (1940) AC 880 HL***, the Defendants/Respondents allowed the public pipe which was draining water from their land to remain blocked and Plaintiff/Appellants adjoining land was flooded with water as a result. The plaintiff sued for damages and the court held that; there was a nuisance caused by the defendants for allowing the annoying state of affairs to remain unrepaired.

In this case, Lord Atkin stated that the defendants:

Created a state of things from which flooding might reasonably be expected to result, it was therefore a nuisance.

But in the case of ***BARKER v. HERBERT ((1911) 2 KB 633 C.A)***. The defendant was the owner of a vacant house on a street with an area adjoining the highway. One of the railings of the house had been broken and there was a gap in the railing. A boy not living in the house climbed through the railing, fell and injured himself. The court held: that the defendant was not liable for nuisance.

This decision was based on the fact that the defendant had no knowledge of the breakage of the rail.

THE DEFENDANT'S MALICE

The intention, motive, malice or the malicious behaviour of the defendant will usually give the impression that the act of the defendant is unreasonable and therefore can amount to nuisance.

It is generally not necessary to prove malice to succeed against the defendant in a claim of nuisance.

A wrongdoer's motive and intention considered to be malicious may show that he is not behaving reasonably and lawfully. Where the conduct of the defendant is considered to be wanton, reckless or malicious to spite or annoy a neighbour, the court will readily give judgment to the plaintiff as that will be considered to be a nuisance.

Nevertheless, it should be noted that a plaintiff bringing a claim for nuisance is exercising a specific legal right where malice may not make interference unlawful. It should further be noted that there must be a balance between the enjoyment of one's property and non-interference with a neighbour's right.

3.3 WHO CAN SUE?

The person who has a right and the right is being or has been taken away or being interfered with is the one that has a right to sue in the tort of private nuisance. In the light of the above, the person(s) who can sue in private nuisance are:

- 1) Any one who has or uses land, or has an interest in land.
- 2) An occupier or user of land.
- 3) A reversioner of land may sue if his reversionary interest in land is being or has been interfered with.

3.4 WHO CAN BE SUED?

It is not anybody that can be sued in the tort of private nuisance. A person to be sued is any person in law bearing some legal responsibility in the enjoyment of a land or property being either the plaintiff or the defendant.

The persons who can be sued for the tort of nuisance include:

- 1) **The Creator of the Nuisance:** A person who committed a nuisance may be sued. He is liable whether or not he is in occupation of land. His liability remains whether or not he is able to abate the nuisance without trespassing on the land of the third party.
- 2) **The Landlord:** The landlord is obliged to put his land or property in a state of affairs that will not constitute nuisance to visitors or other users of the premises. The liability of the landlord for nuisance may arise in the following circumstances:
 - a) If he created the nuisance.
 - b) Expressly or impliedly authorized or ratified the nuisance.
 - c) If he allowed the state of affairs to continue.
 - d) If the property constitute a nuisance.
- 3) **An Occupier:** An occupier is a person who has authority over the premises or any of the tenants he puts in occupation. The occupier may personally be liable in any of the following circumstances:
 - a) If he created the nuisance.
 - b) If his servant or agent created the nuisance.
 - c) If he engages an independent contractor to commit the nuisance.

- d) If his licensee, guest, relation or lodger created the nuisance of which he knew or ought to know but failed to take appropriate step to stop it.
- e) If the nuisance was created by a trespasser, stranger, predecessor in title or act of God of which the occupier failed to do anything to stop its consequence.

It should be noted that where there are several persons creating a nuisance, the plaintiff can sue only one or any of the joint tortfeasors. It will not be a valid defence for the defendant to show that he cannot answer for the nuisance of the other tortfeasors.

3.5 DEFENCES

The defendant has a range of means of defence in a claim for nuisance against him in an action. The following defences may be available to the defendant in a claim against him for nuisance.

- 1) **Reasonableness of His Act or Omission:** A defendant may plead that alleged act of a nuisance was a normal or a reasonable act to be expected in that circumstance and in that community at that period in time and that there was no malice in the act complained against. A person who decides to build his residential house in an industrial estate cannot complain of interference or inconvenience occasioned by noise coming from the generator of a company near to his house.
- 2) **Statutory Authority:** As a general rule, the fact that there is a valid permit by a Government Department is not a licence to commit nuisance. However, a land that has been earmarked for a purpose by statutory authority, carrying out such provision will be a defence under statutory authority, especially when the defendant is not negligent in doing just that.

For example, a land earmarked for the construction of roads was used in building a residential house. That can be demolished and if the owner of the house brings an action against demolition or for compensation or for specific performance, the Government Department can rely on the statute as its authority to carry out the demolition as a defence.

- 3) **Act of God:** Act of God may be a defence in some circumstances. A road that is carved in and cut into two after a heavy rain and flooding of the area may not be attributable to the contractor that constructed the road. This is because, the defendant can plead Act of God in that circumstance.
- 4) **Act of a Stranger:** An act of a stranger may be a good defence if it is shown that the defendant has taken steps to discontinue the effect of the strangers act immediately the act came to his knowledge.
- 5) **Consent:** Consent will be a defence if the defendant has acted within the terms of agreement and has been reasonable in his act.

For examples, a tenant who uses a rented apartment in a reasonable manner and in consonant with his tenancy can use that as a defence in an action for claim in nuisance against him.

3.6 DAMAGES

Nuisance is not actionable per se, but the plaintiff must always prove that he suffered damage by the action or inaction of the defendant.

However, there are three categories of cases where damage is strict and therefore needs no proof. They are:

- 1) Where the facts are overwhelming, damage is readily presumed. For example, where a house projected over the plaintiff's adjoining land especially at the second or higher floors, the court will presume that

- damage would be caused by rain-water dripping from the cornice on to the plaintiff's land. See *Fay v. Prentice (1845) E.R. 789*.
- 2) Where the defendant interferes with an easement or right of way and access of the plaintiff, the court will presume that the plaintiff has suffered damage.
 - 3) An injunction may be granted in an action where harm to the plaintiff is reasonably feared to be imminent though none has actually occurred. For example, a planned demonstration by a group of workers which is feared to disturb free flow of traffic and other activities of the state can be accepted by the court as a good reason for granting an injunction.

4.0 CONCLUSION

Nuisance is an action or inaction which can cause harm, interference or inconvenience to the plaintiff. It is an arm of the municipal law that aims at maintaining good relationship between the citizens of a state or country. It is the aspect of the law that tries to teach a person to put his neighbour and other persons in his community into contemplation before embarking on any activity, business or pleasure. The law that tries to balance the right of the defendant to use and enjoy his landed property with that of his neighbour, the plaintiff who may suffer for that enjoyment. It gives redress to the plaintiff in deserving circumstances.

5.0 SUMMARY

This unit is written on the basis of Liability in Private Nuisance. The best of liability includes injury, inconvenience and interference suffered by the plaintiff for which the defendant ought to pay or put the plaintiff's property back into its original position, i.e. the position the plaintiff ought to have been had the

unreasonable offending injurious action or in-action had not been facilitated by the defendant.

The unit also looks at who can sue in private nuisance and who can be sued. These are the persons who have right to enjoy their land and those who are interfering with that right of enjoyment as defendants. This unit also looks at defences such as reasonableness of the act of the defendant, statutory authority, act of God, act of a stranger and consent of the parties among other damages for a successful claim of the plaintiff against the defendant.

6.0 TUTOR-MARKED ASSIGNMENT

The tort of private nuisance seems to over-protect the plaintiff against the defendant in the enjoyment of the rights attached to the defendants' property – Discuss with the aid of decided cases.

7.0 REFERENCES/FURTHER READING

- ◆ Fleming, J. (1992), *The Law of Tort* (8th ed.) Sydney: The Law Book Company Limited.
- ◆ Gardiner, D. (1991), *Outline of Torts*. Sydney, Butterworths.
- ◆ Gillies, P. (1993), *Business Law* (5th ed.), Federation Press.
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- ◆ Latiner, P. (1995), *Australian Business Law*, North Ryde: CCH.
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MODULE I: UNIT 3:**STRICT LIABILITY: THE RULE IN RYLANDS V. FLETCHER**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
 - 3.1 The Case of Rylands v. Fletcher
 - 3.2 The Scope of the Rule in Rylands v. Fletcher
 - 3.3 Fundamental Differences between Nuisance and the Rule in Rylands v. Fletcher
 - 3.4 Application of the Rule in Nigeria
 - 3.5 Defences
 - 3.6 Damages
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The rule in Ryland v. Fletcher represents one of the principal areas of Strict Liability in the law of Torts. Liability is strict in cases where the defendant is liable for damage caused by his act whether he is at fault or not. The intention of

the defendant whether for good or bad is not put into contemplation in strict liability cases, what matters is whether that action results in damage suffered by another person. Strict liability is an absolute liability or liability without a fault. This, however, may be subject to any defence available to the defendant. See *Ccmbridge Water Works Co v. Esthern Leather*.

2.0 OBJECTIVES

The objective of this unit is for the student to be able to:

- Know what constitutes strict liability in the Law of Tort.
- Know the specific nature of strict liability under the rule in *Rylands v. Fletcher*.
- Be able to differentiate between the liability under *Rylands v. Fletcher* and other types of liability such as in nuisance and negligence.
- Know whether and if it applies in Nigeria.

3.0 MAIN CONTENTS

3.1 THE CASE OF RYLANDS V. FLETCHER (1866) LR I. Exch. 265 Affirmed (1868) LR 2 H.L 330)

The law of tort as stated in the Rule in *Rylands v. Fletcher* is a common law rule which was restated by Blackburn J. after summing up the existing principle of the common law which before then was scattered in earlier decided cases.

In this case, the defendant/appellant who was a mill owner engaged independent contractor to build a reservoir on his land to supply water to his mill. During construction, the contractors found disused mine shafts and passages which unknown to them linked the plaintiff's mines on the adjoining land. The contractors carelessly omitted to block the disused shaft and when the reservoir was filled with water, it escaped and flooded the plaintiff's mine inflicting damage.

The plaintiff then sued for damage, the defendant's conduct did not appear to come within the scope of any existing tort: they were not liable for trespass, because the damage was not direct and immediate; nor for nuisance because the damage was not due to any recurrent condition or state of affairs on their land; nor for negligence, because they had not been careless and they were not liable for negligence of their independent contractors. Blackburn J. held that the defendant was liable. On appeal, the House of Lords upheld the judgment of the lower court by affirming the liability of the defendants.

According to Blackburn J. the principle in the case is that:

A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

In the House of Lords on appeal, Lord Cairns added the requirement that:

The thing which escapes and causes damage should be a non-natural user of the defendant's land.

Fundamentally, the rule in *Rylands v. Fletcher* is characterized by the following:

- a) Bringing and keeping a non-natural user on one's land.
- b) Duty to keep it on one's land at own peril.
- c) Escape of the thing that causes damage .
- d) Liability for the natural consequences of its escape to another person's land.

3.2 THE SCOPE OF THE RULE IN RYLANDS V. FLETCHER

The scope of the rule in *Rylands v. Fletcher* includes the element which the plaintiff must prove to succeed in a claim under the rule. They include:

- 1) That he brought a non-natural user on his land, or kept it on his land.

This means that the defendant brought and kept the things on his land himself or by a third party or an independent contractor. The word natural means that which exist in or by nature without any act or omission of the defendant. These include rocks, weeds growing above the fence to the adjoining premises, rain water, water from flowing river etc.

A non-natural user is a thing which is purposely brought to the defendant's land for purposes of enjoyment, commerce or for any other purpose but was brought by the defendant or a third party, independent contractor with his consent or careless omission.

There must be a bringing or a keeping by the defendant of the thing that escaped and caused damage. Lawrence J. explaining the law in the case of *Bartlett v. Tottenham* (1932) I Ch. 114 at 131 (see also *SMEATON v. ILFORD CORP 450*, *NEPA v. ALLI (1992) 8 NWLR pt 259, p. 279*) stated that the rule applies only to:

Things artificially brought, or kept upon the defendant's land.

It follows from the above that, a defendant is not liable for the escape of things which are by nature or naturally are on land. The things which are by nature or naturally on land include:

- a) Vegetation which naturally grows on the land. Here a tree which spread its branches across the fence to a neighbours land cannot make the owner of the land to be liable in any claim by the plaintiff. This includes weeds, grass and trees of different types.
- b) Water which naturally flows as a river or which came as a result of rainfall. See *Nicholls v. Marshall*

- c) Rocks which naturally exist on the defendant's land.
- d) Rats, snakes, insects (snakes and rats can also be non-natural users).

In the case of ***CROWHURST v. AMERSHAM BURIAL BOARD (1878) 4 Exch. D. 5*** where the defendant Board planted yew trees on the boundary of its land. The branches of the yew trees protruded into the land occupied by the plaintiff. The plaintiff's horse ate some of the leaves and was poisoned and died. The court held that:

That the defendant Board was liable for bringing the poisonous yew trees onto its land. It was a non-natural use of the land to plant such poisonous trees, and the branches of the trees had 'escaped' by protruding into the plaintiff's land where he kept domestic animals.

- 2) That there was an escape of the non-natural user.

"Escape" was defined in the case of ***READ v. LYONS (1947) AC 156*** by Lord Simonds thus:

Escape, for the purpose of applying the proposition in *Rylands v. Fletcher* means escape from a place where the defendant has occupation or control over land, to a place which is outside his occupation or control.

In this case, it was held that there was no escape.

In the case of ***POINTING v. NOAKES (1894) 2 QB***. A poisonous tree was on the defendant's land and its branches never extended over the boundary. But the plaintiff horse reached over the boundary and ate the leaves and died. The court held:

That the defendant was not liable as there was no escape under the rule in *Rylands v. Fletcher*.

- 3) That damage was done to the plaintiff.

Finally, the plaintiff must prove that the thing that escaped caused damage to him or his property. As a general rule, an escape under the rule *Rylands v. Fletcher* is not actionable per se. It is actionable only when the plaintiff proves that the escape caused him damage. Damage here may be personal injuries, damage to land, house, other properties and fittings and domestic animals. See *Cambridge Water Works Co v. Eastern Leather* (1994) 1 ALL E. R. 53; *Transco Corp. v. South Port* (2004) 2 AC 1

3.3 FUNDAMENTAL DIFFERENCES BETWEEN NUISANCE AND THE RULE IN RYLANDS V. FLETCHER

The rule in *Rylands v. Fletcher* has some similarities with the legal principle of nuisance and if care is not taken, one can be mistaken for the other. It is possible that the same facts may give rise to liability under the torts in nuisance and the rule in *Rylands v. Fletcher*. However, there are some fundamental differences as follows:

- i. In *Rylands v. Fletcher* liability is confined to the accumulation of physical objects which can escape and cause damage to the plaintiff while nuisance is an interference with someone's enjoyment of his property caused by intangible things such as noise and smell. Generally the position in *Rylands V. Flecher* is undergoing some changes to the extent that it is now accepted that this is not absolute basis of distinction but in extra harzadous activities. See *Transco Corp. v. South Port* (supra).
- ii. In *Rylands v. Fletcher*, there must be accumulation of things which are physical in nature such as plants, liquid, gas, or rocks but in nuisance, there is no requirement for accumulation.
- iii. In *Rylands v. Fletcher*, there must be an escape of a non-natural user accumulated from the defendant's land to a place outside the defendants

- land but in nuisance, there is no requirement of escape because that is not necessary.
- iv. A plaintiff who is not an occupier of the adjoining land may not sue in Rylands v. Fletcher but in nuisance such a person could bring a suit in private nuisance.
 - v. Liability is confined only to non-natural user under Rylands v. Fletcher but in nuisance liability is not confined only to non-natural user.

3.4 APPLICATION OF THE RULE IN NIGERIA

The level of development generally coupled with the attitudes of Nigerian people to situations around based on different beliefs and capacity of community approach to life has not helped in appraising the rule in Rylands v. Fletcher in full. The hazards of pollution associated with oil exploration and the growth of manufacturing activities in the 1970s would seem to have had serious impact on the application of the rule in Rylands v. Fletcher in Nigeria.

Although there have been a number of cases but there appeared to have been few cases in which the principle has been invoked as compared to other branches of the civil law in Nigeria.

The first case on this principle in Nigeria is the case of ***UMUDJE v. SHELL B.P PET. DEV. CO. OF NIGERIA LTD (1976) 11 SC*** wherein the course of its oil exploration activities, the defendant respondent company diverted a natural stream, thereby denying the plaintiff of water and fish. Oil waste accumulated by the defendant also escaped and caused damage to the plaintiff's land. The Plaintiff/Appellant sued for damages. On Appeal, the Supreme Court held:

That the defendant/respondent company was liable for the escape of the crude oil waste that caused damage to the plaintiff's land and killed fish therein.

However, it held that the Defendant/Respondent company was not liable for diverting the natural course of the stream, as there was no flooding of the plaintiff's land as a result; but only a denial of the plaintiff of water and fish.

The second case on the principle of law in *Rylands v. Fletcher* is *NEPA v. AKPATA (1991) 2 NWLR pt. 175 p. 536 CA* where the Plaintiff/Respondent owned two bungalows at Effurun near Warri for which he got building approval and were completed in 1977. Sometimes in 1980, the defendant/appellant NEPA completed the erection of a high tension electric transmission line from the Ogorode Power Terminal, Sapele, which passed over high above the said plaintiff's buildings. The plaintiff sued that his buildings were rendered uninhabitable as a result of the defendant/appellant's action. On appeal, the court of appeal held that the defendant/appellant NEPA was liable. The court per EJIWUNMI as he then was said that:

While a defendant acting under a statutory power is prima facie protected ... in the exercise of statutory power, he may however be liable ... if it is established ... that the defendant was negligent in the manner in which he acted under the statutory power given to him and damage was caused to that other as a result.

The third case is that of *NEPA v. ALLI (1992) 8 NWLR pt 259 pg. 279 SC*. The defendant/appellant NEPA was supplying electricity to the modern sawmill and factory of the plaintiff/respondent at Ijebu Ode. Due to negligence of the appellant, its transformer at Ijebu ode went up in flames. The fire therefrom spread and destroyed the Plaintiff/Respondent's factory. The plaintiff sued claiming damages. On appeal, the Supreme Court held that the appellant NEPA was liable in damages to the plaintiff/respondent under the rule in *Rylands v. Fletcher*. Nnaemeka-Agu JSC dissented partly for slightly different reasons but also gave judgment to the plaintiff on the ground of negligence.

The Supreme Court per OGWUEGBU JSC said:

That having considered all the circumstances, I am satisfied that negligence on the part of the appellant was proved and this is a proper case where the rule in Rylands v. Fletcher should apply.

See also National Oil & Chem. Marketing (2008) 7 CLRN 64.

3.5 DEFENCES

There are many defences open to the defendant where there are claims for damages against him. These defences and some exceptions to the rule in Rylands v. Fletcher are creating doubt on the rationale in describing the tort in Rylands v. Fletcher as strict liability. It is , however, still strict because liability is without fault but not absolute.

The defences which are available to the defendant in a claim under the rule in Ryland v. Fletcher include:

- 1) Act of God
- 2) Fault of the plaintiff
- 3) Consent of the plaintiff
- 4) Contributory negligence by the plaintiff
- 5) Act of stranger or third party
- 6) Statutory authority; and so forth.

The proof of any of the above act and or exceptions defeats any claim for liability and damages.

3.6 DAMAGES

Upon a successful litigation for liability and claim for damages, the damages recoverable by a successful plaintiff in an action based on the rule in *Rylands v. Fletcher* include one or any combination of the following:

- 1) Damages for physical harm to the land. This is principally hinged on the introduction or escape of a non-natural user to the plaintiff's land and damages result therefrom.
- 2) Damages to any structure on the land.

4.0 CONCLUSION

Looking at the tort in *Rylands v. Fletcher*, it was found that the rule is not found in the statute but in common law. It is a rule of law based on strict liability. This is based on an action of the defendant that caused damage to the plaintiff.

The rule in *Rylands v. Fletcher* has filled the lacuna in law for redress which were not obtainable in nuisance and negligence. The beauty of this rule in *Rylands v. Fletcher* is that public and statutory authorities are not allowed to shield themselves from liability where their legitimate activities caused damage to others.

5.0 SUMMARY

This unit has been able to expose the students to the understanding of strict liability offences especially as practiced under the rule in *Rylands v. Fletcher*. It has opened the understanding of the students' reasoning to the scope of the *Rylands v. Fletcher*, the difference(s) between the *Rylands v. Fletcher* and such important topics as negligence.

The unit dwelt on the rule and cited cases where it was applied in Nigeria. The unit looked at various ways and means of defence and the types of damages available to the plaintiff whenever he brings a claim for damages.

6.0 TUTOR-MARKED ASSIGNMENT

- 1) In a case of claim for damages, what should the plaintiff prove for him to get relief from the court?
- 2) In your own words, define strict liability under the rule in *Rylands v. Fletcher*.

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), *The Law of Tort* (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), *Outline of Torts*. Sydney, Butterworths.
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MODULE I: UNIT 4:**STRICT LIABILITY: LIABILITY OF ANIMALS**

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
 - 3.1 Definition of Animals
 - 3.2 Classes of Animals
 - 3.3 Livestock
 - 3.4 Dangerous Animals
 - 3.5 Non-Dangerous Animals
 - 3.6 Defences
 - 3.7 Remedies for Acts of Animals
 - 3.8 Other Torts of Strict Liability
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

In different parts of the world, people relate with animals differently. Some animals have been trained and made to live with people in some countries while

such animals remain wild and dangerous in other countries. One thing that is evident is that there is a natural relationship between humans and animals. This relationship has different purposes for human beings. Human beings in whatever society need animals for one or a combination of the following purposes:

- 1) For food.
- 2) For business e.g. for sale.
- 3) As a pet, companions and for assistance etc
- 4) For entertainment
- 5) For research
- 6) For many other uses e.g. for leather, hides and skin, export etc.

2.0 OBJECTIVES

The main objective here is to expose the students to the relationship between animals and people and thereby examine the liability of an owner or keeper of animals for the acts or damages perpetrated by them.

3.0 MAIN CONTENTS

3.1 DEFINITION OF ANIMALS

An animal is any creature living in land or in the sea excluding human beings. These creatures include small or big animals, fish, reptiles, crustacean or other creatures.

WHO IS A KEEPER OF AN ANIMAL?

The keeper of an animal is the owner of the animal or his servant, agent or a proxy having the authority of the owner to keep or look after the animal.

Animals are capable of being stolen. Therefore, the keeper of an animal is liable for any damage done by it (see the case of *Daryan v. Njoku* (1965) 2 All N.L.R. 53).

The rule is that a keeper of any animal does that at his own risk. The liability of a keeper of an animal is strict. He owes a duty of care to his neighbours for any injury caused by the animal's behaviour.

3.2 CLASSES OF ANIMALS

Animals are broadly divided into two kinds:

- 1) Domestic animals; and
- 2) Wild animals

However, for the purpose of tortious liability of an owner on keeper, animals have been classified into three categories:

- 1) Livestock or cattle
- 2) Dangerous animals
- 3) Non-dangerous animals

3.3 LIVESTOCK

The word "livestock" also commonly referred to as cattle is any animal reared or kept for food, wool, skin, used for farming works or agricultural activity. Livestock are animals that are not wild in nature. They include: (1) cattle, (2) sheep, (3) goats, (4) horses, (5) camel, (6) mules, (7) asses, (8) pigs, (9) donkey, and (10) poultry, among others but does not include dogs and cats.

As a general rule, a keeper of livestock which strays unto another person's land and damages any property or injures any person is liable for such damage or injury.

The tort of livestock trespass also known as cattle trespass, is a common law tort. The term "livestock" in the context of tortious liability is used to include a large number of domestic animals and animals that are not dangerous. These animals do not include dogs and cats because:

- 1) It is not desirable, and not very practicable to keep them in restraint like livestock; and
- 2) The tendency of dogs and cats for damage when they stray is often minimal, compared to bigger animals like cattle and so forth. But for dogs, some are not dangerous while others especially used as security dogs may be ferocious constituting grave danger to whoever they come in contact with if not restrained.

Claims in respect of cats and dogs may be brought under *scienter action*, that is, a claim for a wild or dangerous animal which we shall look into in the next segment of this unit.

The principle of liability for livestock trespass was clearly stated in the case of ***COX v. BURBRIDGE (1863) 143 ER 171 at 174*** where Williams J. stated that:

If I am the owner of an animal... I am bound to take care that it does not stray on to the land of my neighbour; and I am liable for trespass it may commit, and for the ordinary consequences of that trespass; whether or not the escape of the animal is due to my negligence is altogether immaterial.

WHEN LIABILITY FOR LIVESTOCK MAY OCCUR

Liability for livestock may occur when:

- 1) Prohibited livestock is brought into a country or community.

- 2) A diseased animal especially where it is likely to cause an epidemic that can threaten life and property is kept.
- 3) The owner or keeper failed to vaccinate the animal or give adequate medical care as prescribed by law.
- 4) The owner or keeper failed to restrain, transport, and or keep the animal in the manner prescribed by law.
- 5) The owner or keeper drives the animal intentionally on to another person's land.
- 6) The animal on its own strays independently to the plaintiff's land.
- 7) The owner or keeper carelessly leaves the animal(s) on the highway to the disturbance of the public.
- 8) It causes damage to crops.
- 9) The animals cause injury to another animal belonging to other persons.
- 10) The animal causes damage to chattel, and so forth.

It should be noted that liability does not arise where an animal is properly or lawfully led on a highway and it strays onto adjacent property (see *Tillet v. Ward* (1882) 10 QBD 17.)

In the case of *CURTIS v. BETTS*, the defendant was carrying his dog into the back of his Land Rover, when the plaintiff, a boy of 10 who had known the dog since it was a puppy called its name and approached it. Though the dog was on a lead held by the defendant, it leapt on the plaintiff and bit him on the face. The English Court of Appeal held: that the plaintiff was entitled to damages.

3.4 DANGEROUS ANIMALS

The term “dangerous animals” or “wild animals” are animals that are likely to attack and cause severe injury, or even death to their victims or damage to property if not restrained. These animals include wild dog, wolf, baboon,

monkey, crocodile, snake, lion, tiger, leopard, panther and other wild cats, gorilla, chimpanzee, warthog and so forth. These animals are dangerous to their victims including human beings especially when they are fully grown.

A person may not keep a wild animal unless under a licence granted by a government department. A keeper of a dangerous animal is liable for any damage caused by it.

A legal action brought against a defendant who is an owner, keeper or his agent or proxy of a dangerous animal is called *a scienter action*. This is an action for *a ferae naturae*. The term *faeae naturae* is a latin word which means “wild nature”. Therefore, a scienter action is a legal action brought on a person liable for the consequences of attack of a wild or dangerous animal. These animals by their nature are presumed to be wild and dangerous. *Scienter action* is of two kinds for animals as above and *mansuete naturae*, animals normally harmless though there may be individual cases of viciousness.

The general rule under the common law is that a keeper of an animal must keep it at his peril (see *Brethrens v. Bertram Mills Circus Ltd (1957) 2 QB 1*).

Liability for keeping an animal is strict. The defendant is liable for any damage done by the animal without having to prove that the particular animal was a savage animal. Liability lies with the keeper of the animal.

It is irrelevant where the injury took place, and interest in land is not required to be able to bring the action.

Denman C.J in the case of *May v. Burdeth (1993 the Times, 7 December C.A)* stated the law that:

A person keeping a mischievous animal with knowledge of its propensities, is bound to keep it secure at his peril.

PRINCIPLES OF LIABILITY UNDER THE SCIENTER ACTION

- 1) Whether an animal is dangerous or not normally dangerous is a question of law for a judge to decide relying either on judicial notice or expert evidence (see *McQuaker v. Goddard (1940) 1 KB 687 at 700*. *Uzoahia v. Atu (1975) 5 ECS LR 139 at 141*).
- 2) The knowledge of an animal's propensity to attack must relate to the particular propensity that caused the damage. E.g. if a dog attacks a man, it must be shown that the dog had propensity to attack humans (see *Glanville v. Sutton (1928) 1 KB 571*).
- 3) It is not necessary to show that the animal had actually done the particular type of damage on a previous occasion. It is sufficient to prove that it had exhibited a tendency to do that kind of harm in the past (see *Barnes v. Lucile (1907) 96 L.T 680*, for example, in establishing a dog's propensity to attack, it is sufficient to show that it habitually rushed out of its kennel and attempted to bite passers-by (see *Worth v. Gilling (1866) L.R L.C p. 1*).
- 4) Knowledge of an animal's aggressive tendency is usually imputed to the defendant owner or keeper, even if such knowledge was that of someone to whom custody of the animal was temporarily given (see *Baldwin v. Casella (1872) L.R Ex. 325*; *Daryani v. Njoku (1965) 2 ALL NLR 53 at 127*).
- 5) It is immaterial where the animal carried out the attack. For example, the attack can take place on the plaintiff land, on the defendants land, on the land of a third party, or on the highway or other public place (see *Fleming v. Orr (1857) 2 Mccq. 14 at 348*).
- 6) Liability for damage caused by the animals attack rest on the person who keeps or controls it. However, the mere fact that an occupier has tolerated the presence of an animal on his land does not make him to be liable for its

mischievous. For example, a father will not be liable for an injury caused by a dog owned and controlled by his under aged child (see *North v. Wood (1914) 1 K.B 629*)

3.5 NON-DANGEROUS ANIMALS

A non-dangerous animal is an animal that has been tamed by man. It is an animal that is *mansuetae naturae* - a latin phrase meaning tame by nature. Non-dangerous animals are animals *domitae naturae* – latin phrase meaning – domesticated naturally. These animals include camel, dog, cat, goat, cattle, horse, sheep, pig and so forth.

The owner or keeper of these animals will be liable for an act done by them if it is established that:

- 1) There was damage.
- 2) The particular animal in question had a savage disposition or propensity.

3.6 DEFENCES

The defences available to a keeper for his animal and its act includes:

- 1) Fault of the plaintiff.
- 2) Contributory negligence by the complainant.
- 3) Consent of the injured.
- 4) Act of the third party.
- 5) Act of God, for instance, an act of nature, such as, lightening or loud thunder, if it causes an animal to fear and jump into the plaintiff or stampede into his property or an animal running away or escaping from a flood following a heavy downpour of rain, if it causes injury, may come under the plea of act of God.

3.7 REMEDIES FOR ACTS OF ANIMALS

The remedies for acts of animals available to a person or public authority against an animal include:

- 1) Chasing the animal away by a harmless means
- 2) Self-defence
- 3) Defence of property
- 4) Damages
- 5) Restitution of damaged goods or payment of its market value
- 6) Order of injunction; or
- 7) Order of abatement
- 8) Isolation
- 9) Release into the wild forest for wide life
- 10) Arrest, seizure or confinement in a zoo
- 11) Slaughter, especially where it is viscous or has disease, and
- 12) Repatriation to country of origin, and so forth.

3.8 OTHER TORTS OF STRICT LIABILITY

An animal may commit different kinds of its tort. The acts of an animal may commonly give rise to an action in one or more areas of tort; such as:

- 1) Trespass to land
- 2) Trespass to chattel
- 3) Trespass to person
- 4) The rule in *Rylands v. Fletcher*
- 5) Nuisance
- 6) Negligence.

4.0 CONCLUSION

Liability of action of animals are borne by person(s) who acts as owner, keeper or controller.

It is the duty of the owner or keeper to take care of these animals in order to avoid danger or injury from the actions of these animals. Liability for keeping animals by owners or keeper is strict because the keeper of the animal in human society does that at his own risk and peril.

5.0 SUMMARY

In this unit the student ought to be able to define an animal as any creature living on land or in water excluding human beings. We have looked into classes of animals into livestock or cattle, dangerous animals and non-dangerous animals and the various liabilities for keeping these animals.

This unit has also examined the principles of liability under the scienter action, defences for acts of animals and other torts of strict liabilities.

6.0 TUTOR-MARKED ASSIGNMENT

Explain in details the principles of liability under the scienter action.

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), Outline of Torts. Sydney, Butterworths.
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MODULE 2: VICARIOUS LIABILITY

UNIT 1: MASTER’S LIABILITY FOR SERVANTS TORTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Who is a Servant?

3.2 Who is a Master?

3.3 Master’s Liability for Servant’s Tort

3.4 Remedies of an Employer against an Employee

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

Vicarious liability is the liability of one person for the conduct of another person because they stand in particular relationship to one another.

Vicarious liability is a liability of a superior (a master) for the conduct of a subordinate (a servant). Thus, vicarious liability is the liability of one person usually a superior for the conduct of an employee in the course of employment.

In this unit we shall be looking at vicarious liability of the master for the conduct of his servant.

2.0 OBJECTIVES

- The objective is to let the student know who is a master in law.
- The objective is for a student to also be able to determine who a servant is and for what conduct his master would be liable.
- To determine the legal relationship between a master and servant.

3.0 MAIN CONTENTS

3.1 WHO IS A SERVANT?

The term “*servant*” has no definite meaning and as such difficult to define.

Generally, a servant may be described as a person who works under direct supervision and control of another person for wages in kind or in cash.

According to Salmond:

A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and direction of his employer. A servant is a person engaged to obey his employer's orders from time to time. An independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it, he is bound by his contract, but not his

employer's orders (see Salmond, J.W, 1990 Torts, 18th ed. by R.F. v. Heuston, Sweet & Maxwell, London at para 174).

The above definition of a servant has been approved in a series of cases by the court over the years.

The servant is a person in a contractual relationship with a master where the master usually controls the work to be done and the way the work is to be done.

3.1.1 Professional Persons, Skilled Workers and Other Workers and the Control Test

Professional persons do not usually allow unnecessary imposition, interruption and interference with their professional discretion in carrying out work for their employers. Despite this failure of control of these professionals, the employer is nevertheless liable for the tort of his professional servant committed in the course of carrying out his job. For instance, a lawyer who counterclaimed in the course of his work for a clientele and loses the counterclaim will be at the peril of his client who employed him.

Similarly skilled workers like drivers and others do not want interference in carrying out their jobs. Nevertheless, they are employees whose liability is borne fully by their masters or employer. This liability will also depend on some further questions. These questions include: whether the driver is driving his own car or that of the employer; whether the workman will be paid salary or a lump sum for his labour and so on and so forth.

In the case of ***PERFORMING RIGHTS SOCIETY V. MITCHELL & BOOKER LTD (1924) 1 KB 762, McCarde J.*** in determining the control test in a master and servant relationship said that:

The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner

in which it is paid, the power of dismissal, and the circumstances under which the payment of the reward may be withheld, all these bear on the solution of the question. But it seems clear that a more guiding test must be secured... It seems reasonably clear that the final test, if there is a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance.

3.2 WHO IS A MASTER?

A master is one who has authority over another's service. A master is a specie of a principal. All masters are principals, but all principals are not necessarily masters. A principal becomes a master only if his control of his agent's physical conduct is sufficient (see William A. Gregory (2001), 3rd ed, The Law of Agency and Partnership 5).

A person such as a referee, an auditor, an examiner or an assessor specially appointed to help a court with its proceedings may take testimony, hear and rule on discovery disputes, enter temporary orders, and handle other pre-trial matters, as well as computing interest, valuing annuities, investigating encumbrances on land titles and the like but usually with a written report to the court, who in this instance is, the attenuate master.

3.3 MASTER'S LIABILITY FOR SERVANT'S TORT

The master can be liable for the servant's service in a number of ways:

a) COMMISSION OF A TORT BY THE SERVANT

For the servant to commit a tort for the master to be liable, the plaintiff must prove the commission of the tort by the servant. In the case of ***YOUNG v. BOX & CO. LTD (1951) 1 T.L.R at P. 793***, DENNING L.J explained that:

To make a master liable for the conduct of the servant, the first question is to see whether the servant is liable. If the answer is “yes”, second question is to see whether the employer must shoulder the servant’s liability.

It is clear from the above that vicarious liability of the master can arise only after the servant has been found to be originally liable in his conduct complained against.

In the case of an institution or an establishment like a hospital where it may be difficult to establish which of the servants is liable, the hospital authority will be vicariously liable unless it can be proved that no negligent treatment was handled by any of its staff (servants). In that case the principle of *res ipsa loquitur* (meaning that the fact speaks for itself) applies. (See the case of ***CASSIDY v. MINISTRY OF HEALTH (1951) 2 K.B 343***).

b) COMMISSION OF A TORT IN THE COURSE OF EMPLOYMENT

A master will not be vicariously liable for the tort of the servant if it is not proved that the tort was committed within the course of his performing his job or duty.

In deciding the question whether an act was committed in the course of employment, a court considers a number of relevant factors which include:

- 1) **The express and implied authority of the servant.** It is a general rule of law that a master is liable for the act done by a servant while exercising his master’s express or implied authority in the course of his work.

- 2) **The manner of doing the work the servant is employed to do.** The rule here is that a master or employer is liable where a servant or employee commits a tort, due to an improper, wrongful, forbidden or negligent way of performing an act that is within the scope of his employment. In the case of *Popoola v. Pan African Gas Distributors (1972) ALL NLR 831*, the servants of the defendant gas company were delivering gas cylinders to the plaintiff's home. While unloading, one of the cylinders caught fire from a lighted cigarette in the hand of another servant. The resultant explosion and fire completely destroyed the plaintiff's house. The plaintiff sued for negligence and damage. The Supreme Court held: that the servants were negligent in a duty which was within the scope of their employment and the defendant employers were liable.
- 3) **The authorized limit of time and place.** A master is free to indicate the time limit or hours of work for his staff. The employer is vicariously liable for torts committed within the time limits specified by the employer or master. It should be noted that when a tort is committed by a servant within a reasonable time after the close of working hours, a court can hold an employer liable for it. In *Ruddiman & Co. v. Smith (1889) 60 LT 708*. A clerk used a water tap about ten minutes after office hours in a washroom provided for employees and forgot to turn it off before leaving for home. The adjoining office was flooded with water as a result. The court held: that the defendant employer was vicariously liable for the damage done to the plaintiff. The use of the washroom by the clerk was incidental to his employment and the wrong act took place within a reasonable time after working office hours. See also *AWACHIE v. CHIME (1990) 5 NWLR pt. 150, p. 302 C.A.*

It should be noted also that an employee or servant who goes outside or beyond the express or implied place or course of his duty to engage in an act that is:

- a) For his own benefit; or
- b) For the benefit of a third party is on a business of his own or he is on a FROLIC of his own. (See *JOEL v. MORRISON (1934) 172 ER 1338 at 1339*).
- 4) **Express prohibition by the master.** A master does not escape liability by forbidding the servant from doing wrongful act, otherwise every employer or master will simply deny responsibility by prohibiting all kinds of wrong doing, negligence, mistake and so on connected with the servant's work.

Consequently, disobedience of express orders of the master does not take a servant outside the course of his employment to enable a master evade liability.

However, the existence of a master's express prohibition is a factor to be taken into account when determining the liability of a master. Prohibition by a master may be classified into two:

- 1) A prohibition which limits the scope of employment. This is a job specification and description limiting the scope of employment. If a servant goes outside its limit, he is on a frolic of his own and the master may be relieved of liability.
- 2) A prohibition limiting the manner of carrying out the performance of a job. This is a prohibition which only specifies the manner of conduct of the servant which if the servant does not comply will not relieve the master from any liability.

In the case of *Jarmakani Transport Ltd v. Abeke (1963) ALL NLR 180*. A driver of a lorry designated for carrying only goods contrary to express

prohibition took some passengers on board the vehicle including the plaintiff's "passengers not allowed" boldly written on both sides of the vehicle. He injured the plaintiff in an accident. The trial court gave judgment to the plaintiff. On further appeal, the Supreme Court reversed the judgment and held that the employer was not liable. Coker A.G.F.T said:

I am clearly of the view that the trial judge overlooked the difference between an act which is an improper way of executing an authorized act and an act which is the performance of an authorized act... The learned trial judge overlooked the clear difference between a prohibition that limits or defines the mode of performance of a duty and one that limit or curtails the scope of employment of the driver. In my view, the defendant/appellants were entitled to a finding that a driver at the material time was not acting within the scope of his employment, and they were therefore not liable in damages to the plaintiff/respondent for his negligence.

3.4 REMEDIES OF AN EMPLOYER AGAINST AN EMPLOYEE

Generally, remedies are safeguards to protect against any liability of the servant or employee by the master or the employer.

In general terms, the general rule is that the master is liable for whatever tort committed by a servant who is properly so called. The liability of the master is for the tort of the servant against third parties. The only remedy of the master against the servant is available in the internal rules existing between the master and the servant by which the master can deduct whatever liability to a third party as a result of the servant's tort from the emoluments of the servant. Other remedies include disciplinary measures such as warning, suspension from work for a number of days or outright determination of the servant's employment.

Where personal criminal responsibility occurs, the servant can be handed over to the prosecuting authorities for prosecution.

4.0 CONCLUSION

It has been seen above that whatever a person can do, he can also do it by the help of another person who he engages or employs as a servant. Consequently all the torts of the servant and the liability therefrom is borne by his master who employs him except for few cases which are rare. The master is liable because it is his business that the servant was engaged in and for the benefit of the master.

5.0 SUMMARY

The unit looked into the legal person of a servant and concluded that a servant is a person who is legally attached to another person who employs and supervises his job. Whatever tort committed during the time and place when the servant carries out his job or a reasonable time thereafter or at an adjoining area, his principal, the master is liable. The liability of the master will be maintained even where the master has specifically prohibited the servant from carrying out or doing some certain things. The liability of the master will continue as far as the servant is employed by the master and for a reasonable time after that. That is why some masters will advertise to the public that a former servant is no longer in their employment and that any person who deals with him does so at his own risk.

6.0 TUTOR-MARKED ASSIGNMENT

Explain why the master will be liable for the tort of the servant despite the fact that the master has specifically prohibited the servant from doing such an act?

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), *The Law of Tort* (8th ed.) Sydney: The Law Book Company Limited.
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MODULE 2:

UNIT 2: FRAUD OR THEFT OF TORT BY SERVANTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Fraud Defined

3.2 Theft Defined

3.3 Liability of Master for Fraud and Theft of their Servants

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

Fraud is a crime or tort of deceiving somebody in order to get money, goods or benefits illegally. A person who pretends to have some qualities, abilities that he does not really possess in order to deceive other people and benefit therefrom in whatever way commits a fraud. Fraud is something that is not as good, useful or helpful as people claimed them to be and for which people have parted money, goods or other valuables for.

In this unit the student is being introduced to the vicarious liability of the master for the fraud or theft committed by the servant.

2.0 OBJECTIVES

- The objective in this unit is to let the student understand the meaning of fraud or theft generally.
- It is also to let the student understand the actual and inherent reason while the master is made to be liable for the fraud or theft of his servant especially during the course of the servant's employment.

3.0 MAIN CONTENTS

3.1 FRAUD DEFINED

Fraud is generally a tort but it may also be a crime. It is a misrepresentation made recklessly without belief in its truth to induce another person to act one way or the other and in most cases to the benefit of the person making the misrepresentation. It is a tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.

It is an unconscionable dealing especially in contract law, the unfair use of the power arising out of the transaction, relative positions and resulting in an unconscionable bargain.

Fraud is a tort generally but criminal fraud is the one that has been made illegal by statute and which subjects the offender to criminal penalties such as fines and imprisonment. An example of a criminal fraud is the willful evasion of taxes accompanied by filling a fraudulent tax return.

3.2 THEFT DEFINED

Theft in the law of tort is treated as a synonym to the 'fraud' of a servant. It is the taking and removing something of value from a person with the intent of depriving the true owner of it. But the master of the servant who committed the theft is liable to the plaintiff for the theft of his servant.

Theft is the use of trick to obtain another's property or a thing of value especially by creating or reinforcing a false impression that he is truly representing a true intention of his master.

It is the failing to disclose in a property transfer, a known lien or other legal impediment by a servant knowingly or otherwise at the expense of his principal.

3.3 LIABILITY OF MASTER FOR FRAUD AND THEFT OF THEIR SERVANTS

In the past it was believed that a master was not liable for the fraud, theft or crime of his servant especially when such wrongful act was undertaken solely for the servant's own benefit and not for his employers.

Nowadays, an employer is liable for the fraud and theft of a servant committed in the course of his employment. It is irrelevant that the servant did the particular act for his own purpose or benefit.

However, the master will only be liable if it is proved that the employee (the servant) has;

- 1) Actual authority; or
- 2) Apparent authority, to carry out the act during the life and subsistence of the employment.

The leading case that settled the question of a master's liability for the fraud or theft of his servant is the case of ***LLOYD v. GRACE SMITH & CO. (1912) A.C 716***. In this case, the defendants, a firm of solicitors, employed a managing clerk who was authorized to do conveyancing work for the firm. The clerk induced the plaintiff who owned a number of properties, to instruct him to sell the properties. He then persuaded her to execute this documents, which he falsely told her were necessary for the sale, but which in fact were conveyances of the properties to himself. He then dishonestly sold the properties and misappropriated the proceeds. The House of Lords held that the defendants were liable for the fraud of their servant.

The principle in Lloyd's case was applied in many subsequent cases amongst which was the case of ***UNITED AFRICA CO LTD v. SAKA OWOADE (1955) A.C 130*** a Nigerian case where the defendant introduced two men as his driver and clerk to the plaintiff with the instruction that the plaintiff can give the men goods to be transported. Goods were later given to the two men by the plaintiff for carriage to one of the plaintiff's branches up country, but the goods were not delivered. The plaintiffs claimed that the defendant was vicariously liable for the conversion of the goods by his servants and the Privy Council, reversing the

West African Court of Appeal and agreeing with the trial judge, held that he was liable.

It should however be noted that a master will not be liable for the fraudulent act of a servant not committed in the course of his employment. In the case of *LEESH RIVER TEA CO v. BRITISH INDIA CO (1966) 3 ER 593*. The defendant employed stevedores to load and unload ship at the docks. The stevedores stole fixture from the ship. The court held that the employers were not liable for theft by the employees. The employers can be liable for the cargo which the stevedores were asked to load and unload but not for fixtures which was outside the course of the servant's employment.

4.0 CONCLUSION

Generally, a person who commits a fraud or theft is the one to be liable. But under the contract of employment the servant is employed to carry out the actual and inherent orders of his master. As such, any benefit or liability arising out of the servants acts is imputed to his master.

In view of the above, a master is legitimately liable for the acts or omission of his servant in the course of his employment including fraud and theft committed under the law of torts.

5.0 SUMMARY

In this unit, the student has been exposed to the definition and meaning of fraud and theft committed by a servant in the course of their employment.

It has been shown that even acts constituting fraud but without initial knowledge of the master but under his actual or apparent authority bring liability to the master. However, a fraud or theft committed by a servant totally outside the scope of his employment will not make the master to be liable.

6.0 TUTOR-MARKED ASSIGNMENT

The master is generally liable for the fraudulent acts or theft committed by his servant. In what circumstance(s) is the master relieved from liability arising from the fraud or theft of his servant.

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
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MODULE 2:

UNIT 3: VEHICLES OWNERS AND CASUAL AGENTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Vehicle Owner Defined

3.2 Casual Agents of the Owner Defined

3.3 The Presumption of Service or Agency of the Third Party

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

It is not always possible for a man to be in charge of his moveable and unmovable properties alone. At times, he may need to engage another person to act for him for one thing or another. Such persons are engaged not formally and as such they are called “*casual agents*”. A casual agent is usually not an employee or a servant of a master.

A casual agent is a person who in a particular instance acts wholly or partly as a servant of a master although he is not a servant property so called. Thus, a casual agent is someone, whom one may send on an errand once a while as occasion demands or allows.

2.0 OBJECTIVES

The objective of this unit is to consider who a casual agent is i.e. whether he is a servant or someone else to the person who is an owner of a property or in the position of a master.

The objective seeks to establish the liability of a casual agent in relation to his acts for and on behalf of another person who is in the position of a master.

3.0 MAIN CONTENTS

3.1 Vehicle Owner Defined

A vehicle owner is the registered owner of a vehicle. It is in the name of the vehicle owner that the papers and all other necessary particulars of a vehicle is registered.

The owner may not be in possession as he may ask another person to drive his car for whatever purpose for a term certain. This varies from one hour to one year or more as the case may be.

For example, owners of big lorries such as tippers and trailers do not always drive these vehicles themselves. In law, the owner has a right which is attached to the vehicle. That is the right to determine the destiny of the vehicle. This is a right of sale or to give the vehicle out to another individual or an organisation or the government as gift.

People who donate cars to the police or allow people to win cars in a promo have determined the destiny of such vehicles and as such parted with both ownership and possession of those vehicles.

3.2 Casual Agents of the Owner Defined

A casual agent is someone who is acting wholly or partially for a purpose in which his master or principal has an interest. A casual agency or casual agent arises when a person who is a master or principal usually temporarily delegates another person to do something for him.

Casual agents include: (1) a master's family members such as his wife, children and other persons living with them; (2) friends; (3) other persons with the masters direct or indirect consent.

These category of casual agents are acting but not in the course of employment. The doctrine of vicarious liability has been extended to casual agents on the ground of public policy because the law *prima facie*, presumes that a casual agent is wholly or partly in the service or agency for the person whose property, business, car or interest he is in charge of pursuing or managing.

Therefore, the onus is on the "master" to prove that a person who is *prima facie* his agent is not in fact his agent. This is so because, the master is in position to know the truth.

In the case of ***ORMROD v. CROSSVILLE MOTOR SERVICES LTD (1953) 1 WLR 1120***, the owner of a car asked a friend to drive his car from Liverpool,

England to Monte Carlo where he would join him for a continental holiday together. The court held: that the car owner was vicariously liable for the negligent driving of the friend during the course of the journey. The journey was undertaken partly for the purpose of the owner. In this case, DENNING L.J. said:

It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver, if that driver is his servant acting in the course of his employment. This is not correct. The owner is also liable if the driver is his agent; that is to say, if the driver is with the owner's consent, driving the car on the owner's business or for the owner's purpose. The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver.

However, mere permission to drive is not enough for the owner's responsibility.

Therefore, where a person takes and drives someone else's car with or without his permission, the owner is not liable, except the casual agent is acting wholly or partly for the owner's purpose.

In the case of *HEWITT v. BONVIN (1940) 1 KB 188*, a father allowed his son to use his car to take the son's girlfriend home. The son had an accident. On a claim for damages by the victim against the father, the court held: that the father was not liable, as the son was not acting wholly or partly for the father's purposes by carrying his girlfriend home in the father's car.

3.3 The Presumption of Service or Agency of the Third Party

A person, who seeks to succeed in recovering damages from an owner of a vehicle on the principle of vicarious liability, has to prove that:

- a) The negligent driver was a servant or agent of the owner and

- b) That the offending act of the negligent driver occurred in the course of his employment, or agency of the owner.

The plaintiff's task is assisted by the rule of evidence established in the case of ***BERNARD v. SULLY (1931) 47 T.L.R 557*** and first applied in the Nigerian case of ***ONUCHUKWU v. WILLIAMS (1935) 12 NLR 19***, to the effect that where a plaintiff in an action for negligence proves that damage has been caused by the defendant's vehicle, the fact of ownership of the vehicle is *prima facie* evidence that the vehicle at the material time was being driven by the servant or agent of the owner, or by the owner himself.

However, an owner will not be vicariously liable where he proves that the person who drove his car at the material time was not his servant or agent.

4.0 CONCLUSION

It is a known fact that it is not always possible to own a vehicle and be the one to drive it always. You may need to allow your wife, children, ward or friend to drive it. These people are not your servants as such but casual agents.

A casual agent acting for himself but not for the owner of a vehicle is liable personally for any breach that occurs while driving a vehicle that belongs to another person.

The owner of a vehicle will only be liable if the agent is acting for the owner and not for himself.

5.0 SUMMARY

In this unit we have taught the student to understand the meaning and such can now define 'casual agent'. He can now distinguish between a casual agent and a servant vis-à-vis their liability despite the general liability of the master.

The student by now has the understanding of who an owner of a vehicle is and in what circumstances he is liable or exempted from liability.

The owner is generally liable for the accident his vehicle is involved in as he is presumed to be the driver of his own car. He is relieved of liability if he can prove that he consented to the use of the vehicle by another person but for the benefit of that other person and not in the course of performing a duty for the vehicle owner.

6.0 TUTOR-MARKED ASSIGNMENTS

A father allowed his son to use his car take the son's girlfriend home. The son had an accident and both the son and the girlfriend were injured. The father of the girl has threatened to sue for damages and has approached you for advice on who to sue.

Advice him with a legal opinion.

7.0 REFERENCES/FURTHER READING

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MODULE 2:

UNIT 4: LIABILITY FOR INDEPENDENT CONTRACTOR

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Independent Contractor Defined

3.2 Non-Liability for the Torts of independent contractor by the master

3.3 Exceptions to the Principle of Independent Contractors

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

A physical or legal person is empowered by law to carry out or do all legitimate things by himself and where appropriate he can employ, hire, use or request another person either physical or legal to help him carry out all or any of his activities or functions. For example, a person can build or supervise the building of a house. He can also ask, request, use or hire any person to do the same for and on his behalf by paying for their service. While the hired or employed is carrying out such job, contract or employment, the master or hirer will not be allowed to control or give order or disturb the person in carrying out the job. Such a person is called an independent contractor.

2.0 OBJECTIVES

- The objective of this unit is to understand who an independent contractor is.
- It is also to understand who is liable for his conduct.
- What is the legal relationship between an independent contractor and his employer?

3.0 MAIN CONTENTS

3.1 INDEPENDENT CONTRACTOR DEFINED

An independent contractor is a person who agrees to carry out and/or perform a specific duty or task or to produce a specific result for a fee and who in the performance of his work or duty is not subject to the direct control of his employer and he is entitled to use his discretion in the mode and method of carrying out or performing his work.

Due to the lack of control by his employer over him when carrying out his job, an independent contractor is said to be under a contract of services. He is bound by his contract but not the order of his employer.

For example, a carpenter employed to produce a table is not subject to the control of his employer on how to cut or join wood. All the employer needs is a table. The carpenter is bound only by his contract to produce a table not the order of his employer.

3.2 NON-LIABILITY FOR THE TORTS OF INDEPENDENT CONTRACTOR BY THE MASTER

Under the Principle of vicarious liability generally, the master is responsible and liable for the tort of whoever he employs being his servant. A servant is employed and controlled in what and how he does his work and for this, his master is liable for all his torts in this wise. But an independent contractor is independent of the order and control of the employer on what and how to carry out his work. The independent contractor uses his own discretion, methods and expertise which may not be known even to his employer. By this it will be against the principle of natural justice and fairness if the employer will be made liable for the tort of an independent contractor. For example, a lawyer who is an expert in his profession is usually hired by non-professionals to litigate a case on their behalf. The non-professional cannot be held liable for the liability incurred by the lawyer who was not under the direct control of what and how to take a particular step during the duration of the lawyer's employment.

3.3 EXCEPTIONS TO THE PRINCIPLE OF INDEPENDENT CONTRACTORS

The general rule is that an employer is not liable for the torts committed by an independent contractor. However, there are exceptions to this general rule. An

employer is liable for the tort committed by an independent contractor in the following ways:

- 1) Where an employer expressly or impliedly authorized or engaged an independent contractor to commit an illegality, or a tort. For example, when one person engages another person to commit trespass to person such as assault or arrest. Also where a person engages some miscreants to beat up another person to teach him a lesson. The employer of such miscreants will be liable for assault. See *Ellis v. Sheffield Gas Co. (1853) 118 ER 955* where a company which had no right to dig up streets engaged a contractor to open trenches in a street in Sheffield, England. The contractor's servant left a head of stones on the road which injured the plaintiff. It was held that the defendant company which employed the contractor was liable for the unlawful acts of the contractor.
- 2) Where a contractor commits a strict liability tort, such as, under the Rule in *RYLANDS v. FLETCHER (1868) LR HL 330*. In such cases, the employer will nevertheless be liable notwithstanding the fact that no negligence was imputed to the independent contractor.
- 3) Where a passenger in a taxi orders the driver to drive fast or to overtake other cars and a tort was committed in the course of the driving, both the taxi-driver and the passenger will be liable for any damage caused by the former's reckless driving.

4.0 CONCLUSION

The general rule is that a master is liable for the tort of his servant. He is not liable for the tort of an independent contractor who does not take order from him or allow himself to be controlled while carrying out the job.

However, the employer of the independent contractor may be liable if he is employed to carry out an illegal act or if the act is carried out by both the employer and the independent contractor.

5.0 SUMMARY

Here in this unit we have been able to define who an independent contractor is and that an employer is not generally liable for the tort of an independent contractor. However, that there are few exemptions to the above general rule.

6.0 TUTOR-MARKED ASSIGNMENT

- 1) In what circumstances is an independent contractor relieved of his liability.
- 2) Why are independent contractors made liable for the torts they commit?

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), Outline of Torts. Sydney, Butterworths.
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MODULE 3: DEFAMATION

UNIT 1: DEFAMATION

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Defamation Defined

3.2 Defamation and the Standard of a Right Thinking Members
of the Society

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

The tort of defamation is concerned with intentional or unintentional damage to the reputation of a physical or a corporate person caused by injurious declaration or publication. Any word spoken or written to the hearing or knowledge of third parties that can bring down the reputation of persons being referred to and constituting damage thereof constitutes defamation.

The torts of defamation can be in oral form (slander) or in written or published form (libel).

The law of defamation is designed to protect, compensate and remedy any injury done to the good name, reputation, office etc of the person who has suffered as a result.

However, a person cannot recover damages for the loss of reputation he does not have. Where a person has no good reputation, in respect of what is said, then the law has nothing to protect him for.

2.0 OBJECTIVES

In this unit, its objective is to expose the students to the essence of the law of defamation.

The objective is for the student to understand the tort of defamation and be able to proffer a definition as appropriate.

The student should be able to distinguish defamation from other related accusations.

The student should also know as a matter of course that the law of defamation has the objective to vindicate, compensate and protect the good name and reputation of a person where there has been damage.

3.0 MAIN CONTENTS

3.1 Defamation Defined

Defamation is any expression or publication that damages the reputation of another person. Thus, defamation is the publication of information that lowers a person in the estimation of right thinking persons generally.

According to *Sir Percy H. Winfield, in Law of Tort 18th Edition*, he said that;

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally, or which tends to make them shun or avoid that person”

Essentially, defamation is any communication of any information that injures the reputation of a person and exposes him to hatred, ridicule, or damages him in his office, profession, calling, trade or business. See *Atoyebi v. Odudu (1990) 6 NWLR pt. 157, p. 384 S.C* see also *Complete Comm. Ltd. v. Onoh (1998) 5 NWLR pt. 549, p. 197 C.A.*

Therefore, a person commits the tort of defamation when he publishes to a third party, a discrediting information about another person.

3.2 Defamation and the Standard of Right Thinking Members of the Society

Defamation has been defined as any expression or publication that damages the reputation of another person for which he can redress by suing for damages or demanding that a public apology be tendered in a widely read newspaper.

The question is what is the relationship of defamation with different categories of persons. There are different categories of persons. Some persons are highly educated while others are illiterate. Some persons are sane while others are insane.

Therefore, there should be a standard of right thinking members of society to be used as a yardstick to measure and determine who and when their statements can be regarded as defamatory.

The person or organ of state that determines that standard of right thinking members of society is the court of law.

In the case of *Egbuna v. Amalgamated Press of Nig. Ltd (1967) ALL NLR 27* in finding out the standard of the right thinking members of the society, the Supreme Court said that:

“The court usually rules out on the one hand, persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on other hand those who are so censorious as to regard even trivial accusations, if they were true as lowering another’s reputation, or who are so halcyon as to infer the worst meaning from any ambiguous statement... the ordinary citizen... is neither unusually suspicious nor usually naïve and he does not always interpret the meaning of words as would a lawyer, for he is not inhibited by a knowledge of the rules of construction”.

In essence, for a tort of defamation to pass the standard acceptable to all, the statement must be false and capable of damaging the reputation of another person in the estimation of a reasonable or right thinking member of the society.

The defamatory statement must not emanate from a fool or a highly technical person like a lawyer who will usually subject each word in your statement to various interpretations.

The requirement for defamation is to have a damaging statement to the reputation of a person in the estimation of a normal reasonable and right thinking person. See *Sim v. Stretch (1936) 2 ALL ER 1237 HL*.

4.0 CONCLUSION

It is incumbent on the student at the end of this unit to be able to describe, explain or define the term “defamation”.

He should be able to state the type of comment or statement that can qualify for the state to allow one person to defend his damaged reputation and even ask for measure aimed at rectifying or correcting the impression of impunity against any individual.

5.0 SUMMARY

In this unit, attempt has been made to explain and define the term defamation as an injurious or damaging statement made against the reputation of a person who usually is the plaintiff who has a right to restore his damaged reputation by which the court will ask the defendant, if found guilty, to do or refrain from doing certain action apart from awarding damages against the defendant for the benefit of the plaintiff (if he succeeds).

It was particularly noted in this unit that there is a standard of the right thinking member of the society that is usually applied by the courts in considering and giving judgment in defamation cases. It is clear here that as much as the law of tort is ready to help anybody in legal battle leading to the defence of their dignity and reputation, a person with low or no reputation at all cannot be help by the law of tort and the courts. See the case of *Egbuna v. Amalgamated Press of Nig. Ltd. Supra.*

6.0 TUTOR-MARKED ASSIGNMENT

- 1) Attempt the definition of defamation.

- 2) What is the standard that is usually used by the courts to measure the reputation of litigants under the law of tort on defamation?

7.0 REFERENCES/FURTHER READING

- Curzon, L.B Dictionary of Law.
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MODULE 3:

UNIT 2: LIBEL AND SLANDER

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 What is Libel?

3.2 What is Slander?

3.3 Distinction Between Libel and Slander

3.4 Vulgar Abuse

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

Defamation is a tort against the reputation of a person or a corporate body or the state or any of its officials, committed by a person or a corporate body, the state or any of its officials.

Any of the above listed persons or entities can be on the other side in a case of defamation. This means that any of these group of persons can either be plaintiff or defendant. It is pertinent to know that there are two popular classes or divisions of the term defamation. These are libel and slander.

These terms shall be the discussion in the main contents of this unit.

2.0 OBJECTIVES

The objective of the unit is to look at the meaning and content of the defamation of libel and that of slander. It is also to distinguish and differentiate between libel and slander.

It is also to understand the meaning of vulgar lender and distinguish it from slander. In Nigeria vulgar language is a common phenomenon.

3.0 MAIN CONTENTS

3.1 What is Libel?

A libel is a defamatory statement made in visible permanent form such as written or printed statement. For example, books, newspapers, notes, circular, painting, photograph, films, letters and memoranda.

Section 3 Defamation Law (1961) and Section 3 Law of Lagos State (1973) Cap 34 also provides that any defamatory words contained in a radio and television broadcast, and any recorded audio-visual material are within the ambit of libel. See also *Section 2(1) Law of Western Nigeria Cap 32*.

In *Sketch Publishing Co. Ltd v. Ajagbe Mokeferi (1989) 1 NWLR pt 100, pg. 678 SC*. It was held that in libel, the defamatory statement remains in a permanent form long after publication and may be referred to by any persons in future and cause damage to the person or his family, except the materials are withdrawn from circulation or destroyed by the defendant at the order of the court.

CRIMINAL LIBEL

Section 373-380 Criminal Code also provide that criminal libel is a crime i.e. where a defamation tends to breach the peace, arrest and prosecution may follow a defamatory publication. See *R v. Wicks (1936) 1 ALL ER 384*.

3.2 What is Slander?

Slander is a statement made in a transitory form and not in a permanent form, most often through the medium of spoken words or gesture. It is sometimes said that libels is addressed to the eye, whilst slander is addressed to the ear.

Therefore, it is doubtful whether defamatory statements contained in tape recordings or cassettes are libel or slander, for they are permanent form and yet addressed to the ear.

Slander is only actionable on proof of damages, unless in the exceptions where slander operates like a libel. *Opara v. Umeh (1997) 7 NWLR pt. 11, pg. 95 C.A.*

In *Yesufu v. Gbadamosi (1993) 6 NWLR pt 299, pg 363 C.A.* It was held that in slander the alleged defamatory words relied upon must be pleaded and proved in evidence.

In other words slander is not actionable per se, unless it inputs a crime, contagious disease, unchastity in a woman, or it damages a person in any office, trade, profession carried on by him. See also the case *Coward v. Wellington (1839) 173 ER 234* and *Onojoghofia v. Vokitikpi (1974) EC SLR 465*.

3.3 Distinction between Libel and Slander

Historically, libel and slander were separate torts, but today they are treated as two aspects of the single tort of defamation and are generally governed by the same principle.

The difference between the two however is that libel is actionable per se, i.e. without the need to prove special or actual damage, slander is not actionable per se except in certain cases e.g.

- a. Alleging the commission of a crime punishable by imprisonment or corporal punishment. *Agboaka v. Ejiofor (1972) 2 ECSL 109.*
- b. Alleging that a person is suffering from a contagious or infectious disease, which renders the sufferer liable to be ostracized from society. *Murray v. Williams (1936) 6 JLR 180.*
- c. Alleging unchastity in a woman or girl – *Kerr v. Kennedy (1942) 1 KB 409; 1 ALL ER 412.*
- d. Alleging that a person is unfit for any office, profession, trade, calling or business held or being carried on by the person. *Atoyebi v. Odudu (1990) 6 NWLR pt 157, pg. 384 S.C.*
- e. In the above four exceptions, slander is actionable per se and it does operate and have effect as if it is a libel.

3.4 Vulgar Abuse

As a general rule, mere vulgar abuse or insult is not slander and thus not defamation, therefore they are not actionable in slander. *Bakare v. Ishola (1959) WNLR 106.*

The question whether the annoying or irritating words are mere vulgar abuse or whether they actually amount to a slander is a matter of fact which has to be

decided by the court looking at the circumstances in which they were uttered i.e. the facts of each case.

WHEN VULGAR ABUSE IS ACTIONABLE

Where a vulgar abuse alleges a specific act or wrongdoing, or accuses that the plaintiff committed a specific crime, then the statement will not be regarded as a mere slander, as the statement may lead to the plaintiff being shunned by the public or arrested by the police. The court will hold such vulgar abuse as defamatory whether or not it was said in an atmosphere of jokes or in the heat of anger. *Ibeanu v. Uba (1972) 2 ECSLR 194 at 195.*

4.0 CONCLUSION

In the law of torts on defamation, libel and slander are the most popular being the classes of defamation on which litigants have approached the courts to seek redress when their reputation come under attack.

The tort of libel and slander are generally believed to be the only classes of defamation despite other categories like vulgar abuse which is somehow has some semblance of slander.

The difference between libel and slander represents the difference in the mode and means of committing these offences against the reputation of a person. However, the consequences may be the same for the victim of these torts.

5.0 SUMMARY

In this unit, attempt has been made to define and explain the two classes of defamation which are libel and slander.

While libel is a defamatory statement made in visible or permanent form, slander is a defamatory statement made in transitory form.

While libel is addressed to the eye, slander is addressed to the ear. Vulgar abuse may resemble slander but it is not slander as it is an abuse as a result of

disagreement between parties or in a bid to correct somebody in the course of doing something. For example, can't you see? Are you blind? Don't be foolish.

6.0 TUTOR-MARKED ASSIGNMENT

- Differentiate between slander and vulgar abuse.
- Explain in details what you understand by libel.

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), Outline of Torts. Sydney, Butterworths.
- Gillies, P. (1993), Business Law (5th ed.), Federation Press.
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MODULE 3:

UNIT 3: SPECIAL DAMAGES IN SLANDER

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
 - 3.1 Remoteness of Damages in Libel and Slander
 - 3.2 What the Plaintiff Must Prove
 - 3.3 Other Types of Defamation
 - 3.3.1 Defamation of a Class or Group
 - 3.3.2 Unintentional Defamation
 - 3.3.3 Innocent Dissemination
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

In the law of torts generally, defamation is one of its main pillars as a course. Defamation is a tort against the reputation of person in the estimation of reasonable persons.

The tort of slander is the most committed torts especially in a country where literacy level is low and slander is not committed only by uttering such words in the English language which is the official language in Nigeria.

The purpose of the tort of defamation is to protect persons against falsehood and restore the reputation and dignity of those who are unlawful victim of slander.

The courts will always enforce the law to protect the citizens especially against defendants who are out to destroy the reputation built by a lot of sacrifices by the plaintiff. This the court does by awarding damages and special damages against erring defendants guilty of committing slander.

This unit is therefore devoted to special damages in slander.

2.0 OBJECTIVES

The objective of this unit is to expose the students to the essence of litigation in the tort of defamation which is damages.

The award of damages will vindicate which ever party got the award. It is also to analyse what kinds of words constitute slander and what must be proved by the plaintiff to succeed in getting damages awarded to him by the court of law.

3.0 MAIN CONTENTS

3.1 REMOTENESS OF DAMAGES IN LIBEL AND SLANDER

As a general principle of tort, the damages complained of as a result of a defamatory statement must not be too remote. The plaintiff may recover compensation only for those consequences of the defamatory statement which were foreseeable. See *Vicas v. Wilcox (1806) 103 E.R 244*.

For example, if 'A' slanders 'B' to 'C', and 'C' repeats the slander to 'D' who then dismisses 'B', 'A' is not liable for 'B's dismissal because the damage to B is remote. But 'A' will be liable to 'B' if:

- a. He authorized the slander to 'D';
- b. 'C' had a legal or moral duty to repeat the slander to D;
- c. 'A' should have foreseen that his slander of 'B' would be repeated by 'C' to 'D'.

This rule of remoteness equally apply to cases of libel.

3.2 WHAT THE PLAINTIFF MUST PROVE

The plaintiff in a defamation action must establish three things;

1. That the words were defamatory.
2. That the words referred to the plaintiff.
3. That the words were published (to at least one person other than the plaintiff).

1) WORDS MUST BE DEFAMATORY

The words complained of by the plaintiff must be defamatory and it is for the judge to decide whether the words complained of are reasonably capable of being defamatory. *Okolo v. Midwest Newspaper Corporation (1974) 2 CC HCJ 203 at pg. 205* and *Din v. African Newspaper Ltd (1990) 3 NWLR pt. 139 pg. 392 S.C.*

Where the words complained of are clearly defamatory i.e. “A is a thief”, “B is corrupt”, the judge’s task is comparatively simple.

The words used must be capable of defaming the plaintiff in their natural meaning, otherwise the claim of defamation will fail, except defamation by an innuendo is alleged and proved i.e. words are usually interpreted in their ordinary, natural and literal meaning, unless the plaintiff pleads that the words contain a innuendo, that is, a hidden or secondary meaning.

INNUENDO

Defamation by an innuendo is a defamation by the use of word which are not defamatory in actual sense of the case or in themselves. An innuendo is an indirect defamation by the use of words with a hidden or secondary meaning. *Akintola v. Anyiam (1961) 1 ALL NLR 529.*

TYPES OF INNUENDO

Innuendo are of two types;

1. True or legal innuendo;
2. False or popular innuendo.

TRUE OR LEGAL INNUENDO

These are words which are not defamatory on their face or natural meaning, but they have a defamatory meaning to the person to whom they are published, because of circumstances, facts, information or a special or secondary meaning which are known to the hearers or readers to whom it is published. *Akintola v. Anyiam (1961) 1 ALL NLR 529* and *Duyile v. Ogunbayo & Sons (1988) 1 NWLR, pt. 72, pg. 601 S.C.*

FALSE OR POPULAR INNUENDO

This is a statement which is defamatory not because of any extraneous facts or circumstances known to the people, it is published, but because of the defamatory influence, meaning, or conclusion which reasonable people will draw from the words that have been used. *Mutual Aid Society v. Akerele (1966) NMLR 257*, *Ashubiojo v. African Continental Bank Ltd (1966) LLR 159* and *Adeleke v. National Bank of Nigeria Ltd (1978) I LRN 157*.

2) THAT THE WORDS REFERRED TO THE PLAINTIFF

For the plaintiff to succeed in an action for defamation, the plaintiff must prove that the publication referred to him. In other words, he must prove that he is the person defamed – *BPPC v Gwagwada (1989) 4 NWLR pt. 116, pg 439 C.A* and *New Nigerian Newspaper & Anor v. Oteh (1992) 4 NWLR pt 237, pg 626 C.A*

3) THAT THE STATEMENT WAS PUBLISHED

The plaintiff must prove that the defamatory statement was published or communicated by the defendant to at least one person other than the plaintiff.

The basis of action in defamation is not the words themselves but the publication of it to another person other than the plaintiff. Publication by a defendant may be in the form of writing as a libel or orally by words as a slander.

It is not necessary in all cases to prove that the libelous matter was actually brought to the notice of some third party. If it is made a matter of reasonable inference that such was the fact, a prima facie case of publication will be established. This is particularly so when a book, magazine or newspaper containing a libel is sold. At this instance, where the material is produced to the court by the National Library of Nigeria, that will be a clear evidence that it was

published to a third party, see; *Awoniyi v. Regd. Trustees of AMORC (1990) 6 NWLR pt 154 pg 42 C.A* and *Fawehinmi v. Akilu (1994) 6 NWLR pt 351 pg 387*.

3.3 OTHER TYPES OF DEFAMATION

3.3.1 DEFAMATION OF A CLASS OR GROUP

Despite the requirement that the plaintiff be identified or marked out by the defamatory words, the words must refer to him personally. It follows that where defamatory words are published concerning a group or class of people, such as “*all lawyers are liars*” “*all accountants are thieves*” or “*all bankers are fraudulent*”. It is not defamatory, as no individual member of the group can say that the statement refers to him personally except, the class of such people is so small and the members are clearly known, and that what is said of the class is necessarily said of each and every member of it. In *Dalumo v. The Sketch Publishing Co. Ltd (1972) LL NLR 567 at pg. 568*. It was held that a libel published about the top officials of Nigeria Airways which was a small and ascertainable class of persons sufficiently referred to the plaintiff who came within it per Fatayi Williams, JSC.

3.3.2 UNINTENTIONAL DEFAMATION

It is no defence to an action for libel or slander that the defendant did not intend to defame the plaintiff. The intentions of the defendant may be relevant to the assessment of damages but they are irrelevant to the question of liability see – *Newstead v. London Express Newspaper Ltd (1940) 1 KB. 377*.

The cases of unintentional defamation are common in films, theatres and books which are often based on fiction and fictitious persons or characters.

Youssoupoff v. MGM Pictures (1930) 50 TLR 581. See also *Hulton & CO. v. Jones (1909) 2 KB 444 C.A*

3.3.3 INNOCENT DISSEMINATION

Innocent dissemination is the distribution of a defamatory article, such as a book, Newspaper or film containing a defamation, without knowledge of the defamatory content by the seller.

Therefore, subsidiary distributors are usually not liable for defamation provided the defendant distributor can show that;

- 1) He did not know that the book or publication was libelous; *Awolowo v. Kingsway Stores Ltd (1968) ALL NLR 608*.
- 2) That his lack of knowledge was not due to negligence on his part. *Vizetelly v. Mudie's Select Library Ltd (1900) 2 QB 170*.

4.0 CONCLUSION

This unit is an attempt to expose some technical aspect of slander. These technical aspects include, remoteness of causation leading to slander, unintentional and innocent dissemination of slanderous materials. The essence here is to address the key issue of damages in slander which is usually awarded by the courts. Each of the segments in this unit has been made simple so as to grasp its meaning and essence by the student.

5.0 SUMMARY

This unit is based on special damages in slander. The damages in slander if established is almost the same for libel and for any group or mode of defamation if proved.

In the law of torts generally, including defamations and slander in particular, damage and its award to the plaintiff is the essence of litigation. But in some cases, the plaintiff will win his case but the defendant will be ordered to do certain acts or refrain from some certain actions without damages.

In this unit, we focused on such issues like remoteness of damage that if the slander is remote, the plaintiff may not succeed for the award of damages.

The issue of innuendo and other types of slander with what the plaintiff must prove were also into.

6.0 TUTOR-MARKED ASSIGNMENT

What is the essence of damage to the plaintiff who has the task of restoring his reputation which has been lowered in the estimation of right thinking members of the society?

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
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MODULE 3:

UNIT 4: DEFENCES

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Justification or Truth

3.2 Fair Comment

3.3 Privilege

3.4 Res Judicata

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

Defences generally are the defendant's opposing or denying the truth of the facts of the plaintiff's case.

These are the facts relied upon to rebut the plaintiff's case by the defendant.

Under the law of defamation making statements which can injure the reputation of the plaintiff and bringing his reputation to disrespect in the estimation of members of the society constitutes the major issue against which the plaintiff is suing. He often ask the court to grant him judgment in form of award against the defendant.

The defendant has the duty to defend himself against the suit of the plaintiff.

He may plead among other things: justification or truth of the offending statement; fair comment or privilege based on immunity against any liability or res judicata. These and other relevant issues will be discussed in this unit.

2.0 OBJECTIVES

The objective of this unit is to expose the student to the various ways, means and methods that are open to the defendant when faced with the duty to defend himself against the suit of the plaintiff.

3.0 MAIN CONTENTS

3.1 JUSTIFICATION OR TRUTH

It is a complete defence of an action for libel or slander that the words complained of were true in substance i.e. that the statement is true, a statement of what really happened and that the plaintiff cannot, by the nature of things suffered damage to reputation, nor should he be allowed to recover compensation

for an imaginary damage to a reputation he does not have. See *Onwuchekwa v Onovo (1974) 12 CCHCJ 1919*.

In *Nthenda v. Alade (1974) 4 ECSLR 470*, it was held that:

“the plaintiff has no right to a character free from that imputation, and if he has no right to it, he cannot in justice recover damages for the loss of it; it is *damnus absque injuria*”

However, small inaccuracies do not defeat the plea of justification, for example if the defendant makes four allegation against the plaintiff and succeeds only in proving the truth of three, the defence will not fail. *Dim v. African Newspapers Ltd (1990) 3 NWLR pt 139 pg 392 S.C.*

Section 7 Defamation Law of Lagos State (1961) CAP 34 provides;

“In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff’s reputation having regard to the truth of the remaining charges”

3.2 FAIR COMMENT

Fair comment is an impartial observation, opinion or criticism on a matter of public interest, currency, or discourse, it is a dispassionate expression of opinion on fact correctly stated.

Therefore, it is a defence to an action for libel or slander that the statement complained of was fair comment on a matter of public interest.

The defence of fair comment is very important for the press who daily examine, and comment on multifarious topics and people. Nonetheless, the plea is for everyone generally and is based on the important need to preserve the

fundamental right to freedom of expression for a person to comment on any matter of public interest affecting his community or country.

For the defence of fair comment to succeed, the statement must meet the following requirements;

- 1) The comment must be on a matter of public interest. For example, a matter is of public interest, when it affects a large number of people, or draws their attention so that they may be legitimately interested in it, or what is going on; such a matter is a matter of public interest on which everyone is entitled to make a comment on fair comment. See - *Dim v. African Newspapers Ltd (1990) 3 NWLR pt 139 pg 392 at 408-409 S.C*; also *Staphens v. Avery (1988) 2 ALL ER 479*.
- 2) The statement must be a comment or an opinion. The statement alleged to be offensive must be a comment, observation, conclusion, or opinion and not an assertion of fact – see *Nthenda v. Alade (1974) ECSLR 470* and *London Artists Ltd v. Littler (1969) 2 WLR 409 C.A.*
- 3) The comment must be based upon facts truly stated. That is, it must be based on true facts as they existed in the subject matter under consideration as they existed at the time the comment was made. The law is that “you cannot invent untrue facts about a man and then comment on them”. See *Bakare v. Olumide (1969) ALL NRL 755 at 762*.

However, where in a defence of fair comment the defendant wishes to prove that the facts upon which he commented are true, and therefore wants to rely on the “rolled up plea”, then he must in addition to fair comment plead justification separately – see *Saraki v. Soleye (1972) 2 UILR 271 at 281*.

- 4) The comment must be honestly made. A comment may be fair for the purposes of the defence of fair comment notwithstanding that it is violent, exaggerated, biased or clearly wrong, provided it was honestly made.

The determinant factor is not whether a reasonable man would hold such an opinion, but whether he honestly expressed his genuine views. See *Slim v. Daily Telegram Ltd (1968) 2 QB 157 at 170 C.A.*

- 5) The comment must not be actuated by malice.

Finally, the comment must not be motivated by malice. A plea of fair comment will be defeated if the plaintiff proves that the defendant, in making his comment was actuated by express malice. See *Bakare v. Ibrahim (1973) 6 S.C 205 at pg 215.*

3.3 PRIVILEGE

Privilege from legal action is absolute or conditional immunity from liability for a defamatory publication made by a person.

The defence of privilege is designated to protect certain defamatory statements from legal action on the ground of public policy. The free expression of opinions and disclosure of facts and information in the legislature and other public places is important for the survival of a democratic government and democratic way of life.

TYPES OF PRIVILEGE

- 1) **Absolute Privilege:** This is where the maker of a statement is absolutely protected and immuned against legal action. The situations where absolute privilege applies include:
 - a. Statements made in parliamentary proceedings.

- b. Report ordered to be published by the legislature and parliamentary papers.
 - c. Matters of state and communications between officers of the state – *Chartterton v. Secretary of State for Indian (1895) 2 QB 159*.
 - d. Judicial proceedings – *Egbe v. Adefarasin (1985) 1 NWLR pt 3 pg 549 S.C.*
 - e. Reports of judicial proceedings – *Ojeme v. Punch Nigeria Ltd (1996) 1 NWLR pg 427 pg 701 at 711 C.A*
 - f. Communication between legal practitioner and client – *Saraki v. Soley (1972) UILR 271*.
- 2) **Qualified Privilege:** A qualified privileged statement is one which enjoys the privilege of protection when made without malice and with honest belief in its truth.

However, absolute and qualified privilege exist for the same fundamental purpose i.e. to give protection to persons who make defamatory statements in circumstances where the common convenience and welfare of society demands such protection.

Occasions where qualified privilege applies include:

- a. Statement made in the performance of a legal, moral or social duty – *Ayoola v. Olajure (1977) 3 CCHCJ 315*.
- b. Statements made to the proper authorities in order to obtain redress for public grievances – *Ojeme v. Momodu (1994) 1 NWLR pt 323, pg 685-700*.
- c. Statement made in self-defence – *Osborn v. Thomas Boulter & Sons (1930) 2 KB 226*.

- d. Statement made between parties having a common interest – *Turner v. MGM Pictures (1950) 1 ALL ER 449 at 471 HL.*
- e. Fair and accurate reports of proceedings in the legislature – *Oweh v. Amalgamated Press of Nig Ltd (1957) LLR 6.*
- f. Fair and accurate reports by judicial proceedings – *Omo-Osagie v. Okutobo (1969) 2 ALL NLR 175.*
- g. Statements privileged under the Defamation Acts.

3.4 RES JUDICATA

This is stopping of the plaintiff from filing a fresh suit, because one has earlier been filed by him or his privies, and has been contested and won or lost.

This principle of law which bars a fresh action, or re-litigation of a matter all over is based on the principle of law that there has to be an end to litigation, so that injury can heal, and the parties may renew their friendly relationship where possible. A case that has been contested and won or lost by the same parties is estopped by law from a fresh litigation. Such cases are said to be caught by res judicata.

4.0 CONCLUSION

In defamation, it is not that easy to approach the court for judgment against any statement whether libel, slander, vulgar language or otherwise just because the facts of the evidence of that offending statement is available.

In most cases, the defendant is ready to defend himself against any suit by way of relying on the authenticity of the facts in his offending statement or by relying on other legal provisions guaranteeing his own defence.

The core of this unit is defence based on proof by the rules of the law of evidence.

The court being the arbiter in these suits has the final say in giving judgment to the party who is best able to prove its case and defend it generally.

5.0 SUMMARY

The law of defamation is not complete without defences. This is the theatre of other practical aspects of the law of defamation. After a statement has been made whether imaginary, actual or innocent, the person who felt injured as a result of that publication has a right to act to correct the consequences of the defamatory statement. He will always do this by approaching the court of law. At this juncture, the originator of the statement who is now the defendant has a duty and obligation to defend himself.

There are a lot of ways and means open to the defendant. These means and ways include justification or truth of the fact of the statement; that the statement is a fair comment; that he is covered by immunity against the suit because the law grants him a privilege or that this matter has come before a court of law before where all the issues have been concluded and falling under the rule of res judicata.

6.0 TUTOR-MARKED ASSIGNMENT

Explain two of the following:

- Res judicata
- Privilege
- Fair comment
- Justification

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.

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- Gillies, P. (1993), *Business Law* (5th ed.), Federation Press.
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MODULE 4: DECEIT

UNIT 1: FALSE REPRESENTATION OF FACTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 What is a Fact?

3.2 How can a Fact be Falsely Represented?

3.3 Aspects of False Representation of Facts.

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

False representation of facts is one of the cardinal points in the study of deceit. Under the rule in *HEDLEY BYRNE & CO. LTD v. Heller & Partner (1964) AC 465*, a person who makes a careless misstatement to another may be liable to that other person in negligence for the loss suffered as a result of reliance on that misstatement.

In order to succeed in the tort of deceit generally, the plaintiff must show that:

- 1) The defendant made a representation of fact by words or conduct.
- 2) The defendant intended that the representation be acted upon by the plaintiff or by a class of persons including the plaintiff.
- 3) The plaintiff did act upon the representation and suffered damage.
- 4) The defendant knew the representation to be false or at least had no genuine belief in its truth.

2.0 OBJECTIVES

In this unit, the objective is to expose the students to the understanding of what is a fact. How can fact be falsely represented and the different aspects of misrepresentation of facts.

3.0 MAIN OBJECTIVES

3.1 What is a Fact?

A fact is the existence of a tangible or intangible thing or occurrence which can be relayed to support a declaration or claim at another time. It may also be a

circumstance or incident relating to a case which is being heard. In general, questions of fact are decided by the Jury in English courts while the question of law are decided by the judge (see Metropolitan *Rwy v. Jackson (1887) 3 App. Cases 193*.

In Nigeria, both the question of fact and law are decided by the Judge. Cases are decided based on relevant facts and law. According to Section 70 of the Evidence Act cap. 112, laws of the federation 1990, in civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

3.2 How can a Fact be Falsely Represented?

A fact which is relevant can be represented in diverse ways to achieve a particular aim.

A fact represents certainty, truth, reality, event, action, happening, occurrence, act or incident among other things which if misrepresented can be false. A fact which is false will produce unfaithfulness, treacherous, disloyal, deceitful and untrustworthy situation leading to loss or damage on the party that received it, relied on it or acted on it.

For example, where an attendant at a petrol filling station sold kerosene in place of petrol. This is a fact known to the attendant but falsely represented as another fact to the purchaser. The effect of this unholy false representation will be the knocking of the engine of the car that used kerosene instead of petrol.

An action whereby a lawyer falsely represented a fact to his client by asking the client to sign a deed of conveyance of land to himself and representing the same document as a power of attorney for the lawyer to enable him find a buyer for the client's land will succeed against the lawyer if it is established that:

- 1) The lawyer made a false representation to his client;

- 2) The lawyer intended that false representation to be acted upon by his client;
- 3) The client actually acted upon the false representation by the lawyer;
- 4) The lawyer knew that the representation of fact is false; and
- 5) The client suffered loss.

In the above scenario, the lawyer got the land conveyed to him without any offer, acceptance and/or consideration and he sold the land to a third party and used the proceeds therefore for his personal needs.

The above benefits to the lawyer constituted damage or loss suffered by the client. This false representation of fact is fraudulent, and constituted conversion of another man's property with trick.

3.3 Aspects of False Representation of Facts

There are generally three aspects of the requirement of false representation of fact. These include:

- 1) The false statement may be made by spoken or written words, or by conduct. Spoken or written words are clear enough to be understood both directly and indirectly. But any conduct designed to deceive another person by leading him to believe that a certain fact exist is equivalent in law to a statement in words *that that fact* does not exist (see Kodilinye 1995 reprinted. The Nigerian Law of Torts, Spectrum Books Ltd, Ibadan, Nigeria, p. 209).

In the Nigerian case of *James v. Mid-Motor Nig. Co. Ltd (1978) 2 L.R.N 187*) a man paid for a vehicle on hire purchase and paid premium for a comprehensive insurance after which the company was found to be fictitious and the manager of the insurance company deliberately set out to

defraud the man. The Supreme Court held the defendant was vicariously liable.

- 2) The general rule is that mere disclosure of the truth which is false is not actionable deceit. In other words, silence to the real fact of a situation does not normally constitute fraud. This fact is based on the principle of “caveat emptor” (let the buyer beware).

For instance, a car owner who wants to sell it to another person without disclosing that it was in a bad state needing an overhauling or a replacement of the engine will be held not liable to the buyer in deceit. For the owner has made no positive misrepresentation as to the condition of the engine nor had he “reason to suppose that the plaintiff would not do what a reasonable buyer in his senses would do, namely making proper investigation including inviting a vehicle mechanic on his behalf, and satisfy himself as to the condition of the vehicle before accepting to part with his money for it” (see *Keates v. Ca Dogan (1851) 138 E.R 234 at p. 238*).

Despite the general rule as stated above, silence will constitute deceit (false representation of facts) in the following instances:

- a) Where the fact distorts a positive representation, for example, where a vendor described his papers as fully sold but money has not been received from those who booked for supply. The reasoning here is that half truth may be as good as lie.
- b) Where a true representation of fact when made subsequently becomes untrue and the representor keeps silence about it. For instance, a building material cost N2,000 a piece and the price now falls to N1,500 and the

buyer was made to continue to pay the old price of N2,000 per piece. Here, the seller will be liable in deceit of false representation.

- c) Where a duty of disclosure is imposed by statute e.g. it is the duty of the prosecutor to prove a case against an accused person. Not the other way round.
- 3) The third aspect of the requirement of false representation of fact constitute statements of intention. For example, where a plaintiff who was induced to lend money to a company by certain statements in the company's prospectus to the effect that the money was to be used in the improvement of the premises and the extension of the business, whereas the directors intended to use the money to pay off the company's debts. He will succeed in an action of false representation against the directors (see the case of *Edgington v. Fitzmaurice* (1885) 29 Ch. D. 459, 476).

4.0 CONCLUSION

False representation of facts is a tortious liability designed to put the seller and buyer on their toes so that they will be vigilant and beware when dealing with a partner or a third party. Both the seller and buyer can easily be deceived under false representation if they are not very careful in their assessment of the situation before entering into such contracts.

5.0 SUMMARY

In this unit we have drew the students' attention to two key words in the topic under discussion. These key words are "fact" and "false".

If facts are not falsely represented, there will not be false representation of facts. This unit also highlighted the aspects of false representation.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the role of silence when it comes to false misrepresentation of facts.

7.0 REFERENCE/FURTHER READING

- Fleming, J. (1992), *The Law of Tort* (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), *Outline of Torts*. Sydney, Butterworths.
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MODULE 4:

UNIT 2: STATEMENT RELIEF UPON AS CONVEYING INTENTION

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Statement of Intention or Opinion

3.2 That the Defendant Intended the Plaintiff to Rely on the
Statement

3.3 That the Plaintiff Relied on the Information

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

In an action of deceit it is always a situation where a person called the defendant falsifies a fact and wants or intended that the other person called the plaintiff believes in his statement of fact which is false, act on it to the benefit of the defendant or an unknown third party.

The plaintiff is the one to suffer damage or loss. The damage or loss here depends on the importance or nature of the fact which, at times, monetary compensation may not be enough to restore the loss.

In this unit, we shall be looking at the actions and intentions of the defendant that led the plaintiff in believing in an information, and consequently relying on it which at the end was found to be false.

2.0 OBJECTIVES

The objectives in this unit are to analyse the subject or the fact of statements usually relied upon by the plaintiff as conveying intention or opinion.

The objective is to expose the student to the statements and the intention of the defendant leading the plaintiff to believe in the information therein and thereby relying on it for further action.

3.0 MAIN CONTENTS

3.1 STATEMENT OF INTENTION OR OPINION

A statement of an intention which the maker intends to carry out in the future or an opinion are usually treated as representation of facts at the time they were made. A maker of such a statement of an intention is liable, if it is proved that he never held such intention or that the view or opinion is false. Here, such a statement is untrue and its maker or representor are regarded as liars as to the true intention of his mind or his opinion.

In the case of *Edgington v. Fitzmaurice* (1885) 29 Ch. D. 459, the plaintiff was induced to lend money to a company, when the directors of the company issued a prospectus inviting subscription for debentures, stating that the object of the debentures was to expand the company and develop its trade, when in fact, the directors intended to use the loans to pay off pressing liabilities of the company. The company became insolvent and the plaintiff lost his money. It was held that the directors were liable for deceit and damages. This misstatement of the fact, which influenced the plaintiff to advance the loan rendered to directors liable for the tort or deceit.

3.2 THAT THE DEFENDANT INTENDED THE PLAINTIFF TO RELY ON THE STATEMENT

The plaintiff must prove that the defendant's statement was made with the intention that it should be relied upon and acted upon by the plaintiff (see *Edgington v. Fitzmaurice Supra*) or by a class of persons which includes the plaintiff.

The defendant must have made the deceitful statement knowingly without belief in its truth and recklessly, careless as to whether it be true or false (see *Derry v. Peak* (1889) 14 AC 337 HL).

It is not necessary that the statement be communicated directly to the plaintiff by the defendant. It is sufficient if it gets to the plaintiff through a third party, see *Pilmore v. Hood* (1838) 132 ER 1042 and *Langridge v. Levy* (1839) 150 ER 863.

3.3 THAT THE PLAINTIFF RELIED ON THE INFORMATION

A plaintiff must prove that he actually relied on or acted on the offending statement to his detriment.

Partial reliance on such statement by the plaintiff does not deny him the right of legal action. Also contributory negligence of the plaintiff is not a defence by the defendant and cannot stop the plaintiff from taking any appropriate legal action for deceit. This constructive knowledge is not imputed to the plaintiff in such action in court.

In the case of *Sule v. Aromire* (1951) 20 NLR 202, the defendant sold a certain land to the plaintiff and the title deed covering the sale is found in an entirely different parcel of land which has been declared for the defendant as its beneficial owner. The plaintiff could not take possession of the land sold to him. It was held that the defendant was liable.

It should however be noted that a defendant may not be liable for deceit if:

- a. The plaintiff did not rely on the representation.
- b. Where the plaintiff acted on deceit after an independent contractor or agent has investigated the matter.
- c. Where the plaintiff actually knew that the representation was untrue and he goes ahead to act on it. See *Smith v. Chad* (1884) 9 AC 187.

4.0 CONCLUSION

It should be known to the student that false representation, misrepresentation, reckless or careless representation all leads to deceit. Deceit is deceit and it is a bad and unacceptable fact of life and unacceptable fact of relationship between parties, third parties and the general public.

Deceit puts the onus of discharging it at all times on the abdue.

5.0 SUMMARY

In this unit we dealt generally on offending statement of the defendant relied upon by the plaintiff as conveying good intention. Deceit is deceit and in whatever colouration and with whatever ally. Deceit will always be declared as such by the courts.

In this unit, we analyzed such deceitful statements of intention or opinion that the defendant intended that the plaintiff rely on the statement and that the plaintiff actually relied on the information and on discovery, the courts are always ready to give judgment to the plaintiff.

6.0 TUTOR-MARKED ASSIGNMENT

In what circumstances can the defendant be found not to be liable if his deceitful statement was relied upon by the plaintiff?

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), Outline of Torts. Sydney, Butterworths.
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MODULE 4: DECEIT

UNIT 3: DAMAGE

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 That the Plaintiff Suffered Damage

3.2 Remedies for Deceit

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

Damage is an action that causes injury to persons physically, mentally or spiritually. Damages may be general or special. Damages can equally be classified into nominal; where no actual damage has been suffered; contemptuous; where the amount awarded is derisory (see *Dering v. Uris (1964) 2 QB 669*); substantial damage representing compensation for loss actually suffered. It could also be exemplary or vindictive or punitive given as punishment for the defendant; damage could be liquidated-based on pre-estimate for anticipated breach of contract or unliquidated damage which to a large extent depends on the circumstances of the case.

In this unit, we shall be looking at actual damage suffered. Other damages additional will be at the direction of the court. Damage will only be based on the question of whether the defendant is guilty or not.

2.0 OBJECTIVES

The objectives is to let the student understand the meaning of damage and the remedies for deceit.

3.0 MAIN CONTENTS

3.1 THAT THE PLAINTIFF SUFFERED DAMAGE

The tort of deceit is not actionable per se on mere occurrence. However, the plaintiff must prove that he incurred actual damage in order to succeed in a civil action for deceit in the law of tort.

As far as the plaintiff can prove that he suffered from the deceit of the defendant, a suit of damage can be sustained by the plaintiff. It is irrelevant that the

perpetrators of the deceit (defendant) did not benefit from the deceit, the plaintiff is entitled to recover damage.

In the case of *Doyle v. Olby Iron Mongers Ltd (1969) 2 ALL ER 119* the plaintiff was induced to buy a business at a price above its true market price or value. The plaintiff lost much money and he sued for deceit. The court held that the plaintiff was entitled to recover the difference between what he paid for the business and its true market value including other expenses incurred by him in the effort to revive or carry on the business.

3.2 REMEDIES FOR DECEIT

The main remedies available to the plaintiff in the tort of deceit is any or a combination of one or more of the following:

- 1) Award of damages to the party that suffered from the deceit.
- 2) Restitution of any property that may have passed illegally between the parties whether in money or in any other party.
- 3) Criminal prosecution, where the deceit also amount to a crime and so forth.

4.0 CONCLUSION

Damage is a legal mechanism for bringing a party who suffered unnecessary injury back to the original position he would have been had he not been deceived to wrongly believe in a fact upon which he acted and suffered injury as a result.

The remedies for deceit include award of damages among other measures against the defendant.

5.0 SUMMARY

In this unit, the student has been exposed to the tort of damage which is the award against a party who is liable for the tort of deceit.

In this unit, we have carefully looked at the circumstances leading to the fact that the plaintiff suffered damage as a result of the deceit of the defendant.

We have also exposed the students to the remedies available to the plaintiff in cases of established damages suffered by the plaintiff.

6.0 TUTOR-MARKED ASSIGNMENT

- a. Attempt to explain damages in the tort of deceit.
- b. What are the remedies for deceit.

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
- Gardiner, D. (1991), Outline of Torts. Sydney, Butterworths.
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MODULE 5: ECONOMIC TORT

UNIT 1: PASSING OFF

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
 - 3.1 The Common Forms of Passing Off
 - 3.2 Trading with the Name Resembling that of the Plaintiff
 - 3.3 Marketing a Product as that of the Plaintiff
 - 3.4 Marketing Goods with a Name Resembling that of the Plaintiff's Goods
 - 3.5 Marketing Products with the Plaintiff's Trademark or its Imitation
 - 3.6 Imitating the Appearance of the Plaintiff's Product and Its Advertisement
 - 3.7 Selling Inferior or Expired Goods of the Plaintiff as Original or Current Stock
 - 3.8 Elements of Passing Off
 - 3.9 Remedies for Passing Off
 - 3.10 Defences to Passing Off
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 INTRODUCTION

The tort of passing off is very important in the life of a society. Individual person in a society has the right to life and the right to engage in any legal kind of economic activity to sustain the kind of life style that the individual has chosen.

The law of tort especially protects the individual in whatever economic activity one is engaged in.

It protects business names, names of product, trademarks among others. Anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable for the tort of passing off.

The various forms of passing off and their consequences are the focus of this unit.

2.0 OBJECTIVES

The objective of this unit include:

- Exposing the students to the elements/forms of passing off.
- Various forms of appearance of products.
- Consequences of passing off.
- Remedies and defences to the tort of passing off.

3.0 MAIN CONTENTS

3.1 THE COMMON FORMS OF PASSING OFF

The tort of passing off is committed in various forms. *Francis Day & Hunter Ltd v. Twentieth Century Fox Co. Ltd (1939) 4 ALL ER 192 at 199 P.C.* The common forms of passing off which are easily noticed are as follows:

- 1) Trading with a name resembling that of the plaintiff.
- 2) Marketing a fake product as that of the plaintiff by using the plaintiff's label or design.
- 3) Marketing a product with a name resembling that of the plaintiff's goods.
- 4) Marketing products with the plaintiff trademark or its imitation.
- 5) Imitating the appearance of the plaintiff's product.
- 6) Selling inferior or expired goods of the plaintiff as current stock.
- 7) False advertisement by copying the plaintiff's advertisement.

3.2 TRADING WITH THE NAME RESEMBLING THAT OF THE PLAINTIFF

This is where the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant's product/business and that of the plaintiff are one and the same. In *Hendricks v. Montague (1881) 50 LJ Ch 456* – it was held that 'Universal Life Assurance Society' and 'Universe Life Assurance Association' are very likely.

Also in *Niger Chemist Ltd v. Nigeria Chemist (1961) ALL NLR 180 at 182*; it was held that;

“As a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger Chemists’ and the

other ‘Nigeria Chemists’, there must be a grave risk of confusion and deception”

See also *Ogunlende v. Babayemi* (1971) 1 UILR 417.

3.3 MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not.

In *Byron v. Johnston* (1816) 35 ER 851 – it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Byron on the title page, when in fact that famous poet had nothing to do with its authorship.

3.4 MARKETING GOODS WITH A NAME RESEMBLING THAT OF THE PLAINTIFF’S GOODS

It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendant’s products are mistaken as made by the plaintiff and are bought as the product of the plaintiff.

In *Hines v. Winnick* (1947) Ch 707 at pg 13, the plaintiff musician and band leader who used to broadcast his radio programme under the name ‘Dr. Crock and his crack pots’ obtained an injunction to restrain the defendant from featuring another band on the programme using the same name. *VAISEY J* granting the injunction was of the view that a musician gets known by a particular name and this becomes inevitably part of his stock-in-trade.

3.5 MARKETING PRODUCTS WITH THE PLAINTIFF'S TRADEMARK OR ITS IMITATION

It is actionable in passing off for a defendant to market his goods using the plaintiff's trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff.

Trademarks are usually registered and also protected under the *Merchandise Marks Act 2004*.

Also in *Perry v. Truefitt (1842) 49 ET 749* – the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of 'Medicated Mexican Balm' or other similar designations. *Reckitt & Colman Ltd v. Borden (1990) 1 WLR 491 HL*.

3.6 IMITATING THE APPEARANCE OF THE PLAINTIFF'S PRODUCT AND ITS ADVERTISEMENT

It is passing off for the defendant to do anything, which makes his product appear like the plaintiff's product. This passing off includes any copying of the likeness or appearance of the plaintiff's product, in a manner to confuse the public e.g. general appearance, package, label, or design of the product. *De facto Works Ltd v. Odumotun Trading Co Ltd. (1959) LLR 33* and *Hudson & Co. v. Asian (1964) 1 WLR 466 PC*.

Also an advertisement by the defendant which copies, or imitates the plaintiff's advertisement of his products, may amount to passing off, where such advertisement so resembles that of the plaintiff, as to be capable of misleading the buyers to patronize the defendant's goods as those of the plaintiff. See *Cadbury Schweppes pty Ltd v. Pub Squash Co. pty Ltd (1981) 1 ALL ER 213 PC*.

3.7 SELLING INFERIOR OR EXPIRED GOODS OF THE PLAINTIFF AS ORIGINAL OR CURRENT STOCK

It is a passing off for a defendant to sell inferior or expired goods/products of the plaintiff as current stock, where such has been discarded by the plaintiff. In this passing off, the defendant who has managed to lay hands on the goods, which are unfit for human consumption sell them off as current stock of the plaintiff. See *Wilts Ltd v. Thomas Robinson Sons & Co Ltd (1958) RPC 94 CA* and *Gittette Safety Razor Co & Amor v. Franks (1924) 40 TLR 606*.

Note: There is no passing off, when old goods/products or second hand goods are sold off as such without pretending or falsely representing that they are new ones – *General Electric Co v. Pryce's Stores (1933) 50 RPC 232*.

3.8 ELEMENTS OF PASSING OFF

To succeed in a claim for passing off, the plaintiff must be able to prove the following:

- 1) **The Effect of Fraud by the Defendant:** Where fraud is proved on the part of the defendant, it helps the plaintiff to prove the likelihood of damage, and it makes it easier for the court to award aggravated or punitive damage.
- 2) **Whether the Public is Likely to be Confused:** In order to determine whether the public is to be confused and misled by the activities of the defendant, the court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer – *UK Tobacco Co Ltd v. Carreras (1931) 16 NLR I at p. 4*.
- 3) **The Likelihood of Deception:** To succeed in a claim of passing off, all that a plaintiff has to prove is that the activity of the defendant is

calculated to deceive the public. Liability in the tort of passing off is strict. Therefore, innocent passing off is not a defence, and once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction.

Niger Chemists Ltd v. Nigeria Chemists (1961) ALL NLR 180 at 182 and ***De facto Works Ltd v. Odumotun Trading Co. (1959) LLR 33.***

3.9 REMEDIES FOR PASSING OFF

The remedies for the tort of passing off include the following:

- 1) Damages;
- 2) Account for profit or loss of sales;
- 3) Injunction – ***John Walker & Son Ltd v. Henry Ost & Co. Ltd (1970) 2 ALL ER 106.***
- 4) Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

3.10 DEFENCES TO PASSING OFF

In a claim for the tort of passing off, a defendant may plead a number of defences by saying that the passing off complained of is a;

- 1) Functional design or package – ***Draper v. Trist 91939) 3 ALL ER 513 at p. 518, 525, 528 C.A***

- 2) The mere descriptive name of the product – *British Vacuum Cleaner Co v. New Vacuum Cleaner Co (1907) 2 Ch 312*. An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.
- 3) Consent, such as licence given to him by the plaintiff to produce and or market the product. *Lee v. Haley (1869) 5 Ch App 155*.
- 4) Innocent passing off.

Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.

4.0 CONCLUSION

It is hereby shown that the tort of passing off appears to be simple but in actual fact, it is an all encompassing and ever increasing and expanding concept.

The society is developing with the appearance of new technologies, the tort of passing off is becoming more dynamic and posing new challenges.

5.0 SUMMARY

The tort of passing off is a complex, dynamic and an ever increasing aspect of the law of tort because it relates to economic activities of citizens of a given state.

In an environment like the one applicable in Nigeria where the government employs less than a quarter of its own population the remaining three quarter of the population are free to be engaged in businesses which are not watertight with legal regulation.

In this kind of environment, it is expected that the high level and complexities of passing off will be expected.

In Nigeria today, even the war against unhygienic bread eaten by almost everybody is on the losing side by government agencies responsible for that sector of the economy.

Variation of the same product by different companies and marketing and advertising agencies has brought the incidence of passing off to a high level. In the health sector of the Nigerian economy, the problem of adulterated drugs is the bane of that sector either in the estimation of individuals or in the estimation of experts in the government hospitals and even experts in the medical manufacturing sector.

There are a lot of deceptions and remedies to stem the tide of the increase in the level of passing off.

6.0 TUTOR-MARKED ASSIGNMENT

- What is the difference between inferior and expired goods in the tort of passing off?

7.0 REFERENCES/FURTHER READING

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MODULE 5

UNIT 2: CONSPIRACY

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main Contents
 - 3.1 Elements of the tort of conspiracy
 - 3.2 Defences for Trade conspiracy
 - 3.3 Remedies for trade conspiracy
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-marked Assignment
- 7.0 Reference/Further Reading

1.0 INTRODUCTION

Conspiracy in the law of tort is the combination of two or more persons without lawful justification, so as to cause willful damage to the business of a third person who usually appears as the plaintiff.

2.0 OBJECTIVES

The objectives of this Old Common Law action which seems to be abnormal tort in modern time is to protect a victim who is helpless and without any economic civil remedy other than perhaps remedy in a criminal law.

This is because both law of tort and criminal law frown at crooked, damaging and or criminal combinations to injure the business of the plaintiff to the benefit of their own business.

3.1 ELEMENTS OF THE TORT OF CONSPIRACY

In order to succeed in a claim for conspiracy the plaintiff must prove the following;

1. That there was a combination of two or more persons to injure the plaintiff's business:

The plaintiff must prove that there was a combination of two or more persons. Combination for the purpose of the tort of conspiracy may take various forms. i.e;

- a) Association of traders to ward off the competition of a rival trader.

See *Mogul Steamship Co. McGregor Grow & Co (1892) A.C 25 HL.*

- b) Association of wholesalers and distributors against a retailer to win the custom of newspaper readers.

See *Sorrel V Smith (1925) AC 700 HL.*

2. That Damages Was Inflicted on the Plaintiff's Business

The plaintiff has to prove that the purpose of the combination by the defendants was mainly, to deliberately or willfully inflict damage on his business. Purpose is the test for determining liability.

Crofter Hard Woven Harris Tweed CO. Ltd V Veitch (1942) 1 All ER 142 HL

In *Sorrell V Smith* (1925) AC 700 HL It was held; "A combination of two or more persons willfully to injure a man in his trade is unlawful, and if it results in damages to him is actionable. If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damages to another ensues.

However, where the main purpose of the combines is to injure the plaintiff, it is not a defence, to say they had a subsidiary purpose to protect their own interest.

Lonrho Ltd V Shell pet Co. Ltd (N0 2) (1981) 2 All ER 456

3.2 DEFENCES TO TRADE CONSPIRACY

In an action for the tort of conspiracy a defendant may defend himself in the following ways;

1. LEGITIMATE PURPOSE OF JUSTIFICATION

A defendant who proves that the purpose of the combination was the promotion or furtherance of the legitimate trade interests of the combiners has a complete defence- *Sorrell V Smith* (1925) AC 700 HL

Scale Ballroom (Wolver Hampton) Ltd V Racliffe (1958) 3 All ER 220 CA.

2. THAT THE PLAINTIFF HAS NOT SUFFERED ANY DAMAGE

The plaintiff must show that he has suffered damage as a result of the combination. Where a plaintiff fails to prove damage, his case cannot be sustained and will fail.

3.3 REMEDIES FOR TRADE CONSPIRACY

In an actionable conspiracy, a plaintiff may obtain;

1. Damages:- Is the monetary compensation which a court may order the party who is wrong to pay to the other party who has suffered a loss or legal injury.
2. Injunction:- Is an order of court directing a party to do or to stop doing a specified thing.

An injunction may be;

- a. Interim
- b. Interlocutory
- c. Perpetual

4.0 CONCLUSION

It is common knowledge that there is nothing wrong in combination, mergers and acquisition leading to increase and expansions in business concerns across the world. But it becomes offensive and a tort of conspiracy if the aim of combination of efforts at expansion is to injure another person's business and to create or further the increase of monopolies in the interest of the business of the conspiracy.

Conspiracy ought to be a pure criminal act but these are perpetrated in and within business operations and without adequate knowledge and vigilance and its outward appearance may be attracting the positive attention of the public. The

effect of conspiracy is to engender monopoly, keep the particular industry in bondage, encourage stagnation in employment and work against free trade.

The issue of trade conspiracy is a question of fact which will succeed or fail after it has been put to test before a court of law

5.0 SUMMARY

In this unit the tort of conspiracy has been exposed to the student in its elements and objectives.

The unit has exposed the student to the defences of conspiracy and the remedies for the trade of conspiracy.

6.0 TUTOR-MARKED ASSIGNMENT

The tort of conspiracy is a highly anomalous cause of action. Discuss

7.0 REFERENCE/FURTHER READING

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MODULE 5

UNIT 3: INJURIOUS FALSEHOOD

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Element of Injurious Falsehood

3.2 Defences for Injurious Falsehood

3.3 Differences Between Injurious Falsehood and Defamation

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

All falsehood in whatever colouration or language is deemed to try and hide the truth. The truth will be hidden in order for falsehood to be seen as the truth.

All falsehood will be injurious with dire consequences and damaging effects to the plaintiff.

Falsehood has no other purpose than to discredit the reputation of a person, good, service, business and so on for an inherent gain to the parties sponsoring the falsehood.

The tort of injurious falsehood may be written or oral, published maliciously to cause damages to another person's business.

These and other types of falsehood will be the focus of our discussion under this unit.

2.0 OBJECTIVES

The objectives of this unit is to expose the students to the elements of injurious falsehood with some examples and suggest means of defence for injurious falsehood.

3.0 MAIN CONTENTS

3.1 ELEMENT OF INJURIOUS FALSEHOOD

The tort of injurious falsehood is brought about when lies are published to damage a business. Essentially, the tort of injurious falsehood constitutes lies about a business, calculated to produce damage and actually achieve damage of the goodwill of a business.

The elements which a plaintiff must establish to succeed in an action for injurious falsehood include the following:

1) **THAT THE STATEMENT WAS DISCREDITING, DISPARAGING OR DAMAGING:**

The test of what constitutes a discrediting statement is whether a reasonable man would view the statement as disparaging the goods, services, or business interest in question.

Thus, the following assertions have been held to be tortuous and amounting to injurious falsehood:

- a. A false statement by a Newspaper owner that the circulation of his Newspaper was much greater than that of the rival Newspaper owned by the plaintiff (see *Lyne v. Nicholas (1906) 23 TLR 865; Evans v. Harlow (1884) 5 QB 624*).
- b. A threat by a defendant to initiate proceedings against the plaintiff for infringement of a patent or trademark.

2) **THAT THE STATEMENT WAS FALSE:**

The burden of proof is on the plaintiff to establish that the statement was false (see *Ratcliffe v. Evans (1892) 2 QB 525; Royal Banking Powder v. Grossly (1900) 44 Ch. D 179 at 183*). He must prove that the statement was false about his goods or services. Once a statement is proved to be false, it is also presumed to be malicious. And malice is said to be “want of bona fides or the presence of mala fide” per Lord COLERIDGE LCJ in *Halsey v. Brotherhood (1881) 19 Ch. D 386 at 388 C.A.*

3) **THAT THE STATEMENT IS PUBLISHED:**

Publication here is very essential. The plaintiff must prove that the false statement was published by the defendant to at least one person other than the plaintiff. See *Ratcliffe v. Evans (1892) 2 QB 524*.

4) **THAT DAMAGE WAS SUFFERED BY THE PLAINTIFF:**

The plaintiff must establish that the false statement has caused him damage such as pecuniary loss, that is, it caused him financial loss in his business. See *Malachy v. Soper (1836) 132 ER 453*.

3.2 DEFENCES FOR INJURIOUS FALSEHOOD

In a case for injurious falsehood, a defendant should plead where necessary and appropriate one or a combination of the following:

- 1) Justification or truth of the facts published.
- 2) Legislative immunity. In the house of parliament, a legislator has immunity to speak or publish for the consumption of members of parliament any matter and such matters are covered by immunity. The courts will not be able to entertain any suit on such matters as the courts lack jurisdiction in them.
- 3) Absolute privilege. Persons in court are allowed to say anything produce any document in court to support or defend their cases. Such publication are covered by privilege to persons taking part in judicial proceedings.

3.3 DIFFERENCES BETWEEN INJURIOUS FALSEHOOD AND DEFAMATION

The torts of injurious falsehood and defamation have similarities but the torts are not the same. This is without prejudice to the fact that the same facts may constitute both torts.

The following are the differences noticeable between injurious falsehood and defamation.

- 1) The tort of injurious falsehood protects title to property, name of products, brand, goodwill and reputation of goods or services from being

discredited. While the tort of defamation protects a person's good name or reputation.

- 2) The plaintiff must claim that the statement in both torts is untrue. Truth of the statement is a defence in both torts.
- 3) Injurious falsehood is not actionable per se. libel and certain slanders are actionable per se. In defamation, slanders that do not operate as libel are not actionable per se.
- 4) The action for injurious falsehood is a right in property, that is, a right in rem, or a right in a business, therefore at death, it survives both plaintiff and defendant. While the right of action in defamation is personal. Therefore at death, the right of action also dies for either plaintiff and defendant.

4.0 CONCLUSION

Injurious falsehood is an economic tort designed to protect properties, name of products, goodwill and reputation of goods and services. Any right of action in injurious falsehood cases are right in rem. They can continue between the heirs of both parties even after the death of the directors or owners of such business.

5.0 SUMMARY

This unit exposed the student to the meaning of injurious falsehood, elements of it and defences for injurious falsehood. The tort of injurious falsehood has a lot of semblance with the tort of defamation. Therefore, the unit looked at the differences between injurious falsehood and the tort of defamation.

6.0 TUTOR-MARKED ASSIGNMENT

Differentiate between injurious falsehood and the tort of defamation.

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
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MODULE 5

UNIT 4: INTERFERENCE WITH CONTRACTS

1.0 Introduction

2.0 Objectives

3.0 Main Contents

3.1 Kinds of Contracts Covered

3.2 Elements of Interference with a Contract

3.3 Defences for Interference with Contracts

3.4 Remedies for Interference with a Contracts

4.0 Conclusion

5.0 Summary

6.0 Tutor-Marked Assignment

7.0 References/Further Reading

1.0 INTRODUCTION

The tort of interference with contract is the intentional inducement of a contracting party to break his contract with another person, thereby causing damage to that other person. It is any unlawful interference with contractual relations in this tort, the plaintiff does not need to prove that any unlawful means were used to induce the other party to breach the contract. See *Lumley v. Gye (1853) 118 ER 749 at 1083*. This unit will focus on the tort of interference with contracts.

2.0 OBJECTIVES

The objectives of this unit is to analyse the kinds of contracts covered by the tort of interference with contracts and discuss its elements.

3.0 MAIN CONTENTS

3.1 KINDS OF CONTRACTS COVERED

This tort of inducing breach of contract has extended beyond contracts of service to practically all types of contracts between employee and employer once the evidence of the terms of the contract is clear and the evidence of the terms of contract is sufficient for a contract to be induced for a breach (see *Daily Mirror Newspapers Ltd v. Gardener (1968) 2 ALL ER 103 C.A.*).

However, where a contract is void, an action for interference cannot be brought. These cases include:

- 1) Illegality, immorality, crime or public policy.
- 2) Infancy – (*Sheers v. Mendeloff (1814) 30 WLR 342*)
- 3) Mistake – (*Said v. Butt (1920) 3 KB 497*)
- 4) Being in restraint of trade (*British Motor Trade Association v. Grey (1951) SC 586*).

3.2 ELEMENTS OF INTERFERENCE WITH A CONTRACT

What elements the plaintiff must prove to succeed include:

- 1) That there was a breach of contract (see *Torquay Hotel Co. Ltd v. Cousins (1969) 2 Ch 106*).
- 2) That the defendant knowingly interfered with the contract.
- 3) That damage was suffered by the plaintiff (see *Jones Brothers Ltd v. Stevens (1954) 3 ALL ER 677 C.A*).

3.3 DEFENCES FOR INTERFERENCE WITH CONTRACT

The defendant may plead:

- i. Illegality or immoral contract see *Brimelow v. Casson (1924) 1 Ch. 302*.
- ii. Justification (See *Glamorgan Coal Co. v. South Wales Miners Federation (1903) 2 KB 545 at 574 C.A*).

3.4 REMEDIES FOR INTERFERENCE WITH A CONTRACT

A plaintiff may be entitled to remedies for interference with a contract in the following instances:

- i. Damages. Every intended damage is recoverable (see *Lumley v. Gye (1853) 118 ER 749 at 1083*).
- ii. Injunction by a court. See *Esso Petroleum v. Kingswood (1973) 3 ALL ER 1057*.

4.0 CONCLUSION

Interference is a tort designed to protect businesses where critical and essential employee at critical stage of production in a service or manufacturing concern can be induced with whatever largesse to break their service and breach their employment at the expense of the employer.

5.0 SUMMARY

The plaintiff is hereby protected with the elements of interference and the defendant is allowed to defend his actions.

It is fair that the law of tort provide for remedies for interference with a contract and by so doing create a level playing ground for both the plaintiff and the defendant.

It is pertinent to note here that the rights of the employee to stay or change his employment as at when he wants once the laid down procedure or the attached sanctions are followed is here downplayed. The right of the employee in a free world should be paramount.

6.0 TUTOR-MARKED ASSIGNMENT

What are the elements of interference with a contract?

7.0 REFERENCES/FURTHER READING

- Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
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MODULE 5

UNIT 5: TERMINATION OF TORTS

Introduction

Objective

3.0 Main Contents

3.1 Release

3.2 Waiver of right by election

3.3 Award of Damages

3.4 Injunctions

3.5 Accord and Satisfaction

3.6 Lapse of Time

3.7 Death

3.8 Abatement

3.9 Res judicata

4.0 Conclusion

5.0 Summary

6.0 Tutor-marked Assignment

7.0 Reference/Further Reading

1.0 INTRODUCTION

Torts in its essence aims to compensate persons harmed by the wrongful conduct of others and 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.

The activities that brought about tortious actions will one way or the other by one operation or the other come to an end. This is because there is nothing that has a beginning without an end except the creator of the universe.

The bible in Ecclesiastes 3 v.1 says “To every thing there is a season, and a time to every purpose under the heaven”. In this unit, we shall be considering different ways by which tort is terminated.

2.0 OBJECTIVE

The objective of that limit is to look into the ways and means of bringing different tortious situations to an end. This will also include consequences of the mode of termination.

3.0 MAIN CONCEPT

3.1 RELEASE

A release is the giving up of a right or claim; by not pursuing the relevant claim against the wrong-doer and release him from liability.

A release may be:

1. Giving on the spot or at the time of committing the tort.
2. At any time before or after commencement of legal action. Such release after commencement of action may be by way of amicable settlement, with or without the filing of the terms of settlement in court as consent judgment and thus bring the matter to a close.

See *Philips V Claggett (1943) 152 ER 72*.

3.2 WAIVER OF RIGHT BY ELECTION

A waiver is a voluntary abandonment of a legal right of which a person is aware, either expressly or impliedly by a clear conduct leading to a reasonable inference of abandonment.

Where a person who has been wronged has two inconsistent rights against a wrongdoer, he has to choose which of the inconsistent but not alternative rights he wants to pursue against the tortfeasor. Where he elects to exercise one of the rights if he fails, in such pursuit, he can no longer turn round to claim the other inconsistent right. You cannot waive your right and have it.

In *United Australia Ltd V Barclays Bank Ltd* ((1941) AC 1 at P. 30) “If a man is entitled to one of two inconsistent rights, it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose”.

3.3 AWARD OF DAMAGES

Damages are the monetary compensation which a court may order the party who is wrong to pay to the other party who has suffered a loss or legal injury.

Where an award of damages is paid in full by the defendant, such payment discharges the claim of the plaintiff in respect of the wrong. See *Riches V News Group Newspapers* (1985) 2 All ER 845; *Robertson V Lestrangle* (1985) ALL ER 950; *Jobling V Associated Dairies* (1982) AC 794

3.4 INJUNCTION

An injunction is an order of court directing a party to stop doing a specified thing. An injunction may be mandatory in the form of a mandamus or prohibitory injunction.

An injunction may be;

- 1 Interim, whether or not in the nature of a quia timet injunction.
- 2 Interlocutory.
- 3 Perpetual.

See *M V Home Office (1994) 1 AC 377*; *Allen V Gulf Oil (1980) QB 156*;
Films Rover V Canon Films Sale (1986) 2 ALL ER 772.

3.5 ACCORD AND SATISFACTION

Accord and satisfaction is an agreement and the giving of consideration to secure a release from the performance of an existing obligation owed to the other party.

It is an agreement between parties that something else be given or done for the party who has a right to sue, in satisfaction of his right to remedy. Two conditions must exist in the substitutionary contract, that is to say, first there must be an agreement, and secondly, the performance of the substitutionary agreement as a consideration. i.e “The agreement is the accord and the performance of the new obligation is the satisfaction”

See *D &G Builder V Rees (1966) QB 617*; *Budget Bent A Car V Goodman (1991) 2 NZLR 715*.

Thus, there is accord and satisfaction when parties agree that one of them is to give, and the other is to accept something different in kind from what he was earlier entitled under the law in discharge of an existing legal obligation.

3.6 LAPSE OF TIME

Lapse of time is the time specified by law within which a right of action must be exercised, failure after which a law suit cannot be brought in court, it becomes *statute barred*.

Time is usually limited for civil claim but in criminal law, time does not run against the state; unless the law specifically limited the time for prosecution. See *Egbe V Adefaresin (1985) INWLR pt 3 pg 549 S.C*; *Oseyomon V Ojo (1993) 6 NWLR pt 299 P. 344 CA*; *Dobbie V Medway HA (1994) 4 All ER 450 CA*.

Generally, in tort, the time limited is six years from the date the cause of action arose, but with the following exceptions;

1. Action for defamation either libel or slander must be brought within 3 years from the date the cause of action arose.
2. Action for personal injuries arising from negligence, nuisance or breach of duty, must be brought within 3 years from the date the cause of action arose.

However, where the person dies before the limitation period, it is three years from the date of death, or from the date of the knowledge of the death by the personal representatives, or by person for whose benefit the action is brought.

In some instances the date from which the limitation time begins to run may be postponed due to;

1. Disability, such as infancy, or insanity.
2. Fraudulent concealment.
3. Mistake.

However, right of action may also be barred by negligence or unreasonable delay in enforcing a right. This is known as laches, this is so, because delay defeats equity, and equity aids the vigilant and not the indolent.

3.7 DEATH

Death is the end of the life of a person. As a general rule in torts, death extinguishes a right of action. Right of action may, however, subsist and vest in the estate of the deceased except in defamation.

A right of action for defamation dies with the plaintiff

See *Awoniyi V Registered Trustees of Resicrucian AMORIC (1990) 6nwlr PT 154 PG 42 C.A*

3.8 ABATEMENT

This is the removal of a thing that is causing annoyance, or the stopping of a wrongful act by physical action. Instead of bringing legal action to claim one's right. Thus a tort may be brought to an end by means other than legal action i.e;

1. The wrongdoer himself may stop the act.

See *Cope V Sharpe (No2) (1912) KB 486*.

2. The person, who is aggrieved, injured or suffering may physically stop the wrongful act. This is self help, and it poses the danger of break down of law and order. This should always be done with utmost care in order not to start or continue a tort instead of terminating it. See *Governor of Lagos State V Ojukwu (1936) 1 NWLR P 18 p 621 S.C*; *Agbai V Okogbue (1991) 7 NWLR p204, p391 S.C*; *Calabar East Co.op Society V Ikot (1993) 8 NWLR pt 311 p 324 CA*.

3.9 RES JUDICATA

Res judicata means that a matter which has been tried and concluded. Res judicata is usually pleaded as a defence to bar a concluded matter from being re-opened and litigated a second time.

However, 3 elements must exist for a plea of res judicata to succeed. i.e;

1. There must be an earlier decision on the matter.
2. It must be a final judgment.
3. The parties to the case must be the same.

A matter is res judicata and incapable of fresh litigation between the parties and their privies for ever, for there has to be an end to litigation. See *Fitter V Veal (1701) 88 ER 1506*; *Re May (1885) Ch. D 516*.

4.0 CONCLUSION

It is a saying that whatever comes round must go round and also that whatever goes up will one day come down.

The commencement of an action, intention, omission or an action causing a tortious action will one day come to an end. Such an end may be palatable or otherwise. Even the consequences of termination of one tort can lead to the emergence of another action in tort or in other areas of law. Such situation will also one day come to an end.

The law of tort generally is not a law of agreement *ab initio*. Any agreement in the law of tort arose as a means of solving a problem that pre-dates that particular tort.

The intervention of facts and conditions regulated by statutes guides and ensures proper termination under the law of Tort.

5.0 SUMMARY

The summary of this unit is based on the fact that a situation that occurs today will one day cease to exist either willingly or unwillingly by the parties involved in the different situations.

In this unit, termination of tort is based on the following:

1. Release
2. Waiver of right by election of parties
3. Award of damages by the courts.
4. Injunctions by the courts ordering the party to act or refrain from acting in particular cases.
5. Accord and satisfaction
6. Lapse of time

7. Death of either of the parties
8. Abatement, and
9. Res judicata in which case a matter that has been previously brought before a court and judgment delivered for the same parties cannot be brought before the court again. This is because there must be an end to litigation.

Each of the above points represents a particular way or means by which a tort can be terminated.

6.0 Tutor-Marked Assignment

- 1) What do you understand by accord and satisfaction in the termination of torts?
- 2) Explain how injunction can terminate a tort.

7.0 REFERENCE/FURTHER READING

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