

COURSE TITLE: LAW OF TORTS 2

COURSE MASTER: PR. GALEGA SAMGENA D

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INTRODUCTION

This course is a continuation of Law of Torts 1 which was taught during the first semester. Hence, the objectives of the course, expected outcomes, etc remain the same. In this part of the course, we will consider topics such as Nuisance, Strict Liability (the rule in *Rylands v. Fletcher*) as well as Liability for Animals; Defamation, Trespass to land, Trespass to Chattels, Conversion and Detinue.

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The word "nuisance" is used in popular speech to mean any source of inconvenience or annoyance, but the tort of nuisance has a more restricted scope and not every inconvenience or annoyance is actionable. Nevertheless, this tort "has become a catch-all for a multitude of ill-assorted sins,"¹ such as the emission of noxious fumes from a factory, the crowing of cocks in the early hours of the morning, the obstruction of a public highway, the destruction of a building through vibrations and the interference with an easement of way. The remedies available to one who complains of a nuisance are (i) damages, (ii) an injunction to restrain further nuisance, and (iii) abatement.²

PUBLIC AND PRIVATE NUISANCE

Public nuisance

A public nuisance is committed where a person carries on some harmful activity which affects the general public or a section of the public, for example, where the owners of a factory cause or permit fumes and smoke to pollute the atmosphere in the locality, or where an obstruction is caused on the public highway. Public nuisance is basically a crime,³ actionable by the Attorney-General. It is a tort actionable by an individual plaintiff only where the latter can show that the defendant's conduct has caused him "particular damage" over and above that suffered by the general public.⁴ The reason for this requirement of proof of particular damage is that where a wrong is committed against the community at large, it is considered to be more appropriate to leave the action in the hands of the Attorney-General as the representative of the public rather than to allow the

¹ Fleming *op.cit.* p.393

² A remedy of self-help which entitles a person who is affected by a nuisance to remove it, e.g. the occupier of land may cut off the branches of a tree which overhang from adjacent land. This remedy is not favoured by the courts and is virtually obsolete, except where the nuisance is trivial.

³ Penal Code, ss 192 and 194; Criminal Code, s 234. Under the Criminal Code, the offence is called "common nuisance."

⁴ *Amos v. Shell-B.P. (Nigeria)Ltd* (1974) 4 E.C.S.L.R. 486 at p. 488; *Oyidiobu v. Okechukwu* (1972) 5 S.C. 191 at p. 198, *Akinyede v. Pitan* (1973) 7 CCHCJ 52 at p. 56.

defendant to be harassed by an unlimited number of suits by private individuals, all complaining of the same damage. As to the meaning of "particular damage," one view is that the plaintiff must show that he has suffered damage which is different in kind, not merely in degree, from that suffered by the general public.⁵ But the better view is that it is sufficient for the plaintiff to show that he has suffered damage which is "appreciably greater in degree than any suffered by the general public."⁶ This will include not only special damage in the sense of actual pecuniary loss,⁷ but also general damage such as delay or inconvenience, provided it is substantial.⁸

Examples where "particular damage" was established are:

- where the defendant wrongfully obstructed a public navigable creek by mooring his barge there thus compelling the plaintiff to unload his boats and transport his cargo by land at great expense⁹;
- where the plaintiff intended to let rooms in her house to persons wishing to watch a procession, and the defendants unlawfully created a structure in the public street which obstructed the view from the rooms, thus reducing their letting value¹⁰⁻¹¹
- where the plaintiff's sleep was disturbed by the noise of the defendant's vehicles, and the paintwork of his car, which was parked in the street and was damaged by acid smuts from the defendant's factory¹²;
- where the defendant's blocking of a public street interfered with the access of staff, parents and pupils to the plaintiff's school.¹³

On the other hand, no particular damage was proved where, in an action for obstructing a public way, the plaintiff proved no damage peculiar to himself other than being delayed on several occasions in passing along the way, and being obliged, in common with everyone else who attempted to use it, either to take another route or to remove the obstruction.¹⁴

Since the individual plaintiff must prove particular damage to

⁵ *Ibid*

⁶ *Street, op.cit.* p. 239

⁷ e.g. where a shop-owner loses customers.

⁸ *Street op. cit.* p. 239

⁹ *Rose v. Miles* (1815) 105 E.R. 773.

¹⁰⁻¹¹ *Campbell v. Paddington Corporation* [1911] 1 K.B. 869.

¹² *Halsey v. Esso Petroleum Co. Ltd* [1961] 2 All E.R. 145.

¹³ *Savage v. Akinrinmade* [1964] L.L.R. 238.

¹⁴ *Winterbottom v. Derby* (1867) L.R. 2 Ex. 316.

himself, an action brought by a whole community of persons, such as the inhabitants of a village, will not succeed, in the absence of proof of loss by each individual member. In *Amos v. Shell-B.P. (Nigeria) Ltd.*¹⁵ the defendants, in the course of their work in the oil industry, constructed a temporary dam across a public navigable creek in the Rivers State. The plaintiffs, representing the entire Ogbia Community, brought an action for damages, alleging that the erection of the dam had caused severe flooding on their land, and had obstructed the creek, so that members of the Community were unable to pass with their canoes to transport goods to and from the market. Dismissing the claim, Holden C.J. said¹⁶:

Kolo creek is agreed by both sides to be a public waterway. Blocking it up is a public nuisance. No individual can normally recover damages for a public nuisance. For an individual claim to succeed, there must be proof of the plaintiff having suffered 'special damage peculiar to himself from interference with a public right'... This is an attempt by a section of the general public (and quite a large section, too) to sue generally in respect of losses suffered by them generally, and in my view it cannot succeed. These losses, if in fact they were suffered, were suffered individually and therefore must come under the heading of special damages, where each individual must plead and prove his or her special individual loss. There has been no attempt to do this, so the whole claim must in my view fail.

However, the distinction at common law in respect of private nuisance and public nuisance and that consent of the Attorney-General must be obtained before a party can maintain action in public nuisance has been abolished by the 1979 Constitution. The restriction that is imposed at common law is now void by virtue of section 6(6)(b) of the 1979 Constitution. Action in public nuisance can now be maintained by any member of the public without the consent of the Attorney-General. See *Adediran vs Interland Transport Ltd.* (1991) 9 NWLR part 214 p. 155.

Private nuisance

The rationale and origins of private nuisance are quite different from those of public nuisance. Whereas public nuisance involves

¹⁵ (1974) E.C.S.L.R. 486

¹⁶ At p. 488.

injury to the public at large, and the rights of the private individual to receive protection in tort where he can prove particular damage to himself and irrespective of his ownership or occupation of land, the law of private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof. The main differences between the two species of nuisance are therefore these:

- (i) Public nuisance is a crime,¹⁷ and is a tort where particular damage is proved. Private nuisance is a tort only.
- (ii) To succeed in private nuisance, the plaintiff must have an interest in land.¹⁸ In public nuisance there is no such requirement.¹⁹
- (iii) Damages for personal injuries can be recovered in public nuisance.²⁰ Whether such a claim will lie in private nuisance is doubtful.²¹

Notwithstanding these basic differences, there may be occasions where the facts of a particular case will give rise to liability in both public and private nuisance: for example, where large-scale pollution to the atmosphere causes particular damage to the plaintiff's property. Furthermore, the two causes of action share some common principles. For instance, in both public and private nuisance, the interference complained of must be substantial and unreasonable, and "the law of give and take" applies to both.

Categories of private nuisance

Private nuisance falls into three categories:

- (a) *Physical injury to the plaintiff's property*, e.g. where the plaintiff's crops are destroyed by fumes from the defendant's factory; or where vibrations from the defendant's building operations cause structural damage to the plaintiff's house.
- (b) *Substantial interference with the plaintiff's use and enjoyment of his land*, e.g. where the plaintiff is subjected to unreasonable noise or smells emanating from the defendant's neighbouring land.

¹⁷ Penal Code, ss. 192 and 194; Criminal Code, s. 234. See note 3, *supra*.

¹⁸ *Malone v. Laskey* [1907] 2 K.B. 141.

¹⁹ *Street, op. cit.* p. 214.

²⁰ See e.g. *Castle v. St. Augustine's Links Ltd* (1922) 38 T.L. R. 615.

²¹ *Street, op. cit.* p. 229

- (c) *Interference with easements and profits, e.g.* where the defendant wrongfully obstructs the plaintiff's right of way or right to light.

THE BASIS OF LIABILITY IN PRIVATE NUISANCE

The main problem in the law of private nuisance is to strike a balance between the right of the defendant to use his land as he wishes, and the right of the plaintiff to be protected from interference with his enjoyment of land. In order to strike this balance, two main requirements have been developed:

- (1) The injury or interference complained of will not be actionable unless it is (a) *sensible* (in the case of material damage to land) or (b) *substantial* (in the case of interference with enjoyment of land);
- (2) The defendant will not be held liable unless his conduct was *unreasonable* in the circumstances.²²

Sensible material damage

This is damage which is not merely trifling or minimal and which causes a reduction in the value of the plaintiff's property.²³

It is easier for a plaintiff to succeed in nuisance where he can show material damage to his property than where he complains of interference with his enjoyment of land, since tangible damage can be more easily observed and measured than personal discomfort or inconvenience arising from, for example, noise or smells.²⁴ The leading English case on sensible material damage is *St. Helen's Smelting Co. v. Tipping*,²⁵ where the plaintiff, who lived in an industrial area, proved that his trees and shrubs had been damaged by fumes from the defendant's copper-smelting works. It was held by the House of Lords that the plaintiff's action in nuisance succeeded, since there had been sensible material damage to his property. In the course of his judgment, Lord Westbury drew an important distinction between cases of material injury and cases of interference with enjoyment of land. He stated²⁶

²² Street, *op. cit.* 216 *et seq.*

²³ *Ibid*

²⁴ Fleming, *op. cit.* p.404; Winfield and Jolowicz, *op. cit.* p. 365.

²⁵ (1865) 11 E.R. 1483.

²⁶ At p. 651.

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that where there is an interference with enjoyment of land, the nature of the locality is a factor to be taken into account in deciding whether the acts complained of are actionable, so that a person who chooses to live in the heart of an industrial town or in a densely populated part of a large city is not entitled to expect such a high degree of peace and quiet as one who lives in a residential area. Where there is material damage to property, however, the nature of the locality is irrelevant, and the defendant cannot escape liability by pleading that his activities were carried on in an industrial district.

Actions for nuisances causing material damage appear to be comparatively rare in Nigeria, but one example is *Ige v. Taylor Woodrow (Nigeria) Ltd.*²⁷ Here, Elder Dempster Agencies Ltd. employed the defendant contractors to construct a large building in the centre of Lagos. In preparing the site, the defendants carried on pile-driving which set up such heavy vibrations that the structure of the plaintiff's neighbouring house was damaged, so that it became unsafe and had eventually to be pulled down. The plaintiff sued for damages for negligence and nuisance. The action for negligence failed since there was no evidence of lack of care on the part of the defendants, but the claim in nuisance succeeded. De Lestang C.J. said²⁸.

I now come to the crux of this case, namely nuisance caused by vibrations. I have no doubt on the evidence that the damage to the building rendering it dangerous and necessitating its demolition was caused by the vibrations set up by the piling operations...

The person who uses his land in the exercise of his ordinary 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 Elder Dempster Agencies Ltd. employed the contractors to do on their land something which they were lawfully entitled to do, but unfortunately, in the course of doing what was lawful, a nuisance was caused from which damage to the neighbouring property resulted. The fact that what was being done was in itself lawful is consequently no excuse.

²⁷ [1963] L.L.R. 140. Another example is *Karunwi v. Okunaiye* [1963] 2 All N.L.R. 179, where the defendant was held liable for damage caused to the plaintiff's premises by the collapse of a wall which the defendant had erected on his adjacent land.

²⁸ At p. 145

Substantial interference with enjoyment of land

Where an action in nuisance is founded on interference with enjoyment of land, such as where the plaintiff complains of inconvenience, annoyance or discomfort caused by the defendant's conduct, the interference must be shown to be substantial. The classic formulation of the rule, which has been cited with approval in several cases in Nigeria, is that of Luxmoore J. in *Vanderpant v. Mayfair Hotel Co. Ltd.*²⁹:

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 answer 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 three cases:

In *Abiola v. Ijoma*,³⁰ 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. In 1969, the

²⁹ [1930] 1 Ch. 138

³⁰ [1970] 2 All N.L.R. 268.

defendant purchased four hundred day-old chicks which he kept in pens erected against the boundary wall, which was about five feet from the plaintiff's house. The plaintiff claimed that excessive noise made by the chickens in the early hours of the morning disturbed his sleep, and that nauseating smells from the pens interfered with his comfort. He sought damages and an injunction to restrain the alleged nuisance.

Dosunmu J. first of all explained the principles which the common law lays down for the protection of individuals in the enjoyment of their rights. He cited the observation of Lord Loreburn that "the law of nuisance undoubtedly is elastic, as was stated by Lord Hasbury, who said: 'What may be called the uncertainty of the test may also be described as its elasticity.' A dweller in town cannot expect to have as pure air, as free smoke, smell and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give a cause of action, but in each of such cases, it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give the right of action. This is a question of fact."

The learned judge cited with approval the above-mentioned dictum of Luxmoore J., then continued³¹:

In any organised 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.

With regard to the noise complained of, it was held that since "the main object of living in a house is to have a room with a bed in it where one can sleep in peace,... it seems to me that noise made by the chickens at these hours of the night is worse than a triviality, and the plaintiff is justified if he complains."

As regards the smell, since there was evidence that the defendant had his pens cleaned out only once a week, and the Medical

³¹ At p. 272

Officer testified that he had found excreta and dead fowls in the pen which emitted a repulsive odour, it was clear that the plaintiff had suffered more than a trivial interference with his enjoyment of his land. The learned judge concluded:

I do not believe that the plaintiff is being fanciful in all his complaints of excessive noise and smells, and they are, in my judgment, more than a trifling inconvenience that an ordinary person living in that part of Surulere, which is a residential area, can be called upon to bear.

The plaintiff was accordingly awarded damages and an injunction restraining further acts of nuisance by the defendant.

In *Tebite v. Nigeria Marine & Trading Co. Ltd.*³² Atake J. examined the issue of interference with enjoyment of land in the Nigerian context. Here, the plaintiff, a legal practitioner, occupies premises at 11 Robert Road, Warri, which he used as his chambers. The defendants had a workshop at 9 Robert Road where they carried on the business of boat building and repairing. The plaintiff brought an action against the defendants 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 noxious fumes which diffuse his premises and cause him much discomfort and inconvenience."

After a visit to the *locus in quo* the learned judge found as a fact that the defendants' machine did create considerable noise and offensive smells. He then proceeded to determine whether the noise and smells were such as to entitle the plaintiff to maintain an action in law. The learned judge cited Luxmoore J.'s above mentioned dictum, then continued³³:

Now Luxmoore J. has, in that excerpt from his judgement, stated the law by reference to what obtains among English people. In this case the plaintiff is not an Englishman, and the place concerned is not England: it is Warri in Nigeria. The defendants' counsel has very rightly pointed out that generally people in Nigeria make a lot of noise in their

³² (1971) 1 U.L.R. 432. See also *Karagulam v. Oyesile* (1972) 3 U.I.L.R. 536; *Bankole v. Admekwe* (1973) 12 CCHCJ 97

³³ At p. 435.

neighbourhood and homes, and that the average Nigerian does put up or should be able to put up with a lot of noise. That is not a point that can for sentimental reasons be dismissed with a wave of the hand, for counsel was in all seriousness and honesty stating that which we must all acknowledge is very true. So what has to be considered in this case is the standard of the ordinary Nigerian, and what one ought to do is to apply the tests laid down in the authorities strictly to the circumstances in our country. But one cannot set an arbitrary and fixed standard and expect it to be applicable in all parts of the country, or indeed in all parts of a town or village. The locality or neighbourhood has all the time to be considered. To adapt a well-known passage from the judgment of Thesiger L.J. in *Sturges v. Bridgman*,³⁴ whether anything is a nuisance or not is a question to be determined not merely by an abstract consideration of the thing itself but with reference to its circumstances: what would be a nuisance in Victoria Island or Ikoyi in Lagos would not necessarily be so in Ebute Metta: and what would be a nuisance in the G.R.A. in Warri will not necessarily be so in Robert Road. The neighbourhood of Robert Road has therefore to be considered in this case. The plaintiff cannot come into Robert Road and, because he is a legal practitioner, expect to introduce or import into it certain standards which accord with 'elegant or dainty modes and habits of living.

Atake J. then proceeded to examine the evidence as to the character of the locality. He found³⁵ 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

³⁴ (1879) 11 Ch. D. 852, at 865.

³⁵ At p. 436

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."

The learned judge accordingly held that, in respect of both the noise and the smells, substantial interference with the plaintiff's comfort and convenience had been proved, and he was entitled to damages and an injunction to restrain continuance of the nuisance.

In *Moore v. Nnado*,³⁶ the plaintiff alleged nuisance by the defendant in that the latter caused excessive noise in his neighbouring palm-wine bar by playing stereograms unreasonably loudly until late every night. The plaintiff complained that, as a result of the noise, he had been compelled to seal up his louver windows with sheets of plywood, and to spend most of his time in the backyard to his house.

Oputa J. observed that:

the difficulty with private nuisance is that the acts of the defendant are usually lawful acts, unlike public nuisance, where the acts constituting such nuisance are usually unlawful acts. The defendants here are entitled to pursue their business as palm-wine sellers; to keep their shops or bars open to the public; and to play their radiograms and amplifiers. The plaintiff, on the other hand, is entitled to his quiet rest and comfort and to the full enjoyment of his premises.... To determine whether there has been an actionable nuisance in this case, a just balance must be struck between the rights of the defendants to operate their palmwine bars and the rights of the plaintiff to the undisturbed enjoyment of his property.... Whether the acts of the defendants constitute a nuisance must be determined not merely by an abstract consideration of the acts themselves but by reference to all

³⁶ [1967] F.N.L.R. 156.

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the circumstances of this case, including the time the defendants play their radiograms and amplifiers, how loud they play these instruments, whether the volume of music or noise was wanton or unreasonable, or whether the effect on the plaintiff was merely transitory or was otherwise continuous."

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.³⁷ 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."³⁸

Reasonableness of defendant's conduct

Whether the plaintiff claims in respect of injury to property or in respect of interference with enjoyment of land, the primary question in any action for private nuisance is: "Was the defendant's activity reasonable according to the ordinary usages of mankind living in ... a particular society?"³⁹ There is no precise criterion for determining this issue: all depends upon the circumstances of the individual case. However, a number of factors have criteria for determining this issue: all depends upon the circumstances to be examined briefly.

(1) Locality

As we have seen,⁴⁰ the nature of locality where the acts complained of have occurred may be taken into account in cases of interference with enjoyment of land, but not in cases of physical injury to property.

³⁷ Following *Hollywood Silver Fox Farm Ltd. v. Emmet* [1936] 1 All E.R. 825, p. 102, *post*.
³⁸ At p. 161
³⁹ *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 at p. 903, *per* Lord Wright.
⁴⁰ p. 94, *ante*

2) *Utility of the defendant's conduct*

In general, the court will not find for the defendant merely because he shows that his conduct was beneficial or useful to the community for that would compel the plaintiff "to bear the burden alone of an activity from which many others will benefit."⁴¹ Thus, in one case, an injunction was granted in a nuisance action against a cement company, the effect of which was to close down its cement factory for three months. The court was unmoved by the defendants' argument that their production of cement was vital to the public interest at a time of expansion in house building and that they were the only producers of cement in the country.⁴²

On the other hand, the utility of the defendant's activity may be relevant in the sense that if such an activity is carried out not for any useful purpose but merely for the purpose of annoying or spiting the plaintiff, it will be actionable in nuisance.⁴³ Secondly, there is no doubt that "some consideration will be given to the fact that the offensive enterprise is essential and unavoidable in the particular locality, like a coal-mine, quarry or some public utility or service."⁴⁴ Thirdly, since an injunction is a discretionary remedy, the court may refuse to grant it even though the plaintiff has established that the tort of nuisance has been committed.⁴⁵

(3) *Plaintiff's abnormal sensitivity*

If the plaintiff suffered damage only because he or his property were abnormally delicate or sensitive, and he would not otherwise have been harmed, the defendant will not be liable in nuisance, for the law expects a man to conform to a reasonable standard of conduct not to some unusually high standard which the plaintiff seeks to impose.⁴⁶ Thus, for example, a plaintiff who has an unduly sensitive nose cannot complain of smells which would not have disturbed a normal person; nor can a man who grows exceptionally delicate flowers complain of injury to them if the defendant's activity would not have damaged ordinary flowers.

At first sight, this rule might appear to be contrary to the "egg-



shell skull" rule in negligence,⁴⁷ under which abnormally sensitive plaintiffs can recover damages for the full extent of their loss, whether such loss was foreseeable or not. The rule in nuisance is not really inconsistent with the "egg-shell skull" rule, since it has been held that once the defendant's conduct is found to be unreasonable, then the plaintiff can recover for the full amount of his loss including damage to abnormally sensitive or delicate operations.⁴⁸ Thus, abnormal sensitivity is relevant only to the initial question: "was the defendant's conduct reasonable?", and if that question is answered in the negative, then the "egg-shell skull" rule will be applied.

(4) *Defendant's malice*

That the defendant carried on his activity with the sole or main purpose of causing harm or annoyance to the plaintiff, is a factor to be taken into account in deciding whether his conduct was reasonable. "Malice" in this context means "spite," "ill-will or evil motive." Thus where, out of spite, the defendant fired guns on his land close to the boundary of the plaintiff's land during breeding time in order to cause the plaintiff's silver foxes to miscarry, the defendant was held liable in nuisance for the damage to the foxes, since harmful conduct cannot be reasonable where it is motivated by malice.⁴⁹ And where, in retaliation for the noise made by the plaintiff's music lessons in an adjoining house, the defendant persistently whistled, shouted and beat trays against the party wall, it was held that the conduct of the defendant was an actionable nuisance and would be restrained by an injunction since its purpose was malicious, whereas the plaintiff's conduct was reasonable and therefore not actionable.⁵⁰

(5) *Duration of the harm*

The question of the duration of the harm complained of may arise in two contexts:

(1) It has been said that the essence of nuisance is a continuing state of affairs on the defendant's land which causes damage to the plaintiff⁵¹ for example, a factory emitting constant noise and fumes,

⁴¹ Winfield and Jolowicz, *op. cit.* p. 365.

⁴² *Bellew v. Cement Co. Ltd.* [1948] L.R. 61.

⁴³ See p. 102, *post.*

⁴⁴ *Fleming, op. cit.* p. 402.

⁴⁵ See *Miller v. Jackson* [1977] Q.B. 966.

⁴⁶ *Robinson v. Kilvert* (1889) 41 Ch. D. 88

⁴⁷ See p. 56. *ante*

⁴⁸ *McKinnon Industries Ltd. v. Walker* [1951] 3 D.L.R. 577 at p. 581.

⁴⁹ *Hollywood Silver Fox Farm Ltd. v. Emmet* [1936] 1 All E.R. 825; followed in *Moore v. Nnado* [1967] F.N.L.R. 156, p. 99, *ante*.

⁵⁰ *Christie v. Davey* [1893] 1 Ch. 316; followed in *Moore v. Nnado*, *supra*.

⁵¹ *Bolton v. Stone* [1950] 1 K.B. 201 at p. 213. See also *Castle v. St. Augustine's Links* (1922) 38 T.L.R. 615.

or a golf course or cricket pitch so sited that balls are frequently struck on to the plaintiff's adjacent land. The actual damage to the plaintiff's property may arise from a single isolated occurrence (such as where, owing to defective electrical wiring on the defendant's house, a fire broke out which destroyed the plaintiff's neighbouring house),⁵² but the essence of the nuisance is the continuing of affairs (in this example, the faulty wiring).

(2) A relevant factor in determining the reasonableness of the defendant's conduct is whether it was temporary or permanent.⁵³ Thus, a mere temporary inconvenience, for example, noise and dust from demolition or building work on the defendant's land, may not be unreasonable, whereas a permanent inconvenience such as noise and smoke emanating from the defendant's factory is more likely to be held unreasonable, and therefore actionable. Furthermore, it is a well-established principle of equity that an injunction will not be granted to restrain a nuisance which is merely temporary, except in extreme cases,⁵⁴ and the plaintiff will thus be confined to seeking damages.

WHO CAN SUE

Private nuisance

Since private nuisance is essentially an interference with the use and enjoyment of land, only a person who has an interest in the land affected is entitled to bring an action.⁵⁵ Thus, an owner in fee simple, a lessee under a lease or a person having a statutory right of occupancy⁵⁶ will have a sufficient interest in land to maintain an action. A person having no legal, equitable or statutory interest in the property, such as a guest, a lodger or a member of the owner's family, cannot sue for private nuisance⁵⁷; their only course will be to sue in negligence in respect of any damage they may have suffered personally. Furthermore, even a person who has an interest in the land cannot sue if he is not in possession but

⁵² *Spicer v. Smee* [1946] 1 All. E.R. 489.

⁵³ *Bamford v. Turnley* [1861-73] All E.R. Rep. 706.

⁵⁴ *Dr. Keyser's Royal Hotel Ltd. v. Spicer Bros Ltd.* (1914) 30 T.L.R. 257.

⁵⁵ *Read v. Lyons* [1947] A.C. 156 at p. 183.

⁵⁶ Under, e.g. The Land Use Decree 1978 (No. 49), or the Land Tenure Law 1962 (Cap. 59, Laws of Northern Nigeria).

⁵⁷ *Malone v. Laskey* [1907] 2 K.B. 141.

has only a reversionary interest. Thus, where property is let to a tenant having exclusive possession, the landlord cannot maintain an action in nuisance in respect of any activity of the defendant which occurs during the tenancy,⁵⁸ unless he can show that the activity has caused or is likely to cause permanent damage to the property, for example, damage due to vibrations set up on the defendant's land,⁵⁹ which will injure his reversionary interest.

It is uncertain whether even a plaintiff having an interest in land can recover damages for (i) harm to chattels and (ii) personal injuries. Damages have been awarded in some cases of harm to chattels⁶¹ and refused in others.⁶² But it appears there is no case in which damages for personal injuries have been recovered in private, as opposed to public nuisance.⁶³ It has been suggested that once the plaintiff has established an interference with his use of land, he should be able to recover by way of consequential damages for harm to his chattels and for personal injury.⁶⁴ Thus, for example, the owner of land who proves a nuisance caused by noxious fumes from the defendant's factory should be able to recover damages for any illness he has suffered thereby.

Public nuisance

As we have seen, any person who can show that he has suffered particular damage over and above that suffered by the general public can sue for public nuisance.⁶⁵ Particular damages include, *inter alia*, injury to land and chattels and personal injuries. The range of persons who may sue for public nuisance is therefore wider than that of private nuisance in that in public nuisance:

- (i) the plaintiff need not have an interest in land, and
- (ii) the plaintiff can recover damages for personal injuries.

⁵⁸ *Cooper v. Crabtree* (1882) 20 Ch. D. 589.

⁵⁹ *Colwell v. St. Pancras Borough Council* [1904] Ch. 707.

⁶⁰ A similar rule applies to actions for trespass to land. See p. 183, *post*.

⁶¹ e.g. *Midwood v. Manchester Corporation* [1905] 2 K.B. 597; *Halsey v. Esso Petroleum Co. Ltd.* [1961] 2 All E.R. 145.

⁶² *Cunard v. Antifyre Ltd.* [1933] 1 K.B. 551.

⁶³ *Street. op. cit.* p. 229. C.f. Winfield and Jolowicz, *op. cit.* 373, who point out that it has been assumed in a number of cases that personal injuries are compensable in private nuisance.

⁶⁴ *Ibid.*

⁶⁵ pp. 90 *et seq.*, *ante*.

In *Castle v. St. Augustine's Link Ltd.*,⁶⁶ for example, a taxi-driver was driving his taxi along a public highway when he was hit in the eye by a golf-ball struck from the defendants' nearby golf-course. His action for damages for the loss of eye succeeded on the ground that the positioning of the golf-course so close to the highway as to endanger passers-by constituted a public nuisance, and the plaintiff had suffered particular damage. No action in private nuisance would have been possible since the plaintiff had no interest in land, and he had suffered only personal injuries.

WHO CAN BE SUED

The proper defendant in action for public or private nuisance is the person who bears "some degree of personal responsibility"⁶⁷ for it. He may be either (i) the creator of the nuisance, or (ii) the occupier of the premises from where the nuisance emanates, or (iii) in certain circumstances, the landlord who is out of occupation of such premises.

(1) The creator

Whoever creates a nuisance may be sued for it, whether or not he is in occupation of the land from which it emanates.⁶⁸ The example commonly given of liability of the creator of a nuisance is that of the builder of a house which obstructs the neighbouring landowner's easement of light or easement of way.⁶⁹ The liability is a continuing one including not merely the wrongful act itself, but the continuance of the wrongful state of affairs which results from it; and it has been held that it is no defence that the creator of the nuisance has no power to remove it without committing a trespass because the land from which the nuisance emanates is in the occupation of a third party.⁷⁰

(2) The occupier

It is normally the occupier of the land from which the nuisance emanates who will be liable for it. "Occupier," as is usual in

the law of torts, means the person having control of premises, whether personally or through his servants or agents. In most cases, the occupier will also be the creator of the nuisance (e.g. where he causes unreasonable noise or noxious fumes to be emitted from his factory; or where he builds a wall on his land which collapses and damages the plaintiff's adjoining property)⁷¹ but that will not necessarily be so. Where the occupier is not also the creator, the following principles will apply:

- (i) if the nuisance is created by the occupier's servant acting in the course of his employment, the occupier will be liable on ordinary principles of vicarious liability.⁷²
- (ii) If it is created by an independent contractor engaged by the occupier, the latter will generally not be liable.⁷³ But where the contractor is employed to do a job which involves special risk of nuisance, for example, construction work on or near the highway, the occupier will be under a "non-delegable" duty to ensure that care is taken,⁷⁴ and if the contractor creates a nuisance the occupier will be liable for it.
- (iii) If it is created by a licensee of the occupier, for example, the occupier's guest, lodger or visiting relative, the occupier will not be liable unless he knew or ought to have known of the nuisance and failed to take steps to control the licensee.⁷⁵
- (iv) If it is created by a trespasser (over whom the occupier has no control) or result from an act of nature, the occupier will not be liable unless (i) he knows or ought to have known of its existence, and (ii) he "adopts" the nuisance by using the state of affairs for his own purpose, or "continues" the nuisance by failing to take reasonably prompt and effective steps to abate it.⁷⁶
- (v) If the nuisance existed before the occupier acquired the property, he will not be liable unless he knew or ought to have known of its existence and failed to take reasonable steps to abate it.⁷⁷

⁷¹ See *Karunwi v. Okunaiye* [1963] 2 All N.L.R. 179.

⁷² See Chap. 13, *post*.

⁷³ See Chap. 13, *post*.

⁷⁴ *Hole v. Sittingbourne Ry.* (1861) 158 E.R. 201; *Matania v. National Provincial Bank* [1936] 2 All E.R. 633.

⁷⁵ *White v. Jamieson* (1874) L.R. 18 E.q. 303.

⁷⁶ *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880.

⁷⁷ *St. Anne's Well Brewery Co. v. Roberts* [1928] All E.R. Rep. 28.

⁶⁶ (1922) 38 T.L.R. 615

⁶⁷ *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880 at p. 897, *per* Lord Atkin.

⁶⁸ *Fleming, op. cit.* p. 409

⁶⁹ See *Salmond, op. cit.* 68, n 67.

⁷⁰ *Thompson v. Gibson* [1835-42] All E.R. Rep. 623.

- (vi) In all the above cases, the creator⁷⁸ of the nuisance will himself be liable.⁷⁹

(3) The landlord

Where land is let to a tenant, he has exclusive possession and generally it is he, and not the landlord, who can be sued for any nuisance occurring during the period of the tenancy.⁸⁰ But a landlord can be sued where:

- (a) he expressly or impliedly authorised the tenant to create the nuisance (e.g. where L let premises to T for a purpose which both parties knew would cause unreasonable noise and smoke)⁸¹; or
- (b) he let land on which there was already a nuisance for which he was himself responsible, and he knew or ought to have known of the existence of the nuisance before he let the land⁸²; or
- (c) in the case of a nuisance arising from failure to repair, where he covenanted in the lease to repair, or he reserved to himself a right to enter and repair, or he had an implied right to enter and repair.⁸³

DAMAGES

Nuisance, being derived from an action on the case and not from trespass,⁸⁴ is not actionable *per se* and damage must normally be proved by the plaintiff. Thus, as we have seen, in public nuisance the plaintiff must prove that he has suffered some particular damage over and above that suffered by the general public, and in private nuisance he must show sensible material injury to his property or substantial interference with his enjoyment of his land. But there are three classes of case where damage need not be proved. They are:

- (1) Where, on the facts, damage can be readily presumed.
For example, where the defendant built a house so that

⁷⁸ i.e. the servant, the independent contractor, licensee or the trespasser.

⁷⁹ See p. 105, *ante*.

⁸⁰ *Cheetham v. Hampson* (1791) 100 E.R. 1041

⁸¹ *Harris v. James* [1874-80] All E.R. Rep. 1142.

⁸² *St. Anne's Well Brewer Co. v. Roberts* [1928] All E.R. Rep. 28.

⁸³ See *Winfield and Jolowicz, op. cit.* pp. 380-383.

⁸⁴ See pp. 5-7, *ante*.

one of the cornices projected over the plaintiff's adjoining land, the court presumed that damage would be caused by rain-water dripping from the cornice on to the plaintiff's land.⁸⁵

- (2) Where the defendant interferes with an easement or right of access of the plaintiff.⁸⁶
- (3) An injunction may be granted in a *quia timet* action where harm to the plaintiff is reasonably feared to be imminent, though none has actually occurred.⁸⁷

DEFENCES

Certain general defences are available to defendants in nuisance actions, though most are somewhat restricted in their application. For instance, it seems that contributory negligence can be invoked only where the nuisance complained of is based on negligent conduct, and not where it is the intended result of an intentional act of the defendant⁸⁸; *volenti non fit injuria* may be available, provided there is no negligence on the defendant's part⁸⁹; and "act of a stranger" will be a defence only where the defendant was not at fault in failing to notice the nuisance or in failing to take steps to abate it.⁹⁰ Another possible defence is necessity, which lies where, in order to avoid an imminent peril to himself, the defendant takes some action which unavoidably causes damage to the plaintiff. For example, it has been held that a landowner whose property is threatened by an incursion of flood-water is entitled to erect barricades on his land, even if the foreseeable result is the flooding of his neighbour's property by the diverted water.⁹¹

Perhaps the most important defence, from a practical point of view, is that of statutory authority. In modern times, legislatures frequently impose duties upon or give powers to public authorities to perform certain functions for the public benefit, such as the running of railways, the supply of water and electricity and the disposal of sewage. Where a nuisance is caused

⁸⁵ *Fay v. Prentice* (1845) E.R. 789.

⁸⁶ *Nicholls v. Ely Beet Sugar Factory Ltd.* [1936] Ch. 343.

⁸⁷ *Attorney-General v. Manchester Corporation* [1893] 2 Ch. 87.

⁸⁸ See *Street, op. cit.* p. 236

⁸⁹ *Kiddle v. City Business Properties Ltd.* [1942] 1 K.B. 269.

⁹⁰ See pp. 119-121, *post*.

⁹¹ *Nields v. L.& N.W. Ry.* (1874) L.R. 10 Ex. 4 at p. 7.

in the course of carrying out such duties or powers, the public authority may sometimes escape liability by pleading statutory authority. The scope of the defence is somewhat uncertain, but the basic principles may be stated thus:

- (i) where a statute authorises the doing of a particular act which will inevitably cause a nuisance, any resulting harm will not be actionable provided that all reasonable care and skill, according to the current state of scientific knowledge, has been taken⁹²;
- (ii) where a statute authorises the doing of a particular act only if no nuisance is caused thereby, then there will be no defence to action in nuisance⁹³;
- (iii) statutory authority to commit a nuisance must be granted expressly or by necessary implication, and if the conduct complained of falls outside the duty or power given by the statute, the defence will fail.

This latter principle was applied by the Supreme Court in *Lagos City Council v. Olutimehin*,⁹⁵ where the plaintiffs brought an action in nuisance against the Lagos City Council, complaining of the emission of offensive smells and vapours from the Council's nightsoil depot which was situated close to the plaintiff's church and school.

The defendants pleaded statutory authority, arguing *inter alia*, that they were acting under a duty imposed upon them by section 140(5) of the Lagos Local Government Act 1959, which provided that "it shall be the duty of the Council within the town to ... provide for the removal of nightsoil and disposal of sewage from all premises and houses in the town." The Supreme Court held that the defendants could not rely on the defence of statutory authority since the duty imposed by the statute was to *remove* nightsoil, not to *dispose* of it. Nor was the disposal of sewage (expressly mentioned in the statute) to be equated with the disposal of nightsoil. Lewis J.S.C., delivering the Court's judgment, said:

Dealing first with the argument in regard to section 140(5) and

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(13) of the Lagos Government Act, 1959, we would agree that the imposition of a duty on a statutory corporation normally implies the carrying out of things incidental to that duty. We think, however, that in so far as the carrying out is likely to interfere with ordinary rights of private citizens, it must be strictly construed, and we do not see that a necessary incident to the duty to remove nightsoil is its disposal. Anything incidental to the removal itself would be covered, but the final disposal is not, so that so far as the final disposal is concerned the ordinary rules of nuisance will apply. We are fortified in this view because section 140(5) goes on to deal specifically with the disposal of sewage so that removal of nightsoil is starkly contrasted with the disposal of sewage.

That brings us to [counsel for the defendants'] second argument that disposal of sewage covers the disposal of nightsoil. We do not think it does. Sewage is defined in the Shorter Oxford Dictionary as "refuse matter conveyed in sewers," and, whilst we were not referred to any definition of nightsoil, it is well known and indeed conceded by both counsel that it did not pertain to the disposal of refuse by way of sewers. Moreover, it was just because there were no sewers that nightsoil had to be collected in Lagos. It follows that the power to dispose of sewage was not exercised here, as no use of sewers was made for the disposal of nightsoil.

Ineffectual defences

We have already seen that it is no defence to an action in nuisance that the activity complained of was for the benefit of the community.⁹⁶ Nor is it a defence that the defendant exercised all care and skill in carrying out his activity,⁹⁷ though this is a factor which may be taken into account in determining whether his conduct was reasonable or not. It has also been established that it is no defence that the plaintiff "came to" the nuisance. Thus, where the plaintiff bought a house close to a noisy and smoky factory, he was held to be entitled to succeed in nuisance, and it was no defence that the factory had been in existence for three years before the plaintiff arrived, since he "came to the house... with all the rights which common law affords, and one of them is a right to

⁹⁶ p 100, *ante*

⁹⁷ See Winfield and Jolowicz, *op. cit.* p. 360 *Lagos City Council v. Olutimehin* [1969]

1 All N.L.R. 403, at pp. 414, 415.

⁹² *Geddis v. Proprietors of the Bann Reservoir* (1878) 3 App. Cas. 430 at p. 455; *Manchester Corp. v. Farnworth* [1930] A.C. 171.

⁹³ *Manchester Corp. v. Farnworth*, *supra*.

⁹⁴ *Geddis v. Proprietors of the Bann Reservoir*, *supra*.

⁹⁵ [1969] 1 All N.L.R. 403

wholesome air."⁹⁸ This, however is subject to the principle already mentioned that, where interference with enjoyment of land is complained of, the character of the district must be taken into account. ⁹⁹ Thus, a plaintiff who chooses to live in an industrial or manufacturing district must put up with the discomfort which the average inhabitant of that district might reasonably expect. In other words, the plaintiff has no right to expect more than the local "standard" of the district. "What would be a nuisance in Ikoyi would not necessarily be so in Ebute Metta."¹

⁹⁸ *Bliss v. Hall* (1838) 132 E.R. 758

⁹⁹ See p. 94, *ante*

¹ See p. 98, *ant*

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CHAPTER 6

STRICT LIABILITY

Liability is strict in those cases where the defendant is liable for damage caused by his act, irrespective of any fault on his part; or, as it has been expressed, "where a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence."¹

The two principal areas of strict liability in the law of torts are (i) liability under the rule in *Rylands v. Fletcher*, and (ii) liability for animals.

THE RULE IN RYLANDS V. FLETCHER²

In this case, the defendants employed independent contractors to build a reservoir on their land. The contractor carelessly omitted to block up some disused shafts on the site which communicated with the plaintiffs' coal mine beneath the reservoir, so that, when the reservoir was filled, water escaped down the shaft and flooded the plaintiff's mine. The defendants' 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 the negligence of their independent contractors.³ However, they were held strictly liable for the damage on the basis of the following rule propounded by Blackburn J., which is now known as the rule in *Rylands v. Fletcher*⁴:

The person who, for his own purposes [and in the course of *non-natural* user of his land],⁵ brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it

¹ Salmond, *op. cit.* p. 314.

² (1866) L.R.1. Exch. 265, affirmed (1868) L.R. 3 H.L. 330.

³ The case was decided before the emergence of the principle that an employer may be liable for the negligence of his independent contractor where ultra-hazardous activities are involved. See p. 251, *post*.

⁴ (1866) L.R. 1. Exch. 265 at pp. 279, 280.

⁵ This requirement was added by Lord Cairns in the House of Lords which affirmed the decision of the lower court (1868) L.R. 3 H.L., 330 at pp. 338-340

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.⁶

The rule in *Rylands v. Fletcher* has some affinities with nuisance, and it has been said that "the law of nuisance and the rule in *Rylands v. Fletcher* might in most cases be invoked indifferently."⁷ It is certainly true that the same facts may easily give rise to liability under both torts,⁸ but there are some fundamental differences:

- (i) *Rylands v. Fletcher* liability is confined to the accumulation of physical objects which escape and do damage; nuisance is not so confined, and covers interference caused by intangibles such as noise and smells.
- (ii) In *Rylands v. Fletcher* there must be an accumulation of things, such as water, gas, chemicals or explosives; in nuisance there is no requirement of accumulation.
- (iii) In *Rylands v. Fletcher* there must be an escape of the accumulated material from the defendant's land to a place outside that land; in nuisance an escape is not necessary.
- (iv) Probably a plaintiff who is not an occupier of adjoining land may sue under *Rylands v. Fletcher*, whereas such a person could not sue in private nuisance.
- (v) Liability under *Rylands v. Fletcher* is confined to cases of non-natural user of land; there is no such limitation in nuisance.

Scope of the rule

(a) Things within the rule

According to Blackburn J., things within the rule include "anything likely to do mischief if it escapes."⁹ They therefore include not only inherently "dangerous" materials such as explosives,¹⁰ gas,¹¹ petrol¹² or chemicals, but also relatively innocuous thing which only become hazardous when accumulated in large quantities, such as water,¹³ crude oil,¹⁴ sewage¹⁵ and slag

⁶ Italics added.

⁷ *Read v. Lyons* [1945] K.B. 216 at p. 183 per Lord Simonds.

⁸ See, e.g. *Midwood v. Manchester Corp.* [1905] 2 K.B. 597.

⁹ *Rylands v. Fletcher* (1866) L.R. 1 Exch. 265 at p. 279.

¹⁰ *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co.* [1921] A.C. 465.

¹¹ *Batcheller v. Tunbridge Wells Gas Co.* (1901) 84 L.T. 765.

¹² *Musgrove v. Pandelis* [1919] 2 K.B. 43.

¹³ *Rylands v. Fletcher*, *supra*; *Oladehin v. Continental Textile Mills Ltd* (1975) 6 CCHCJ 1269 (Industrial waste water).

¹⁴ *Umudje v. Shell-B.P. (Nigeria) Ltd.* (1975) 11 S.C. 155.

¹⁵ *Humphries v. Cousins* (1877) 2 C. P. D. 239.

heap.¹⁶ Even caravan-dwellers have been held to be "things" within the rule,¹⁷ though the decision has not been followed.¹⁸ There will also be liability under the rule for the escape of fire.¹⁹

(b) Bringing on the land and accumulation

The defendant must have brought the thing on to his land and accumulated it there for the rule applies only to "things artificially brought or kept upon the defendant's land."²⁰ Thus, for example, if water flows from the defendant's underground tunnels into the plaintiff's mines, whether by percolation or by force of gravity, the defendant will not be liable under the rule if the water is naturally on the defendant's land and he has done nothing to accumulate it there.²¹ But he will be liable if, as in *Rylands v. Fletcher* itself, he accumulates the water on his land by constructing a reservoir. Again, the defendant will not be liable for damage caused by the escape of rocks, since they are naturally on the land,²² being "the product of natural forces operating in geological time."²³ In the case of vegetation, there will be no liability for its escape if it grows naturally on the land in the form of weeds or other uncultivated growth,²⁴ but the defendant will be liable for the escape of anything which he plants on his land, since that will constitute an "accumulation."²⁵

(c) Escape

There must be an escape of the accumulated substance from the land where it is kept to a place outside. In the words of Lord Simon²⁶:

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.

¹⁶ *Hale v. Jennings Bros* [1938] 1 All E.R. 579; *All-Gen. v. Bros.* [1921] 1 A.C. 521.

¹⁷ *Att-Gen. v. Corke* [1933] Ch. 89.

¹⁸ *Matheson v. Northcote College* [1975] 2 N.Z.L.R. 106.

¹⁹ *Musgrove v. Pandelis* [1919] 2 K.B. 43.

²⁰ *Bartlett v. Tottenham* [1932] 1 Ch. 114 at p. 131, per Lawrence J.

²¹ *Wilson v. Waddell* (1876) 2 App. Cas. 95; *Dublin v. Ghana Housing Corporation* [1975] 2 G.L.R. 337.

²² *Pontadauwe R.D.C. v. Moore-Gwynne* [1929] 1 Ch. 656. But he will be liable if the rocks are thrown on to the adjacent land by blasting with explosives. See p. 114 *post*.

²³ *Salmond, op. cit.* p. 325.

²⁴ *Giles v. Walker* (1890) 62 L.T. 933.

²⁵ *Crowhurst v. A. Amersham Burial Board* (1878) 4 Ex. D. 5.

²⁶ *Read v. Lyons* [1947] A.C. 156 at p. 168; *Umudje v. Shell B-P. (Nigeria) Ltd.* (1975) 11 S.C. 155 at p. 160, per Idigbe J.S.C.

Thus, for instance, there was no escape and therefore no liability where the plaintiff, while carrying out her duties inside the defendant's factory, was injured by an explosion which occurred within the factory premises²⁷; nor where a poisonous tree on the defendant's land caused death of a horse which ate its leaves by reaching over from adjacent land, the tree never having extended beyond the defendant's boundary.²⁸ On the other hand, it was held that there was a sufficient escape where a piece of equipment was thrown from one part of a fairground to another, since each part was occupied by different persons.²⁹ It seems that the actual damage caused by the escape need not be immediately caused by the thing accumulated. Thus, for example, where the defendant accumulates explosives for quarrying purposes, and later, during blasting operations, rocks are thrown on to the plaintiff's adjacent land, the plaintiff can recover under *Rylands v. Fletcher* for damages caused by the rocks, even though they were not the things which were accumulated.³⁰

(d) Non-natural user

The word "natural" is used in two distinct senses in this tort. First, it means "that which exists in or by nature and is not artificial."³¹ Thus, as we have seen, there is no liability for an escape of things naturally on the land, such as rocks or weeds. Secondly, it means "that which is ordinary and usual, even though it may be artificial,"³² and it is in this latter sense that the term "non-natural user" is generally understood. The best-known definition of non-natural user is that of Lord Moulton:

It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.³³

It has also been emphasised that non-natural user is a question of fact and "all the circumstances of time and practice of mankind

²⁷ *Ibid.*

²⁸ *Ponting v. Noakes* [1894] 2 Q.B. 281.

²⁹ *Hale V. Jennings Bros.* [1938] 1 All E.R. 579.

³⁰ *Street, op. cit.* p. 250.

³¹ (1961) 24 M.L.R. 557 at p. 561 (Newark).

³² *Ibid.*

³³ *Rickards v. Lothian* [1913] A.C. 263 at p. 279.

must be taken into consideration, so that what may be regarded as dangerous or non-natural may vary according to the circumstances."³⁴

Thus, in deciding whether a particular user is non-natural, the court will look "not only at the thing or activity in isolation, but also to the place and manner in which it is maintained and its relation to its surroundings."³⁵

One advantage of this flexible concept of non-natural user is that it can be adjusted to meet changing social needs. In recent times it has been used by the courts to restrict the scope of the *Rylands v. Fletcher* principle, on the ground that what may have been a non-natural user in 1900 would not necessarily be so in 1960 or 1980. For instance, it has been held that "the manufacturing of electrical and electronic components in the year 1964 ... cannot be adjudged to be a special use, nor can the bringing and storing on the premises of metal foil be a special use in itself... The metal foil was there for use in the manufacture of goods of a common type which at all material times were needed for the general benefit of the community."³⁶ And as far back as 1947 the court hesitated "to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives."³⁷ It has therefore been suggested³⁸ that, in modern times, normal industrial activities properly carried out may no longer constitute a non-natural use of land, and that many of the older authorities may need reconsidering. On this view, even a case such as *Rylands v. Fletcher* itself might be decided differently today, for it is arguable that the accumulation of water in a reservoir serving a large city or town is, at the present day, a sufficiently ordinary user of land and sufficiently beneficial to the community to be considered "natural" within Blackburn J.'s definition.³⁹

Examples of user held to be natural are: water-pipe installations in buildings⁴⁰; the working of mines and minerals⁴¹; the operation

³⁴ *Read v. Lyons* [1947] A.C. 156 at p. 176.

³⁵ *Fleming, op. cit.* p. 322.

³⁶ *British Celanese Ltd v. Hunt* [1969] 1 W.L.R. 959 at p. 963.

³⁷ *Read v. Lyons, supra*, at p. 174, per Lord Macmillan.

³⁸ *Winfield and Jolowicz, op. cit.* p. 421.

³⁹ *Supra*.

⁴⁰ *Rickards v. Lothian* [1913] A.C. 263.

⁴¹ *Rouse v. Gravelworks Ltd.* [1940] 1 K.B. 489.

of a steam boiler in a flour mill⁴², the storage of metal foil in a factory⁴³; the lighting of fires for cooking food⁴⁴ or for heating rooms⁴⁵; necessary wiring for the supply of electric light⁴⁶; the playing of golf⁴⁷; the firing of hunting rifles⁴⁸; the planting of trees at least if not poisonous.⁴⁹

Examples of user held to be non-natural are: the storage of water, gas or electricity in bulk in mains⁵⁰; the operation of a "chair-o-plane" in a fairground⁵¹; the spraying of crops from an aircraft⁵²; the collection of noxious sewage⁵³; the storage of a car with a tank full of petrol in a garage⁵⁴; the parking of a motor-coach in a parking ground after the tank had been emptied⁵⁵; the use of a blow lamp to thaw frozen pipes in a loft.⁵⁶

Application of the rule in Nigeria

The hazards of pollution associated with the oil industry and the rapid growth of manufacturing activity in Nigeria since the late 1960s would seem to have ensured an important role for the *Rylands v. Fletcher* principle. Surprisingly, however, there appear so far to be very few cases in which the principle has been invoked or discussed. Perhaps the most significant case is *Umudje v. Shell-B.P. Petroleum Development Co. of Nigeria Ltd.*⁵⁷ This action arose out of certain activities of the defendants carried out in the course of oil exploration in the Mid-western (now Edo and Delta) States. The plaintiffs, who owned land adjacent to the area of exploration complained:

- (i) that, in the course of road-building, the defendants had blocked and diverted a natural stream, thus interfering seriously with the plaintiff's fishing rights, and
- (ii) that the defendants had accumulated oil waste on land under their control and that this oil had escaped on to the plaintiff's land and caused damage there.

⁴² *Wise Brothers v. Commissioner for Railways* (1974) 75 C.L.R. 59

⁴³ *British Celanese Ltd. v. Hunt* [1969] 1 W.L.R. 959.

⁴⁴ *Hazelwood v. Webber* (1934) 52 C.L.R. 268.

⁴⁵ *Sochaki v. Sas* [1974] 1 All E.R. 344.

⁴⁶ *Collingwood v. Home and Colonial Stores Ltd.* [1936] 3 All E.R. 200

⁴⁷ *Matheson v. Northcote College* [1975] 2 N.Z.L.R. 106

⁴⁸ *Dahlberg v. Naydiuk* (1970) 10 D.L.R. (3d) 519.

⁴⁹ *Noble v. Harrison* [1926] 2 K.B. 332.

⁵⁰ *Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd.* [1936] A.C. 108.

⁵¹ *Hale v. Jennings Bros* [1938] 1 All E.R. 579.

⁵² *Mihalchuk v. Ratke* (1966) 57 D.L.R., (2d) 269.

⁵³ *Sneaton v. Ilford Corp.* [1954] Ch. 450 at p. 472.

⁵⁴ *Musgrove v. Pandelis* [1919] 2 K.B. 43.

⁵⁵ *Perry v. Kendricks Transport Ltd.* [1956] 1 W.L.R. 85.

⁵⁶ *Balfour v. Barty-King* [1956] 2 All E.R. 555.

⁵⁷ (1975) 11 S.C. 155. See also *Ige v. Taylor Woodrow (Nigeria) Ltd.* [1963] L.L.R. 140 (vibrations causing damage to plaintiffs' building) *Oladehin v. Continental Textile Mills Ltd.* (1975) 6 CCHCJ1269 (industrial wastewater damaging plaintiff's house).

With respect to the first complaint, the Supreme Court held that under the rule in *Rylands v. Fletcher* "it is now generally accepted that a person who diverts a natural stream or causes the same to become blocked and in this way diverts its natural course does so at his peril, and is liable for any damage caused by the failure of his works to contain the diverted streams, although there was no negligence on his part."⁵⁸ However, in the present case, the defendants were not liable because their blocking of the stream had not caused flooding of the plaintiff's land but merely starvation of water and fish; there was, in other words, no escape of water from the defendant's land to that of the plaintiff.

With regard to the second complaint, however, the defendants were held liable under the rule, since there was clear proof that crude-oil waste, which they had accumulated in a pit on land under their control, had escaped on to the plaintiff's land where it had polluted certain ponds and killed the fish therein.

Defences

It has been rightly said that there are so many defences and exceptions to liability under the *Rylands v. Fletcher* principle that it is "doubtful whether there is much left on the rationale of strict liability as originally contemplated in 1866."⁵⁹ These defences are briefly as follows:

(1) Consent of the plaintiff

Where the plaintiff has expressly or impliedly consented to the presence of the source of danger, the defendant is not liable unless he has been negligent.⁶⁰ This is merely an application of the maxim *volenti non fit injuria*.⁶¹ The defence is most often applied in cases where a tenant in a block of flats suffers damage as a result of water escaping from an upper floor, for example, where a pipe connected to the mains supply bursts, or where a rat gnaws a hole in a tank on the roof.⁶²

⁵⁸ At p. 159, per Idigbe J.S.C.

⁵⁹ Fleming, *op. cit.* p. 329.

⁶⁰ *Carstairs v. Taylor* (1871) L.R. 6 Ex. 217

⁶¹ See pp. 87-89, ante.

⁶² *Carstairs v. Taylor*, *supra*.

The rationale behind this rule is that the water has been brought to the building and collected there for the mutual benefit of both parties and with their express or implied consent; therefore, there is "no sufficient reason why the risk of accident should lie upon the upper rather than the lower occupant, and the only duty is one of reasonable care."⁶³

Although in such cases the plaintiff is denied the benefit of strict liability, he will succeed if he can prove lack of care on the defendant's part. For example, he will not be deemed to have consented to a flood caused by carelessness in forgetting to turn off a tap,⁶⁴ or in blocking up a drain with tea leaves.⁶⁵ And if the escape was caused by the act of a stranger, the defendant will be excused only if he was not careless in failing to guard against such act.⁶⁶

(2) Default of the plaintiff

It was suggested in *Rylands v. Fletcher* itself that there would be no liability under the rule if the escape was due to the plaintiff's own default.⁶⁷ Thus in a later case, where the plaintiffs worked a mine under the defendant's canal, indifferent to the risks of flooding, the defendant was not liable for the escape of water from the canal and the consequent inundation of the mine, since, "the plaintiffs saw the danger and may be said to have courted it."⁶⁸ Alternatively, where the plaintiff's conduct amounts to contributory negligence, the statutory apportionment rule will apply and his damages will be reduced.⁶⁹

Another aspect of this defence is that, by analogy with the tort of nuisance,⁷⁰ there will be no liability if the damage would not have occurred but for the abnormal sensitivity of the plaintiff's property or the use to which it is put. Thus, where the plaintiffs complained that an escape of electricity stored on the defendants' premises interfered with the sending of messages by the plaintiffs through their submarine cables, the action failed since "a man cannot increase the liabilities of his neighbour by applying his

⁶³ Salmond, *op.cit.* 326. An additional ground for exonerating the defendant in such a case is that the user of the land is not "non-natural."

⁶⁴ *Ruddinan v. Smith* (1889) 60 L.T. 708.

⁶⁵ *Abelson v. Brockman* (1890) 54 J.P. 119.

⁶⁶ See p. 119, *post*.

⁶⁷ (1866) L.R. 1 Ex. 265 at p. 279.

⁶⁸ *Dunn v. Birmingham Canal Co.* (1872) L.R. 7 Q.B. 244 at p. 260.

⁶⁹ See p. 85 *ante*.

⁷⁰ See p. 101, *ante*.

own property to special uses, whether for business or pleasure."⁷¹ It has been held, however, that where the plaintiff complains that vibrations from pile-driving on the defendant's land have caused damage to his building, it is no defence to an action under *Rylands v. Fletcher* that the plaintiff's building was old and therefore abnormally vulnerable to damage from vibrations,⁷² since the plaintiff in such a case has not put his property to any special or unusually sensitive use.

(3) Act of God

Where the escape is the result of "the operation of natural forces, free from human intervention,"⁷³ the defence of Act of God may be available. Thus, for example, an escape caused by an extraordinary violent storm, wind or tide,⁷⁴ or by an earthquake may not be actionable. However, the courts have kept this defence within a very narrow compass, and there appears to be only one reported case in which it has been allowed. In this case⁷⁵ the defendant had for many years, been in possession of some artificial pools formed by damming a natural stream. An extraordinary rainfall, "greater and more violent than any within the memory of witness," broke down the embankments, and the rush of escaping water swept away certain bridges of the plaintiff. It was held that the defendant was not liable for the damage to the bridges because there had been no negligence on his part and the accident was due directly to an Act of God. The defendant was not to be made liable for an extraordinary act of nature which she could not reasonably have anticipated. Since this case was decided, however, a more stringent test has been formulated. It seems that it is now no longer sufficient to show that the occurrence could not reasonably have been anticipated; it must be shown that human foresight and prudence could not reasonably have recognised the possibility of

⁷¹ *Eastern & Southern African Telegraph Co. v. Cape Town Tramways Co. Ltd.* [1902] A.C. 381 at p. 393.

⁷² *Hoare & Co. v. McAlpine* [1923] 1 Ch. 167; *Ige v. Taylor-Woodrow (Nigeria) Ltd.* [1963] L.L.R. 140.

⁷³ *Fleming op. cit.* p. 331.

⁷⁴ Although ordinary wind, rainfall or tide "is in the ordinary course of nature and in that sense an 'act of God,'" its interference will not absolve the defendant from liability in tort: *Omotayo v. Arbuckle Smith & Co. Ltd.* (1954) 14 W.A.C.A 515 at p. 518, *per* Foster-Sutton P.

⁷⁵ *Nichols v. Marshland* (1876) 2 Ex. D.1.

such an event.⁷⁶ Or, have been "an irresistible and unsearchable Providence nullifying all human effort."⁷⁷

(4) Act of a Stranger

It is a defence to liability under *Rylands v Fletcher* that the escape complained of was caused by the deliberate act of a stranger which could not reasonably have been anticipated by the defendant. For example:

an oil company was not liable for an escape of oil and consequent damage to the crops of neighbouring landowners which was caused by an unknown trespasser's deliberately drilling a hole in the company's oil pipeline⁷⁸:

the owner of a vehicle was not liable for damage caused by the act of mischievous children in throwing a lighted match into the petrol tank⁷⁹;

the owners of a reservoir were not liable for flooding of neighbouring land caused by the act of a third party in emptying his own reservoir into theirs.⁸⁰

For the defence to lie, the stranger's act must have been "mischievous, deliberate, and conscious."⁸¹ Thus it seems that merely negligent acts of strangers are not within the defence. This restriction has been criticised on the ground that the basis of the defence is the absence of any control by the defendant over the unforeseeable acts of a stranger on his land, and it should be irrelevant whether the stranger's act was deliberate or negligent.⁸²

Where, in the circumstances, the defendant should reasonably have anticipated and guarded against the act of the stranger, and yet failed to do so, he will have no defence and will be liable for his failure to take reasonable care.⁸³ It is at this point that the torts of *Rylands v Fletcher* and negligence merge, for it seems that "the ordinary negligence test applies in determining whether, and what, measures of protection against outside interference should appropriately be taken."⁸⁴ Moreover, it seems that a defendant in a

⁷⁶ *Greenock Corp. v. Caledonian Ry.* [1917] A.C. 556

⁷⁷ *The Mostyn* [1928] A.C. 57 at p. 93.

⁷⁸ *Mandraj v. Texaco Trinidad Inc.* (1969) 15 W.I.R. 251

⁷⁹ *Perry v. Kendricks Transport Ltd.* [1956] 1 W.L.R. 85

⁸⁰ *Box v. Jubb* (1879) 4 Ex.D. 76.

⁸¹ *Perry v. Kendricks Transport Ltd.*, *supra* at p. 87, *per* Singleton L.J.; *Dominion Gas Co. v. Collins* [1909] A.C. 640.

⁸² *Ibid.* at p. 90, *per* Jenkins L.J.

⁸³ *Winfield and Jolowicz, op. cit.* p. 412.

⁸⁴ *Fleming, op. cit.*, p. 332

Rylands v. Fletcher situation who fails to take reasonable care to guard against the foreseeable act of a stranger is liable not under *Rylands v. Fletcher* but in negligence. Thus a public utility company who carried natural gas at high pressure under the streets of a city were held liable in negligence for the destruction of the plaintiff's hotel due to an escape of gas and consequent explosion caused by the activities of a third party in constructing an underground sewer in the vicinity. The defendants were liable because the risk involved in their operation was so great that a high degree of care was expected of them, and in failing to guard against the conspicuous activities of the third party they had failed to discharge their duty of care.⁸⁵

The class of "strangers" clearly included trespassers,⁸⁶ but there is no clear authority, as to which other persons are included. The occupier will be vicariously liable for the defaults of his servants⁸⁷ and, in this tort, for those of his independent contractors⁸⁸; and it has been held that the occupier of a fairground for the act of a lawful visitor in tampering with equipment provided for the entertainment of customers.⁸⁹ The status of other visitors, however, such as members of the occupier's family, guests, lodgers and casual visitors (e.g. messengers delivering messages), is uncertain. Probably the correct view is that the occupier will be liable for the defaults of all such persons unless it is shown that, in the circumstances, he had no control over the conduct of the person in question.⁹⁰

(5) Statutory authority

Sometimes public authorities charged with providing a particular public service, for example, the collection and disposal of sewage, are exempted from liability provided they have not been negligent. As in the case of nuisance,⁹¹ it is a question of construction of the statute in question as to whether and to what extent liability under *Rylands v. Fletcher* has been excluded.

⁸⁵ *Northwestern Utilities Ltd. v. London Guarantee and Accident Co. Ltd.* [1936] A.C. 108.

⁸⁶ *Mandraj v. Texaco Trinidad Inc.* (1969) 15 W.I.R. 251.

⁸⁷ See Chap. 13, *post*.

⁸⁸ *Balfour v. Barty-King* [1957] 1 Q.B. 496.

⁸⁹ *Hale v. Jennings Bros.* [1938] 1 All E.R. 579.

⁹⁰ *Perry v. Kendricks Transport Ltd.* [1956] W.L.R.

⁹¹ See pp. 108 and 109. *ante*

Damages

The rule in *Rylands v. Fletcher* is not a tort actionable *per se*, and so damage must be proved. As to what types of injury are compensable, the harm primarily protected by the tort is damage to land, building and fixtures thereon. The plaintiff may also recover for harm to his chattels.⁹² Whether damages are recoverable for personal injuries is more doubtful. Despite dicta to the contrary,⁹³ it seems to be settled that a person having an interest in land can recover for personal injuries.⁹⁴ It has even been suggested that a non-occupier can recover for injuries to his person,⁹⁵ but the authority of this opinion is doubtful. Whether damages are recoverable for economic loss must be regarded as an open question. In one case, where a virus dangerous to cattle escaped and caused economic loss to certain auctioneers, damages were held not to be recoverable⁹⁶; but with the modern trend towards allowing recovery for purely economic loss, this decision may no longer be valid.

LIABILITY FOR ANIMALS

These are two separate torts in which strict liability for harm caused by animals is imposed: (i) cattle trespass, and (ii) the scienter action (liability for dangerous animals).

(1) Cattle trespass

This, one of the most ancient causes of action known to the common law, lies where cattle in the possession or control of the defendant are either intentionally driven on to the plaintiff's land, or stray on to such land independently. The essence of the tort has been expressed thus:

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 any 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.⁹⁷

⁹² *Jones v. Festiniog Ry.* (1868) L.R. 3 Q.B. 733.

⁹³ *Read v. Lyons* [1947] A.C. 156 at p. 182, per Lord Macmillan.

⁹⁴ *Hale v. Jennings Bros.* [1938] 1 All E.R. 557; *Perry v. Kendricks Transport Ltd.* [1956] 1 W.L.R. 85 at p. 92.

⁹⁵ *Shiffman v. Order of St. John* [1936] 1 All E.R. 557 at p. 561.

⁹⁶ *Weller v. Foot and Mouth Disease Research Institute* [1966] 1 Q.B. 569.

⁹⁷ *Cox v. Burbridge* (1863) 143 E.R. 171 at p. 174, per Williams J.

The following principles have been established by the cases:

- (a) "Cattle" includes cows, bulls, horses, mules, goats and pigs. It has also been extended to include fowls.⁹⁸ It does not, however include dogs⁹⁹ and cats,¹ the reasons for this exemption being, first, that it is undesirable and virtually impossible to keep them under the same restraint as cattle and, secondly, that their propensity for damage through straying is negligible compared with that of larger and heavier animals such as cows and horses.²
- (b) By way of exception, there will be no liability where cattle which are lawfully being led along the highway escape from there on to adjacent land,³ for this is regarded as a normal hazard associated with the passage of traffic along the highway. But if the escape is due to carelessness on the part of the person in control of the cattle on the highway, the latter will be liable in negligence⁴.
- (c) Only a person having an interest in the land trespassed upon can sue. Thus a mere licensee on the land has no right of action.⁵
- (d) Damages are recoverable not only for harm to the plaintiff's land and crops caused by the trespass,⁶ but also for injury to his animals⁷ and chattels,⁸ and for injuries inflicted upon the plaintiff himself.⁹

Defences to cattle trespass are, for the most part, the same as those available under *Rylands v. Fletcher*. They include default of the plaintiff (e.g. where he has failed to maintain an adequate fence when under a duty to do so),¹⁰ act of a stranger (e.g. where a third party drives the defendant's cattle on to the plaintiff's land¹¹), and

⁹⁸ *Williams, Animals*, Chap. 9.

⁹⁹ *Tallents v. Ben.* [1944] 2 All E.R. 474.

¹ *Buckle v. Holmes* [1926] 2 K.B. 125.

² But there may be liability under the scienter action or in negligence for injury caused by dogs or cats. See pp. 124, 129, *post*.

³ *Tillett v. Ward* (1882) 10 Q.B.D. 17.

⁴ *Gayler and Pope v. Davies* [1924] 2 K.B. 75.

⁵ *Manton v. Brocklebank* [1923] 2 K.B. 212.

⁶ *Fleming, op. cit.* p. 341.

⁷ *Ellis v. Loftu* (1874) L.R. 10 C.P.

⁸ *Cooper v. Railway Executive* [1953] 1 W.L.R. 223 (derailment of train).

⁹ *Wormald v. Cole* [1954] 1 Q.B. 614.

¹⁰ *Singleton v. Williamson* (1861) 158 E.R. 533.

¹¹ *Smith v. Stone* (1647) 82 E.R. 533.

act of God (e.g. where a flash of lightning strikes such terror into cattle that they stampede on to the plaintiff's land).¹²

(2) The scienter action (liability for dangerous animals)

Strict liability is imposed upon a person who keeps a dangerous animal which causes damage to another.¹³

For the purposes of this tort, animals are divided into two categories

- (1) Animals *ferae naturae*, i.e. animals belonging to a species which is normally dangerous, though individual animals may be tamed. Examples are elephants, lions, leopards, tigers and gorillas.
- (2) Animals *mansuetae naturae* i.e. animals belonging to a species which is normally harmless, though individuals may harbour a vicious disposition. Examples are cows, horses, goats, camels, cats and dogs.¹⁴

An animal of a class *ferae naturae* is conclusively presumed to be dangerous, and the keeper of such an animal is liable for any harm it may cause without proof that the particular animal was savage. Thus, for example, the keepers of a "tame" elephant in circus were held liable when the animal, without any aggression, knocked down and injured the plaintiff.¹⁵

Where damage is caused by an animal of a class *mansuetae naturae*, however, the keeper of the animal will be liable only if:

- (a) the particular animal had a vicious tendency, and
- (b) the keeper knew of that tendency.

Proof of knowledge of an animal's vicious propensity, the onus of which is on the plaintiff, is called "scienter," a term derived from an ancient form of declaration charging the defendant with knowingly keeping a dangerous animal. In its origin the scienter action was one of negligence, but later, "by somewhat dubious legal reasoning," liability became strict. "Instead of saying that the defendant was liable for negligence, the mere keeping of a dangerous animal being negligent, it was said that the defendant

¹² Williams, *Animals*, pp. 184, 185

¹³ *May v. Burdett* (1846) 115 E.R. 1213.

¹⁴ *Ibid*

¹⁵ *Behrens v. Betram Mills Circus* [1957] 2 Q.B.1

was liable without proof of negligence, the obligation being to keep the animal safe 'at his peril'."¹⁶

The following principles of liability under the scienter action have been established by the cases:

- (i) whether a species of animal is to be classified as *ferae* or as *mansuetae naturae* is a question of law for the judge, to be decided either on the basis of judicial notice or on expert evidence.¹⁷
- (ii) the requisite knowledge of an animal's vicious propensity must relate to the particular propensity that caused the damage. For instance, if a dog attacks a man, it must be shown that the animal had a propensity to attack humans; it would not be sufficient to show a propensity to attack other animals.¹⁸
- (iii) in establishing scienter, 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.¹⁹ For instance, in proving a dog's propensity to attack humans, it is sufficient to show that it habitually rushed out of its kennel where it was chained, and attempted to bite passers-by.²⁰ Thus, the common saying that "every dog is allowed one free bite" is not accurate.²¹ Though if the plaintiff *can* show that the animal did on a previous occasion cause the particular type of harm²² then his case will presumably be stronger.
- (iv) in the case of harm caused by an animal *mansuetae naturae*, the propensity of the animal must be shown to be vicious or hostile. The defendant will not be liable if the animal was merely indulging in a propensity towards playfulness or some other non-aggressive behaviour, especially where such propensity is common to most animals of that species, for example, the frolicking of high-spirited horses²³; dogs

¹⁶ Williams and Hepple, *Foundations of the Law of Tort*, p. 111

¹⁷ *McQuaker v. Goddard* [1940] 1 K.B. 687 at p. 700; *Uzoahia v. Atu* (1975) 5 E.C.S.L.R. 139 at p. 141.

¹⁸ *Glanville v. Sutton* [1928] 1 K.B. 571.

¹⁹ *Barnes v. Lucille* (1907) 96 L.T. 680.

²⁰ *Worth v. Gilling* (1866) L. R. 2 C. P. 1.

²¹ *Salmond, op. cit.* p. 339.

²² *As in Daryani v. Njoku* [1965] 2 All N.L.R. 53, p. 127 *post*.

²³ *Fitzgerald v. Cooke* [1964] 1 Q.B. 249.

- chasing each other or running across traffic.²⁴
- (v) knowledge of an animal's vicious propensity will be imputed to the defendant where it is acquired by someone to whom the defendant delegated full custody or control of the animal²⁵; and in certain other cases it may be inferred that knowledge gained by a third party (e.g. the wife of the keeper,²⁶ or a servant in charge of premises where the animal is kept)²⁷ had been communicated to the keeper.
 - (vi) for the purposes of the scienter action, it is immaterial where the animal's attack took place; whether, for example, on the plaintiff's land, on the defendant's premises, on the land of a third party, or on the highway or other public place.²⁸
 - (vii) liability rests on the "keeper" of the offending animal, that is, on the person who harbours and controls it.²⁹ In most cases the owner of the animal will be its keeper, but this is not necessarily so. For instance, an occupier who took care of a vicious dog left on premises of a previous tenant was held liable for injury caused by the animal.³⁰ However, the mere fact that an occupier has tolerated the presence of someone else's animal on his land does not fix him with responsibility for its mischief. Thus, for example, a father was not liable for an injury inflicted by a dog owned and fed by his 11-year-old daughter,³¹ and a school authority was not liable when a dog kept on school premises by the caretaker attacked and injured a cleaner.³²

Defences

The only well-recognised defences to liability under the scienter action are default of the plaintiff, contributory negligence and *volenti non fit injuria*.³³ With respect to the first, it is probably a good defence to show that the plaintiff, at the time he was injured by the animal,

²⁴ *Martignoni v. Harris* [1971] N.S.W.L.R. 102.

²⁵ *Baldwin v. Casella* (1872) L.R. 7 Ex. 325.

²⁶ *Daryani v. Njoku* [1965] 2 All N.L.R. 53 p. 127, post; *Gladman v. Johnson* (1867) 36 L.J. C.P. 153.

²⁷ *Appleby v. Percy* (1874) L.R. 9 C.P. 647.

²⁸ *Fleming, op. cit.* p. 348.

²⁹ *Ibid*

³⁰ *McKone v. Wood* (1831) 172 E.R. 850

³¹ *North v. Wood* [1914] 1 K.B. 629.

³² *Knott v. L.C.C.* [1934] 1 K.B. 126.

³³ *Fleming, op. cit.* pp. 348, 349.

was trespassing on the defendant's land, unless the animal was kept with the deliberate intention of injuring, rather than of merely deterring, trespassers.³⁴ It is unlikely that the decision in *British Railways Board v. Herrington*³⁵ has affected the principle that "every man has a right to keep a dog for the protection of his yard or house,"³⁶ without being liable to a trespasser who enters and is thereby attacked. Default of the plaintiff will also be a defence where the plaintiff brings the injury upon himself by, for example, stroking a zebra at zoo³⁷ or teasing a dog³⁸; though it is not sufficient that the plaintiff merely walked close to the animal, unless this was in unreasonable disregard of obvious danger.³⁹ If the plaintiff was entirely responsible for his injury, his action will fail altogether; but if he was merely contributorily negligent, his damages will be reduced under the statutory apportionment provisions⁴⁰.

Volenti non fit injuria may also afford a defence,⁴¹ and will most often apply where persons whose livelihood it is to deal with dangerous animals, such as zoo keepers and animal trainers⁴², are injured in the course of their work.

There is no authority as to whether act of God is a defence, and there is a conflict of authority as to the availability of the defence of act of a stranger. In one case,⁴³ it was held that the keeper of a fierce dog was not liable for injuries caused when a trespasser maliciously let the animal off its chain, but more recent cases⁴⁴ have clearly decided that act of a stranger is no defence to a claim in scienter, on the ground that the intervention of a stranger should be taken to be within the foreseeable risk created by the possession of a dangerous animal.

The Nigerian situation

Liability for harm caused by animals is an area of law of torts which has been much neglected in Nigeria, and there appears to be only one reported case directly on the topic⁴⁵. A possible

³⁴ *Sarch v. Blackburn* (1830) 172 E.R. 712.

³⁵ [1972] A.C. 877. See p. 82, ante.

³⁶ *Brock v. Copeland* (1794) 170 E.R. 328, per Lord Kenyon.

³⁷ *Marlor v. Ball* (1900) 16 T.L.R. 239

³⁸ *Sycamore v. Ley* (1932) 147 L.T. 342.

³⁹ *Filburn v. People's Palace* (1890) 25 Q.B.D. 258.

⁴⁰ See p. 85, ante.

⁴¹ *Sylsvester v. Chapman* (1935) 79 S.J. 777.

⁴² *Rands v. McNeill* [1955] 1 Q.B. 253.

⁴³ *Fleeming v. Orr* (1857) 2 Macq. 14

⁴⁴ *Baker v. Snell* [1908] 2 K.B. 825; *Behrens v. Bertram Mills Circus* [1957] 2 Q.B. 1

⁴⁵ *Daryani v. Njoku* [1965] 2 All N.L.R. 53.

reason for this dearth of authority is that the captive animal population in Nigeria is relatively small by comparison with those common law countries where cattle-breeding is carried out on a large scale, and where a high percentage of the population keep domestic pets, such as dogs and cats. Furthermore, although there are a few small zoos in Nigeria where various species of animals *ferae naturae* are kept, the temptation to make commercial profit out of the exhibition of wild animals in large zoos and circuses has been resisted, and there is thus little risk of actionable damage by such animals.

The case of *Daryani v. Njoku*⁴⁶ is a straightforward example of liability under the scienter rule. Here D was attacked and bitten by a dog belonging to N. There was evidence that on a previous occasion the dog had bitten a housemaid and that this incident had been reported to N's wife, though apparently not to N himself. Counsel for N argued that the fact that N's wife had been informed of the previous attack did not prove that N himself was aware of the vicious nature of his dog. Sowemimo J. rejected this contention, holding that notice to the wife amounted to notice to her husband also, since the wife "was in duty bound [to inform him], because that was the purpose of lodging a report to her."⁴⁷ Scienter was thus established and N was liable.

Mention may also be made of a Nigerian case which shows that where animal attacks persons or property, the defence of necessity will be available to one who kills or incapacitates the animal in order to prevent further damage. The case in question is *Uzoahia v. Atu*,⁴⁸ the facts of which were that the plaintiff's cow, being disturbed by a tsetse fly, broke away from its drover and found its way into a village where it attacked and injured one person and terrorised others. A group of villagers led by the defendant cornered and killed the cow. The plaintiff's action for trespass to a chattel⁴⁹ was dismissed by Nwokedi J. on the ground that:

a cow, even though belonging to a class of animals *mansuetae naturae*, is definitely a ferocious-looking creature bound to frighten anyone coming into contact with it at any

⁴⁶ *Ibid*

⁴⁷ At pp. 55.

⁴⁸ (1975) 5 E.C.S.L.R. 139. See also *Workman v. Cowper* [1961] 2 Q.B. 143; *Cope v. Sharpe* (No. 2) [1912] 1 K.B. 496.

⁴⁹ See pp. 190-194. *post*.

given moment. If such a person believes that the behaviour of such a cow constitutes imminent danger to life, and if under such belief the cow is either incapacitated or even killed, I think that under such circumstances the defence of necessity would avail its killer. I think that this was exactly what happened in this case, and although it is unfortunate that the plaintiffs lost their cow in the process, there is justification for the conduct of the defendant. Without straining the finesse of the English law on this point, it is to be borne in mind that we are dealing with unsophisticated local people and their reaction to a situation of the type in this case.⁵⁰

Negligence

Quite apart from any liability in cattle trespass or under the scienter rule, the keeper of an animal owes a duty to take care that it does not become a source of harm to others.⁵¹ In most cases it will be unnecessary for a person injured by an animal to establish negligence on the part of its keeper, but if for any reason an action under the scienter rule or in cattle trespass is not available, the plaintiff may still recover in negligence. For instance, where the plaintiff, an infant, was attacked and badly injured by a pack of terrier dogs which suddenly dashed out of the defendant's premises, the plaintiff could not recover in cattle trespass because dogs are not included within the definition of "cattle," nor under the scienter rule because he could not prove that the defendant had knowledge of a vicious propensity on the part of any particular dog. He did succeed in negligence, however, on the ground that the defendant knew or ought to have known that terrier dogs could be dangerous if allowed to roam about in packs, and yet he had taken no steps to fence them in or otherwise to prevent them from escaping and doing damage.⁵²

There are, however, limits to the liability in negligence. It has been stated that "where no special circumstances exist, negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild

⁵⁰ At p. 142

⁵¹ *Fleming, op. cit.* p. 350

⁵² *Draper v. Hodder* [1972] 2 Q.B. 556.

disposition will do some dangerous act contrary to its ordinary nature."⁵³ It seems therefore, that the plaintiff will not succeed unless (i) there is special risk of injury to others, and (ii) the particular kind of injury which occurred was foreseeable.⁵⁴ With regard to the latter requirement, if, for example, a horse bit a human, it would be sufficient for the victim to show that the horse was high-spirited and therefore likely to knock people down, for harm from a bite is of a totally different kind from harm by accidental collision.⁵⁵

An important exclusion from liability in negligence is the rule in *Searle v. Wallbank*,⁵⁶ which is to the effect that the occupier of premises adjoining a highway is under no duty to users of the highway to prevent his domestic animals not known to be dangerous from straying on to the highway and causing accidents there. Thus, there is no duty upon the owner of land to maintain a fence or other obstacle around the property to keep his animals in. There are, however, two exceptions to this rule.

- (i) Exceptional circumstances may require fencing; for example where a dog dashed on to the road so often that it became "more like a missile than a dog."⁵⁷
- (ii) If the defendant actually brings, leads or drives an animal on the highway, he is under a duty to take reasonable care that it does not cause damage there.⁵⁸ What constitutes reasonable care is a question of fact in each case; for instance, greater care may need to be taken in an urban area than in the country.⁵⁹

Other torts

Finally, it may be noted that there can be liability in other torts for harm caused by animals, for instance:

- (i) one who deliberately incites an animal to attack a person (e.g. where he sets a dog on to the plaintiff)⁶⁰ will be as liable

⁵³ *Wright v. Callwood* [1950] 2 K.B. 515.

⁵⁴ *Fleming, op. cit.* p. 351.

⁵⁵ *Aldham v. United Dairies* [1940] 1 K.B. 507 at p. 511.

⁵⁶ [1947] A.C. 341.

⁵⁷ *Ellis v. Johnstone* [1963] 2 Q.B. 8 at p. 26.

⁵⁸ *Deen v. Davies* [1935] 2 K.B. 282.

⁵⁹ *Gomberg v. Smith* [1963] 1 Q.B. 25.

⁶⁰ *Latwal v. Deputy Superintendent of Police* (1975) 2 W.S.C.A. 72; *Scott v. Shepherd* (1558-1774) All E.R. Rep. 295.

for assault and battery as if he had struck the plaintiff a blow with his fist. And one who trains his dog to take another person's property will be liable for trespass to chattels⁶¹

- (ii) one who collects animals on his land in such large numbers as to cause substantial annoyance to his neighbour may be liable in nuisance. For example, the keeping of an unreasonable number of noisy and stinking chickens on premises situated in a residential area has been held to be actionable nuisance⁶²:
- (iii) one who accumulates on his land animals which escape and cause harm elsewhere may be liable under the rule in *Rylands v. Fletcher*.⁶³

⁶¹ *Manton v. Brockle bank* [1923] 2 K.B. 212 at p. 219.

⁶² *Abiola v. Ijoma* [1970] 2 All N.L.R. 268; pp. 96, 97, ante, see also a *Leeman v. Montangu* [1936] 2 All E.R. 1677.

⁶³ *Behrens v. Betram Mills Circus* [1957] 2 Q.B. 1 at p. 22.

The tort of defamation occupies a prominent place in Nigerian Law, as it does in the Laws of most African countries in which the common law applies. The immediate post-independence period in Nigeria was characterised by vigorous political activity supported by an articulate and free press. It is significant that the plaintiffs in defamation actions in the early 1960s included most of the leading political personalities of the time, and that there was hardly a national newspaper which was not a defendant in at least one such action during the period. With the advent of military rule, defamation actions no longer featured "battles" between politicians and the press, or between politicians themselves, and the great increase in road traffic, and therefore road accidents, in the 1970's ensured that negligence superseded defamation as the most frequently litigated tort. Most defamation actions in Nigeria today are without political significance, though with recent return to democratically-elected government the situation may change.

WHAT IS DEFAMATORY

Defamation is concerned with injury to *reputation* resulting from words written or spoken by others.

A defamatory statement may be defined as one which tends:

- (i) to lower the plaintiff in the estimation of right-thinking members of society generally; or
- (ii) to expose him to hatred, contempt or ridicule; or
- (iii) to cause other persons to shun or avoid him; or
- (iv) to discredit him in his office, trade or profession; or
- (v) to injure his financial credit.¹

The words complained of must tend to injure the plaintiff's reputation in the minds of right-thinking people generally, not merely in the minds of a particular section of the public. "To write or say of a man something that will disparage him in the eyes of a particular section of the community, but will not affect his

reputation in the eyes of the average right-thinking man, is not actionable within the law of defamation."²

This principle is well illustrated by *Byrne v. Dean*.³ There the plaintiff and the defendant were both members of a golf club. The plaintiff alleged that the defendant had defamed him by putting up a notice in the club to the effect that the plaintiff had made a report to the police about certain illegal gaming machines kept on the club premises. It was held that the defendant's statement could not be defamatory since, although the other members of the club might think less well of the plaintiff in consequence of it, right-thinking members of the general public would approve rather than disapprove of a person who reported a criminal offence to the police.

The term "a particular section of the community" was defined by the Supreme Court in *Egbuna v. Amalgamated Press of Nigeria Ltd.* as "a body of persons who subscribe to standards of conduct which are not those of society generally."⁴ Thus, for example, the colleagues or business associates of a professional person are not "a particular section of the community" in this context unless their standards of conduct or morality are different from those of right-thinking persons generally. Therefore, a statement which would tend to lower the plaintiff in the estimation of his colleagues would be defamatory, unless it were shown that reasonable members of society would take a different view.

In assessing the standard of the average right-thinking member of the public, the court will "rule 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 the other hand those who are censorious as to regard even trivial accusations (if they were true) as lowering another's reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement.... The ordinary citizen... is neither unusually suspicious nor unusually naive, 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.'"⁵

² *Tolley v. Fry* [1930] 1 K.B. 467 at p. 479, per Green L.J. cited with approval by Brett J.S.C. in *Egbuna v. Amalgamated Press of Nigeria Ltd* [1967] 1 All N.L.R. 25 at p. 29.

³ [1937] 1 K.B. 818.

⁴ [1967] 1 All N.L.R. 25 at p. 30.

⁵ Winfield and Jolowicz, *op. cit.* p. 275; *Lewis v. Daily Telegraph Ltd.* [1964] A.C. 234, at p. 258, per Lord Reid; *Awolowo v. Kingsway Stores (Nig.) Ltd.* [1968] 2 All N.L.R. 217 at p. 230, per Adefarasin J.

¹ See generally *Gatley on Libel and Slander* (7th ed..) Chap. 2.

It must also be borne in mind that what may be defamatory in one society will not necessarily be so in another, and that, as time passes and social attitudes change, word may cease to be or become defamatory, as the case may be.⁶

Example of defamatory statements

Any written or spoken words which fall within one or more of the five definitions listed above may be defamatory. The following are examples of statements held defamatory by the Nigerian courts.

To state:

that a medical practitioner has a "fake" degree and that he exploited the public⁷;

that a stevedoring and general contractor exploited the labour of dockworkers and lived a life of wanton gluttony and immorality⁸;

that a public official was corrupt,⁹ or had been arrested on suspicion of corrupt practices¹⁰;

that a legal practitioner had defrauded his clients¹¹;

that a university lecturer had committed adultery with a female student¹²

that a female teacher was a "bad woman"¹³

that an "aladura" of the Cherubim and Seraphim sect had used enchantments that were not from the Bible¹⁴; that the plaintiff had stolen the defendant's coco-yams¹⁵; that the plaintiff's house was to be sold by public auction to satisfy a mortgage debt¹⁶; that a tenant had "brought strange people into the house day and night, smoking nauseating substances."¹⁷

Finally, it may be noted at this point that there is an initial presumption that a defamatory statement is untrue; but if the defendant can prove that the statement is substantially true, he

⁶ Gatley, *op. cit.* para 47.

⁷ *African Press Ltd. v. Ikejiani* (1953) 14 W.A.C.A 386.

⁸ *Bakare v. Oluwide* [1969] 2 All N.L.R. 324.

⁹ *African Newspapers Ltd v. Coker* [1973] 1 N.M.L.R. 386.

¹⁰ *Ukpoma v. Daily Times of Nigeria Ltd* (1979) 2 L.R.N. 357

¹¹ *Lardner v. The Sketch Publishing Co. Ltd.* (1979) 3 L.R.N. 276.

¹² *Nthenda v. Alade* (1974) 4 E.C.S.L.R. 109.

¹³ *Omo-Osagie v. Okutubo* (1969) 2 All N.L.R. 175.

¹⁴ *Bande v. Daily Times of Nigeria Ltd.* (1974) 6 CCHCJ 755

¹⁵ *Agoaka v. Ejiofor* (1972) 2 E.C.S.L.R. 109.

¹⁶ *Mutual Aid Society Ltd. v. Akerele* [1966] N.M.L.R. 257; *Karunwi v. Wema Bank Ltd.* (1973) 3 CCHCJ 61; affirmed (1975) 1 S.C. 15 Cf. *Osisanwa v. Lagos City Council* (1974) CCHCJ 565.

¹⁷ *Adewunmi v. Oshinowo* (1977) 3 CCHCJ 187.

will have a complete defence to an action for defamation. This is the defence of justification, which is considered below.¹⁸

LIBEL AND SLANDER

There are two types of defamation: (1) libel and (2) slander.

(1) *Libel* is defamation in a permanent form, the most common being written or printed words contained in, for example, a newspaper, a book, a letter, a notice. Defamation is also in permanent form if contained in a painting, cartoon, a photograph, a statute or a film.¹⁹ Also, by the Defamation Law 1961, s. 3,²⁰ and the Defamation Law 1959, s. 3,^{20a} defamatory words contained in a radio broadcast are also within the ambit of the sections, which define 'words' as including "pictures, visual images, gestures and other methods of signifying meaning." The Defamation Law of the eastern states expressly provides that "broadcasting" includes publication for general reception by means of wireless telegraphy or television.²¹

(2) *Slander* is defamation in a transient form, most often through the medium of spoken words or gestures. It is sometimes said that libel is addressed to the eye, whilst slander is addressed to the ear. It is doubtful whether defamatory statements contained in gramophone records, tape recordings or cassettes are libel or slander, for they are in permanent form and yet addressed to the ear. Most commentators consider such statements to be libel,²² but there appears to be no firm judicial authority on the point.

Importance of the distinction between libel and slander

Historically, libel and slander were separate torts,²³ but today they are treated as two aspects of the single tort of defamation and are generally governed by the same principles. They differ, however, in that whereas libel is always actionable *per se*, that is without the need to prove special (i.e. actual) damage, slander is not actionable *per se* except in certain cases.

¹⁸ p. 154, *post.*

¹⁹ See Gatley, *op. cit.* para. 81-85.

²⁰ Cap. 34, Laws of Lagos State (1973). This section is identical to s. 1 of the English Defamation Act 1952.

^{20a} Cap. 32, Laws of Western Nigeria.

²¹ s. 2 (1)

²² e.g. Salmond *op. cit.* para 47

²³ See 18 L.Q.R. at pp. 255, 388; Holdsworth, *History of English Law* Vol. 5 pp. 205-212; Vol 8, pp. 333-378.

Libel actionable per se

This means that whenever a libel is published, the law will presume that damage has been caused to the plaintiff's reputation and will award him general damages by way of compensation. In *Nthenda v. Alade*,²⁴ for instance, the plaintiff brought an action against the proprietor, the editor and a reporter of the *Lagos Weekend* newspaper, alleging that an article published in the newspaper was defamatory of him. The defendants argued that the plaintiff's action should fail as he had not proved that he had suffered any actual damage as a consequence of the publication. Bello S.P.J. rejected this contention, saying that ²⁵:

in action for libel, the plaintiff need not prove malice in law and need not prove that he has suffered any actual damage as the result of the publication. Both malice and damage are presumed from the publication itself, in the absence of lawful excuse.... In *Williams v. The West African Pilot* ²⁶ it was held that once a publication has been found to be a libel, the law presumes damage.

If the plaintiff in a libel action does prove he has suffered actual damage, he will be entitled to recover a further sum in addition to the general damages.²⁷

Exceptional cases in which slander is actionable per se

Slander, as we have seen, is generally not actionable per se. This means that no action will lie unless the plaintiff can prove he has suffered some actual loss, for example, that he has been dismissed from his employment as a result of the slander. However, slander is actionable per se in the following cases,^{27a} and so will have the same effect as a libel.

(1) Imputation of crime

It is slander actionable per se to allege that the plaintiff has committed a criminal offence punishable by imprisonment,^{27b} for example, to call the plaintiff a "thief." In *Agoaka v. Ejiofor*,²⁸ for

²⁴ (1974) 4 E.C.S.L.R. 470. See also *Lardner v. The Sketch Publishing Co. Ltd.* (1979) 3 L.R.N. 276 at pp. 278, 280, per Ajose-Adeogun J.

²⁵ *Ibid* at p. 477.

²⁶ [1961] 1 All N.L.R. 866.

²⁷ *Gatley, op. cit* pp. 415-416.

^{27a} See also *Stephen v. Atuegbelunu* (1971) 2 U.I.L.R. 101 at p. 102.

^{27b} *Okolo v. Midwest Newspaper Corporation* (1974) 2 CCHCJ 203 at p. 205.

²⁸ (1972) 2 E.C.S.L.R. 109.

instance, the defendant falsely accused the plaintiff at a village gathering of having stolen his coco-yams. It was clear from the evidence that the plaintiff had suffered no actual damage. Aniagolu J. held that the plaintiff was entitled to recover general damages for slander. The learned judge cited with approval²⁹ the following observation of Bowen L.J.³⁰:

Every libel is of itself a wrong in regard to which the law implies general damages.... Akin to actions for libel are those actions which are brought for oral slander, where such slander consists of words actionable per se, and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case presumes ...general damages.

The following principles regarding this exception have been established by the cases:

- (i) To be actionable per se, there must be a direct assertion of guilt. A mere allegation of suspicion is not sufficient.³¹ Thus, to say that the plaintiff is "a thief" would be actionable per se; but to say that the plaintiff "is suspected of having stolen" would not.³²
- (ii) The words used by the defendant must be looked at in the context in which they were spoken, in order to determine what was actually imputed. Thus, words which, taken by themselves would be defamatory, may not be so when taken together with other words spoken by the defendant, or when considered in the light of the circumstances in which they were uttered.³³ Thus, for example, the words "X is thief" would not be actionable per se if followed by, "the cloth he has sold me is not worth half of what he charged me for it," since, taken together, the words do not impute any criminal offence but only that X has not given value for money. Nor will spoken words be actionable at all if they constitute mere vulgar abuse. This is discussed below.³⁴

²⁹ At p. 112.

³⁰ *Ractcliffe v. Evans* [1892] 2 Q. B. 524 at pp. 529, 530.

³¹ *Simmons v. Mitchell* (1880) 43 L.T. 710.

³² This, somewhat illogically, is different from the normal rule in defamation whereby an imputation of suspicion of guilt is as defamatory as a direct imputation of guilt. See *Eyo v. Eastern Nigeria Information Service* (1963) 7 E.N. L.R. 144 at p. 145.

³³ *Thompson v. Bernard* (1807) 170 E.R. 872.

³⁴ See pp. 140-142, *post*.

- (iii) The crime alleged must be punishable corporally, i.e. by punishment with at least imprisonment in the first instance. It is insufficient if the offence of which the plaintiff is accused is punishable by fine only, or by imprisonment only in default of paying fine, or by imprisonment only on a second or subsequent conviction unless a second or subsequent offence is alleged. An interesting illustration of this principle is *Farashi v. Yakubu*.³⁵ Here the plaintiff claimed damages for slander in respect of words uttered by the defendant imputing that the plaintiff had committed adultery with his (defendant's) sister-in-law. Actual damage was not proved. Hague Ag. J. said ³⁶:

It is well-settled law that damage need not be proved where a person is accused of a crime, whether triable on information or summarily, provided such person may be made to suffer physically by way of punishment. In other words, the punishment must be of a corporal nature (death, imprisonment or caning) and it is not sufficient if imprisonment may only be inflicted in default of paying a fine.

The learned judge found that under section 387 of the Penal Code of the northern States, adultery by a man was punishable by imprisonment, but the section further provided that the man concerned must be subject to a native law and custom in which extra-marital sexual intercourse was recognised as a criminal offence. Evidence was adduced which showed that under the local law and custom to which the plaintiff was subject, adultery was not a crime, since it was not punishable (by caning) unless the adulterer failed to pay compensation to the woman's husband. Hague J. held that the position was "analogous to imprisonment in default of paying a fine," and that the slander was accordingly not actionable without proof of actual damage.

Basis of the exception. At one time it was considered that the reason for this exception was that it put the plaintiff in jeopardy of a prosecution for the crime alleged. That can no longer be regarded as correct, for in *Gray v. Jone* ³⁷ it was held actionable *per se* to say of the plaintiff, "you are a convicted person." Obviously

³⁵ [1970] N.N.L.R. 17.

³⁶ *Ibid* at p. 18.

³⁷ (1939) 1 All E.R. 798

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there is no danger of a prosecution for an offence for which the plaintiff has already been convicted. It seems, therefore, that the true rationale for the exception is not that it puts the plaintiff in jeopardy of a prosecution, but rather that it would tend to expose him to social ostracism and cause other persons to shun and avoid him ³⁸.

(2) *Imputation of certain diseases*

It is actionable *per se* to say that the plaintiff is infected with certain contagious or repulsive diseases, since this would tend to cause other persons to shun or avoid him. There is uncertainty, however, as to what diseases are included within this exception. Most commentators accept that contagious venereal diseases are included, and some would also include leprosy, plague or any contagious skin disease caused by personal uncleanness.³⁹ There appears to be no modern Nigerian or English case in which this exception has been considered, but in Jamaica it has been held in two cases⁴⁰ that an imputation of tuberculosis is not actionable *per se*, the judges in these cases preferring the view that only contagious venereal diseases are within the exception.

(3) *Imputation of unchastity or adultery*

By section 1 of the Slander of Women Act 1891,⁴¹ section 5 (1) of the Defamation Law of the eastern States, and section 4 of the Defamation Law of the western States, an imputation of unchastity or adultery concerning any woman or girl is actionable *per se*. "Unchastity" has subsequently been held to include lesbianism.⁴² Again, if the words are shown to have been uttered as mere vulgar abuse,⁴³ then they are not actionable at all.

(4) *Imputation affecting professional business reputation.*

Examples of such statements are: that a surgeon is incompetent; that a banker is fraudulent; that an engineer has no technique; that a lawyer knows no law; that a trader is insolvent.

At common law, the scope of this exception is considerably restricted by the rule that slander is not actionable *per se* under

³⁸ *Ibid*.

³⁹ Salmond, *op. cit* p. 190; Winfield and Jolowicz, *op. cit.* p. 281.

⁴⁰ *Murray v. Williams* (1936) 6 J.L.R. 180; *Hinds v. Lee* (1952) 6 J. L. R. 176.

⁴¹ An English statute of general application received into Nigeria. In the eastern States the provision has been re-enacted in s. 5 of the Defamation Law Cap. 33.

⁴² *Kerr v. Kennedy* [1942] 1 K.B. 409

⁴³ See *infra*, p. 140.

this head unless it amounts to a disparagement in the way of the plaintiff's possession or business. This means that the words must have been "spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling"⁴⁴

The severity of this rule is illustrated by *Jones v. Jones*⁴⁵ where it was held not actionable *per se* to say that a schoolmaster had committed adultery with a married woman employed at the school as a cleaner, because, although the statement imputed moral misconduct to the plaintiff and would certainly be injurious to him in his profession, it did not allege misconduct in the course of his duties as a schoolmaster, not was continence part of his professional duty.

This common law rule is still in force in the northern States of Nigeria. Thus, in *Onojioghofia v. Okitipai*⁴⁶ Wheeler Ag. S.P.J. held that the words "T. O. is a rogue; he ran away with my money and he is still on the run," spoken of a building contractor, were not actionable *per se* because "although those words impute dishonesty and are injurious to the plaintiff and could be particularly harmful to him in the way of his business, they do not, in my opinion, impute dishonesty to him in his capacity as a building contractor"⁴⁷.

In the western, eastern and Lagos States, the common rule of law has been altered by statutory provisions modelled on section 2 of the English Defamation Act 1952. These statutes provided that⁴⁸:

in an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

The effect of the statutes is that any words spoken of the plaintiff which are reasonably likely to injure him in his office, profession, calling, trade or business will be actionable *per se* even though not spoken "in the way of" his office, profession, etc.. Thus, cases such as *Jones v. Jones* would be decided differently under the statutes.

SPECIAL DAMAGE IN SLANDER

In cases of slander which are not actionable *per se*, the plaintiff

⁴⁴ *Jones v. Jones* (1916) 2 A. C. 481 at p. 500, *per Lord Sumner*.

⁴⁵ *Ibid*

(1974) 4 E.C.S.L.R. 465.

⁴⁶ *Ibid.* at p. 467

⁴⁸ Defamation Act 1961, Cap. 34, s. 4. (Lagos); Defamation Law, Cap. 33, s. 4 (East); Defamation Law Cap.32, s. 5 (West)

cannot recover damages merely on account of his loss of reputation. He will be able to recover only if he can prove that he has suffered some "special (i.e actual) damage." "Special damage" here means loss of money or of some material or temporal advantage, such as loss of employment, loss of a client, refusal of credit, loss of hospitality of friends who had provided material things such as food, drink and shelter on previous occasions, loss of a prospective marriage and loss of consortium. The loss of mere companionship or of the society of friends is not "special damage" in this sense, since it has no material value.⁴⁹

Many actions for slander have failed because of lack of proof of special damage. Thus, e.g., in *Onojioghofia v. Okitipai*⁵⁰ where, as we have seen, the slander was not actionable *per se*, the plaintiff's claim failed *in toto* since he was unable to show that he incurred any financial loss or other material disadvantage." "All he pleads and alleges is that he was discredited or embarrassed, that is to say he avers a loss of reputation only.... That does not constitute special damage in a case of this kind."⁵¹

In cases of libel and of slander actionable *per se*, the plaintiff can sue and recover general damages for the injury to his reputation without the need to prove special damage. If he can prove special damage, he may recover a further sum in addition to the general damages.⁵²

VULGAR ABUSE

It is well established that words spoken as mere vulgar abuse or insult are not actionable in slander.⁵³ Whether particular words constitute slander or mere vulgar abuse depends upon the circumstances in which they are spoken. Thus, for example, if A. calls B a "dirty whore" at the height of a violent quarrel, this may be mere vulgar abuse and not actionable; but the same words spoken in cold blood" would be slander. The onus is on the defendant to satisfy the court (i) that the words were words of heat and anger, and (ii) that they were so understood by persons who were present when they were uttered.

The position may be illustrated by comparing two cases, *Bakare v. Ishola* and *Ibeanu v. Uba*. In *Bakare v. Ishola*⁵⁴ there had been a

⁴⁹ Gatley, *op. cit.*, paras. 203-208.

⁵⁰ (1974) E.S.C.L.R. 465.

⁵¹ *Ibid.* at p. 469.

⁵² Winfield and Jolowicz, *op. cit.* p. 279.

⁵³ *Bakare v. Ishola* [1959] W.N.L.R. 106; *Olakunori v. Olujatin* (1971) 2 U.I.L.R. 226.

⁵⁴ [1959] W.N.L.R. 106. See also *Olakunori v. Olujatin* (1971) 2 U.I.L.R.226; *Ajala v. Adelagun* (1978) 3 LRN 28.

fight preceded by an altercation between the two parties. In the heat of anger the defendant had, in the presence of onlookers, spoken of the plaintiff in Yoruba: "*Ole ni o, Elewon, iwo ti o sese ti ewon de yi*," which in English meant: "You are a thief. Ex-convict, you who have just come out of prison." Jibowu C.J. held that the words complained of were vulgar abuse, as they had been spoken while the parties were exchanging words which led to blows. "It is a matter of common knowledge, of which this court takes judicial notice that the people commonly abuse each other as a prelude to a fight and call each other 'Ole! Elewon' (Thief! Ex-convict!), which abuse no one takes seriously as they are words of heat and anger."⁵⁵ The learned judge distinguished *Gray v. Jones*⁵⁶ on the facts, expressing the view that "the principles decided by that case would have been applicable to this case if there was no question that the words complained of were just vulgar abuse." In *Ibeanu v. Uba*,⁵⁷ on the other hand, Egbuna J. held that the following words spoken in Igbo in the presence of witnesses: "*Josiah, Josiah, ongi kpo ndi ori bia zulu ewum, bia malu uma najum*," meaning in English: "Josiah, Josiah, you brought the thieves with whom you stole my goat and you have now come to ask me," were not mere vulgar abuse but constituted actionable slander, since it was clear from the evidence that there was no quarrel between the parties. On the contrary, "the plaintiff saw the defendant passing and called him to sympathise with him as he had heard that the defendant had been visited by thieves who had stolen his property,"⁵⁸ and the defendant thereupon retorted with the slanderous words.

If the defamatory words are written or printed, not spoken, the defendant cannot rely on the defence of vulgar abuse, since he would have had time to reflect upon what he was writing. Thus in *Benson v. West African Pilot Ltd.*⁵⁹ Ikpeazu J. rejected the contention that a report in the defendants' newspaper, to the effect that the plaintiff was "an idiot and a simpleton," was mere vulgar abuse and not actionable. The learned judge said:⁶⁰

The present action is...concerned...with the publication of those words in their written form by the defendant. There is a distinction in law between the spoken vulgar abuse

and the written one. The former is not actionable while the latter is."

REMOTENESS OF DAMAGE IN LIBEL AND SLANDER

In accordance with the general tort principles, the damage 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 defendant's defamatory statement which were foreseeable. It was held in one case⁶¹ that if A slanders B, so that B is wrongfully (i.e. in breach of contract) dismissed from his employment by C, A is not liable to compensate B for the dismissal since, being wrongful, it is too remote a consequence of the slander. But this is no longer regarded as good law. The modern view is that A will be liable if B's dismissal was the natural and probable result of the slander, whether B's dismissal by C was wrongful or not.⁶²

Again, 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 since the damage is too remote. But A will be liable if:

- (i) he authorised the repetition; or
- (ii) C had a legal or moral duty to repeat it; or
- (iii) A should have foreseen that his slander would be repeated by C.

These rules of remoteness apply equally to cases of libel⁶³

WHAT THE PLAINTIFF MUST PROVE

The plaintiff in a defamation action must establish three things:

- (1) That the words were *defamatory*
- (2) That the word., *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 nature of a defamatory statement has already been considered. In trial by judge and jury, it is for the judge to decide whether the words complained of are reasonably *capable of being*

⁵⁵ *Ibid.* at p. 107

⁵⁶ [1939] 1 All E.R. 798, *ante.*, p. 137

⁵⁷ (1972) 2 E.C.S.L.R. 194

⁵⁸ *Ibid.* at p. 195.

⁵⁹ [1966] N.M.L.R. 3.

⁶⁰ *Ibid.* at p. 7

⁶¹ *Vicars v. Wilcox* (1806) 103 E.R. 244.

⁶² *Winfield and Jolowicz, op. cit.* p. 279

⁶³ *Ibid.* at p. 280

defamatory; and it is for the jury to decide whether they are defamatory.^{63a} In Nigeria, juries are not used, and all defamation actions are tried by judge alone, who must therefore perform both functions.^{63b}

The approach which the judge should adopt in deciding whether the particular words are capable of being defamatory was outlined by Adefarasin J. thus⁶⁴:

The judge... has to consider what is the natural and ordinary meaning in which these words would be understood by reasonable men to whom they were published. In determining whether the words are capable of a defamatory meaning, the judge should construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence who are neither unusually suspicious nor unusually naive.

Where the words complained of are clearly defamatory, for example, "A is a thief," "B is corrupt," "C is a whore," the judge's task is comparatively simple. In such a case, his findings that the words are capable of being defamatory will almost inevitably lead to a decision that they are in fact defamatory. But where the words are ambiguous, in the sense that they are reasonably capable of either defamatory or an innocent meaning, the judge has the difficult task of deciding as a question of fact which of the two meanings they did convey to those to whom they were published. In *Eyo v. Eastern Nigeria Information Service*,⁶⁵ for instance, the plaintiff sued for defendants for libel in respect of the following extract from a report contained in the defendants' newspaper:

The Uyo firm met its deadlock because Mr. E. had withdrawn advances totalling £2, 312 for the Foster Sutton Tribunal on the African Continental Bank and the resultant East Regional Parliamentary Elections.

This statement was part of a report which explained that the plaintiff was a partner in a firm which had failed to meet its obligations to the tune of nearly £10,000.

^{63a} *Okolo v. Midwest Newspaper Corporation* (1974) 2 CCHCJ 203 at p. 205.

^{63b} *Akurefe v. The Sketch Publishing Co. Ltd.* (1971) 1 U.I.L.R. 13 at p. 15

⁶⁴ *Omo-Osagie v. Okutubo* [1969] 2 All N.L.R. 175 at p. 179.

⁶⁵ (1963) 7 E.N.L.R. 144

The plaintiff alleged that the words contained the innuendo that he had behaved dishonestly in withdrawing the money. Palmer J. said⁶⁶

In this case I should, as judge, hold that the words are capable of the meaning ascribed to them, namely that the plaintiff has behaved dishonestly. But they are not words which must necessarily bear that meaning. There are some words which could not be anything but defamatory, for example: 'A is a thief,' or 'B is a prostitute.' In such cases it is quite unnecessary to plead even the 'false' or 'popular' innuendo⁶⁷ to explain the defamatory meaning inherent in the words. But the words here complained of are not of that nature. They are capable of meaning that the plaintiff is dishonest, but it is for him to satisfy me (since I am both judge and jury) that they do in fact convey that meaning. A jury has to draw its own conclusions as to the meaning of the words and not accept that of witnesses....The report does not set out when or in what circumstances the advances were drawn. Nor is it stated whether they were repaid or if so when. The plaintiff might have borrowed from the firm when it had a large credit balance and it might have been good business risk. If subsequently the firm ran into difficulties and the plaintiff could not repay his outstanding debt, that would no doubt embarrass the firm, but it could hardly be said that the plaintiff had acted dishonestly in borrowing that money. It is really all a matter of speculation. If the plaintiff had borrowed from the firm when it actually needed the money for its trading purposes, and had done so reckless of the consequences to the firm, then no doubt it would be dishonest. But that is not the only interpretation which can be put on the words. The words are, in short, capable of two meanings, one derogatory of the plaintiff and the other not derogatory. On the balance, I do not feel that the plaintiff has satisfied me that the words have in fact the derogatory meaning, although "concede that it would not be impossible for a reasonable jury to come to the opposite conclusion."

The innuendo

Innuendoes in the law of defamation are of two types, (a) the "true" or "legal" innuendo, and (b) the "false" or "popular innuendo"⁶⁸

⁶⁶ *Ibid.*

⁶⁷ see p. 146, *post.*

⁶⁸ *Eyo v. Eastern Nigeria Information Service* (1963) 7 E.N.L.R. 144 at p. 146.

(a) *True (or legal) innuendo.* Here the plaintiff contends that although the words used are not defamatory on their face, they do convey a defamatory meaning to persons to whom they are published because of certain *special facts or circumstances not set out in the words themselves but known to those persons*. For instance, a statement that X was a frequent visitor to a house at No.10 Kaduna Street is perfectly innocent on its face. But it may be defamatory if it was published to persons who knew the special fact that No. 10 was the headquarters of a gang of robbers, for then the statement would carry the innuendo that X was himself a member of the gang. Again, a statement that "Y is a dedicated businessman" is innocent on its face, but may be defamatory if published to people who knew that Y was a priest who was prohibited by his calling from engaging in commercial activities.

A case in which a true innuendo was established is *Akintola v. Anyiam*.⁶⁹ The plaintiff was the Premier of the Western Region and a native of Ogbomosho, born of Ogbomosho parents. The defendant published a booklet, entitled *Among Nigerian Celebrities*, containing an entry about the plaintiff which incorrectly stated that the plaintiff was a "son of Chief Sawe of Ilesha and Alice." Although these words were innocent on their face, they were nevertheless held defamatory, since people who read the booklet and who knew that the plaintiff claimed to be an Ogbomosho man would think that he had been lying about his origins and parentage.

A plea of true innuendo failed, however, in *Johnson v. Daily Times of Nigeria Ltd.*⁷⁰ In this case the plaintiff was a building contractor and a former Minister in the Federal Government, responsible for, *inter alia*, the national stadium. The defendants published in their newspaper an article under the caption "Who Got the Stadium Contract?" stating that a contract to rebuild the national stadium had been awarded to "Modupe Johnson & Co." George Ag. J. said:⁷¹

The authorities show that the burden on a plaintiff alleging an innuendo is to prove special facts or special circumstances known to persons to whom the publication was made which would lead reasonable persons (with knowledge of those facts and circumstances) to infer that the words were understood in a defamatory meaning.... Granted that a person who had knowledge of the fact that the plaintiff was until December

⁶⁹ [1961] 1 All N.L.R. 508

⁷⁰ [1966] L.L.R. 110

⁷¹ *Ibid.* at p. 118.

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1964 Federal Minister of Labour; that tenders had been invited for the re-building of the national stadium when the plaintiff was Minister; that there was widespread demand for the re-building of the stadium, and that the plaintiff knew all the confidential facts and details. Would he, by reason of that knowledge, ascribe to the publication the meaning... that "the plaintiff has secured the award and had signed a contract by grossly irregular and underhand means?... A man of low mentality or morbid mind might, but certainly not a reasonable man.

This case shows that the plaintiff must establish that persons having knowledge of special facts or circumstances might reasonably understand the words in a defamatory sense. If he cannot do this, his plea of innuendo must fail.

(b) *False (or popular) innuendo.* Here the plaintiff contends that the words are defamatory, not because of any special extrinsic facts or circumstances known to those to whom the words were published, but because of some defamatory *inference* which reasonable persons generally would *draw from the words themselves*. A false innuendo goes "beyond the literal meaning of the words but is... inherent in them." It is "no more than an elaboration or embroidering of the words used without proof of extraneous facts."⁷²

A common instance of false innuendo arises where a bank wrongfully refuses to honour a cheque drawn to cover the amount of the cheque, and returns the cheque to the payee's bank, marked "Return to Drawer" or "R/D". Such a statement is defamatory^{72a} since it carries the very clear innuendo that the customer is not only a bad financial risk but also dishonest.

Another example of false innuendo is afforded by *Mutual Aid Society Ltd. v. Akerele*⁷³. There, an auctioneer instructed by the defendant mortgagees mistakenly advertised the plaintiff's house for sale by public auction. A portion of the notice of sale, which was posted on the house and at various other places in Surulere, Yaba and Ebute Metta, read- "Mr. [S.O.C.], licensed auctioneer,... has been honoured with instructions by the mortgagees, the Mutual Aid Society Ltd., Lagos, to sell and will sell by public auction...

⁷² *Eyo v Eastern Nigeria Information Services* (1963) 7 E.N.L.R. 144 at p. 146.

^{72a} See *Ashubiojo v. African Continental Bank Ltd.* [1966] L.L.R. 156; *Adeleke v. National Bank of Nigeria Ltd.* (1978) 1 L.R. N. 159.

⁷³ [1966] N.M.L.R. 257(S.C.). See also *Karunwi v. Wema Bank Ltd.* (1973) 3 CCHCJ 61; affirmed (1975) 1 S.C. 15 C.f. *Osisanja v. Lagos City Council* (1974) 5 CCHCJ 565.

the house and landed property ... at No. 39 Olatilewa Street."

The Supreme Court, upholding the decision of Lambo J.⁷⁴ on this point, held that these words were defamatory of the plaintiff, since they carried the innuendo that the plaintiff's property was being sold in the exercise of the mortgagees' power of sale, on account of the plaintiff's default in repaying a mortgage debt. Such an allegation was clearly injurious to the plaintiff's credit.

Again, in *Okeke v. Mkpanam*⁷⁵ Kaine J. held that a report in the defendant's newspaper which stated that the plaintiff, a Minister of the Government of Eastern Nigeria and Member of the Eastern House of Assembly representing the constituency of Onitsha South-West, had referred to local traders as "economic Shylocks," was defamatory of the plaintiff, since reasonable persons would infer from it that the plaintiff was irresponsible and unfit to represent a constituency a large section of which belonged to the trader class.

On the other hand, in *Eyo v. Eastern Nigerian Information Service*,⁷⁶ as we have seen, the allegation of false innuendo failed since Palmer J. was not satisfied that "the words complained of, read in their context conveyed to the ordinary reader with no knowledge of any extraneous facts the implication that the plaintiff had behaved dishonestly"⁷⁷

(2) Words must refer to the plaintiff

The second requirement for a successful defamation action is that the words complained of must be shown to refer to the plaintiff. The requirement was explained by Fatayi-Williams J.S.C. in *Dalumo v. The Sketch Publishing Co. Ltd.*⁷⁸

It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff.'... It is not necessary that the words should refer to the plaintiff by name. Provided that the words could be understood by reasonable people to refer to him, and this is the test in every case, it is sufficient. As the law stands, the test of whether words that do not specifically name a plaintiff refer to him or not is this; are the words such as, reasonably in the circumstances, would lead persons who knew the plaintiff to believe that he was the person referred to?

Thus the requirement will be satisfied not only where the plaintiff

⁷⁴ [1962] L.L.R. 46

⁷⁵ (1962) 6 E.N.L.R. 209

⁷⁶ (1963) 7 E.N.L.R. 144

⁷⁷ *Ibid.* at p. 147.

⁷⁸ [1972] 1 All N.L.R. 130.

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is referred to by his correct name^{78a} which is the most usual case—but where he is identified by, for example, his initials, his nickname, his office or post, a photograph, drawing or verbal description of him, or by reference to a particular group of persons of which he is a member,⁷⁹ provided, in all cases, that the defamatory words can be reasonably understood as referring to him. Three examples may be noted. In *The Service Press Ltd. v. Azikiwe*,⁸⁰ the respondent brought an action against the appellants in respect of libellous article in the appellants' newspaper concerning a "Ben Azikiwe." The West African Court of Appeal held that the action must fail as there was "no proof that the Ben Azikiwe referred to in the article was the same person as Nnamdi Azikiwe, the respondent."⁸¹ In *Dafe v. Tsewinor*,⁸² on the other hand, Idigbe C.J. held that certain defamatory statements made about "a Minister from Aboh" in the suspended Mid-West Government were capable of referring and did refer to the plaintiff who was a Minister of Finance and the only Minister from Aboh in that government. In *Bakare v. Oluwide*,⁸³ Adedipe J. held that the plaintiff, a stevedoring and general contractor as well as a traditional ruler, was sufficiently identified by a cartoon closely resembling himself, and by references to the exploitation of dock workers which accompanied an article in which the author attacked the alleged greed, corruption and debauchery of "the man of means in Nigeria." Also, in *Ukpoma v. Daily Times of Nigeria Ltd.*⁸⁴ Savage J. held that a report in the defendants' newspaper that "a retired assistant director of works in Lagos" had been arrested by officials of the Federal Corrupt Practices Investigation Bureau on account of alleged corruption, did contain sufficient references to the plaintiff, who was indeed a retired assistant director of works.

Defamation of a class or group

It was established in the leading case of *Knupffer v. London Express Newspaper Ltd.*⁸⁵ that where defamatory words are written of a whole class of persons (e.g. "all lawyers are thieves"), no

^{78a} See, e.g. *Lardner v. The Sketch Publishing Co. Ltd.* (1979) 3 L.R.N. 276 at p.279

⁷⁹ Carter-Ruck, *op.cit.* p. 67.

⁸⁰ (1951) 14 W.A.C.A. 176.

⁸¹ *Per Jibowu J.*

⁸² [1967] N.M.L.R. 331

⁸³ [1969] 2 All N.L.R. 321

⁸⁴ (1979) 2 L.R.N. 357.

⁸⁵ (1944) A.C. 116

individual member of that class can sue for libel unless the class is so small or so ascertainable that what it said of the class is necessarily said of each and every member of it; if circumstances of the case show that the plaintiff was particularly pointed at.

In *Dalumo v. The Sketch Publishing Co. Ltd.*⁸⁶ the Supreme Court upheld the trial judge's finding that there was sufficient reference to the plaintiff, who was the acting general secretary of the Nigeria Airways Corporation, in the words "Are top officials of the Nigeria Airways Corporation taking oath of secrecy again?" since the class referred to was a small and ascertainable one and there was no doubt that the plaintiff came within it.

In *Zik Enterprises Ltd. v. Awolowo*,⁸⁷ on the other hand, West African Court of Appeal held that an article captioned, "Action Group Threatens Crisis to win Over the Government- Secret Behind Plan Disclosed", could not reasonably be regarded as referring to the plaintiff.

Foster-Sutton P. said⁸⁸:

Taking the article ... as a whole ... I am unable to see that, upon a reasonable construction, it can be regarded as referring to the plaintiff. It seems to me that the whole tenor of the article shows that it is the policy of the Action Group as a party which is aimed at, not any particular individual.

Unintentional defamation

At common law, it is no defence to an action for libel or slander that the defendant did not intend to defame the plaintiff.⁸⁹ The intentions of the defendant may be relevant to the assessment of damages⁹⁰ but they are irrelevant to the question of liability.

Defamation may be unintentional either with regard to reference to the plaintiff, or with regard to knowledge of facts which make a statement innocent on its face defamatory of the plaintiff (the legal innuendo.⁹¹) Unintentional defamation with regard to reference to the plaintiff is illustrated by two cases. *Hulton v. Jones* and *Newstead v. London Express Newspapers Ltd.* In *Hulton v. Jones*⁹² the defendants published a fictional story in their newspaper concerning the adulterous exploits of one "Artemus Jones. A real person named Artemus Jones, who was a barrister sued the defendants for libel,

⁸⁶ [1972] 1 All N.L.R. 130
⁸⁷ (1955) 14 W.A.C.A. 696.

⁸⁸ *Ibid* at p. 699

⁸⁹ *Gatley, op. cit.* para 290

⁹⁰ See p. 282, *post*.

⁹¹ See p. 144, *ante*

⁹² [1909] 2 K.B. 444 (C.A.).

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and his action succeeded, despite the fact that the use of his name was quite accidental. In *Newstead v. London Express Newspaper Ltd*⁹³ the defendants published an accurate and correct report about the trial for bigamy of one Harold Newstead of Camberwell. Unknown to the defendant, there was another Harold Newstead, also of Camberwell, who produced witnesses who swore that they believed the report referred to him. The plaintiff's action for libel succeeded, though the court awarded only nominal damages.

Unintentional defamation with regard to knowledge of facts which make a statement, innocent on its face, defamatory of the plaintiff, is illustrated by *Cassidy v. Daily Mirror Newspaper Ltd.*⁹⁴ There the defendants published in their newspaper a photograph of one Corrigan in the company of Miss X with the caption, "Mr. Corrigan the race-horse owner and Miss [X] whose engagement has been announced." Mrs. Corrigan brought an action for libel, pleading the innuendo that readers of the newspaper who knew her would think that she was not the lawful wife of Corrigan and that she had been living with him in immoral cohabitation. Her action succeeded.

The "terror to authorship"⁹⁵ highlighted by *Hulton v. Jones*, and the manifest absurdity of cases such as *Newstead* and *Cassidy* prompted the legislature in England to introduce a new statutory defence in cases of unintentional defamation. This defence, contained in section 4 of the Defamation Act 1952, was later introduced into Nigeria by section 6 of the Defamation Law 1961⁹⁶ which provides, in effect, that where words are published innocently, as defined by the statute, a defendant may escape liability for damages if he is willing to publish a reasonable correction and apology, called an "offer of amends". Words are published "innocently" within statutory definition if either:

- (a) the publisher did not intend to publish them of and concerning that other person and did not know of circumstances by virtue of which they might be understood to refer to him⁹⁷; or
- (b) the words were not defamatory on the face of them, and the

⁹³ [1940] 1 K.B. 377.

⁹⁴ [1929] 2 K.B. 331. See also *Hough v. London Express Newspaper Ltd.*

[1940] 2 K.B. 507

⁹⁵ *Knupffer v. London Express Newspaper Ltd.* [1943] K.B. 80 at p. 89.

⁹⁶ Cap. 34, Laws of Lagos State (1973). Similar provisions are contained in the Defamation Laws of the western and eastern States, ss 5 and 7 respectively.

⁹⁷ This subsection is intended to cover cases of unintentional reference to the plaintiff (as in the *Hulton* and *Newstead* cases, *supra*).

the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that person,⁹⁸

and in either case the publisher exercised all reasonable care in relation to the publication.

An offer of amends under the statutes is an offer:

- (i) in any case to publish a suitable correction and apology; and
- (ii) where copies of the defamatory material have been distributed by or with the knowledge of the defendant, to take reasonable steps to notify persons to whom copies have been distributed that the words are alleged to be defamatory of the plaintiff.

If the offer of amends is accepted by the party aggrieved, and duly performed, no proceedings for libel or slander may be taken or continued by the party against the party making the offer in respect of the publication in question.

If the offer of amends is not accepted by the party aggrieved, then it is a defence in any proceeding by him for libel or slander to prove:

- (a) that the words were published innocently in relation to the plaintiff;
- (b) that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff; and
- (c) that if the publication was of words of which the defendant was not the author, that the words were written by the author without malice.

(3) Words must be published

The plaintiff must prove that the words of which he complains were "published," that is communicated by the defendant to at least one person other than the plaintiff himself. The reason why publication to the plaintiff alone is not actionable is that the tort of defamation protects a person from injury to his reputation among other people, and not from injury to his feelings about himself.⁹⁹ In *Okotcha v. Olumese*¹ the plaintiff wrote to the Inspector General of Police

⁹⁸ This subsection is intended to cover cases of unintentional defamation with regard to knowledge of facts which make an apparently innocent statement defamatory (as in *Cassidy's case*, *supra*).

⁹⁹ *Gatley*, *op. cit.* para. 221.

¹ [1967] F.N.L.R. 174. See also *Dickson v. Enwere* [1967] F.N.L.R. 163

in Lagos requesting a character certificate in connection with his application for a visa to visit the United States. The defendant, an official in the Central C.I.D. in Lagos, sent to the plaintiff a certificate headed "To Whom It May Concern," which recorded, erroneously that the plaintiff had been twice convicted in the magistrate's court for offences involving dishonesty. The plaintiff showed the certificate to a third party. Adefarasin J. held that the plaintiff's action for libel must fail on the ground, *inter alia*, that it was the plaintiff himself, and not the defendant, who had communicated the defamatory matter to a third party. The learned judge said²:

In order to succeed in an action for defamation, a plaintiff must establish that the libel was communicated to some person or persons other than the plaintiff himself. In the case in hand it is quite clear that although the certificate was headed "To Whom It May Concern, and that it was required for the purpose of a third party, it was made available only to the plaintiff himself... Regarding the communication by the plaintiff to Mr. Haden of the character certificate, I am of the view that it was not the act of the first defendant and no action is maintainable against him on that account.... The communication was made directly to the plaintiff and to no one else.

Every repetition of a defamatory statement is a fresh publication and creates a fresh cause of action.³ Thus, for example, in a libel contained in a newspaper the following will be *prima facie* liable: the writer of the article, the editor, the publisher, the printer, and even a newsagent and street vendor. Nor is it a defence that in publishing a defamatory statement the defendant was merely repeating what someone else told him.

There is no publication if the defamatory words could not be understood by the person to whom they are addressed, for example, where the latter is too blind to read or is illiterate, or is too deaf to hear, or where he does not understand the language in which words are written or spoken.⁴ Nor is the defendant responsible for publication to a person to whom he did not intend to publish and to whom he could not reasonably have foreseen the words would be published, for example, where a third party unexpectedly overhears his words; where a father wrongfully

² *Ibid.* at p. 176.

³ *Truth (N.Z.) Ltd. v. Holloway* [1960] 1 W.L.R. 997.

⁴ *Winfield and Jolowicz, op. cit.* 297.

opens a letter addressed to his son or where a servant opens a letter addressed to his master (even if the letter is unsealed).⁵ On the other hand, a correspondent should expect that if he sends a defamatory letter to a businessman at his place of business, the latter's clerk or secretary might, in the ordinary course of the business, open it and read it (unless marked "Private," "Personal" or "Confidential"), and the correspondent will be liable for the publication. If the defamatory words are written on a postcard or contained in a telegram, there is a rebuttable presumption that they are published to post office officials and to telegraph operators respectively.⁶ And it was held, somewhat surprisingly, in *Theaker v. Richardson*,⁷ that it is to be expected that a husband might open an unstamped brown envelope lying on the doormat of the matrimonial home and looking like a circular, even though it is sealed and addressed to his wife.

Communication of defamatory matter by a husband to his wife and vice versa is not "publication," since husband and wife are treated as one person. But the communication by a third party to one spouse of matter defamatory of the other spouse, or the communication to a third party by one spouse⁸ of matter defamatory of the other, is publication.

The name of the person to whom delivery of the libellous document was made must be pleaded. See *Nsirim vs Nsirim* (1990) NWLR part 138 page 285 at 298.

Innocent dissemination

The law takes a more lenient attitude towards those who are not the authors, printers or first or main publishers of a libel, but who take only a subordinate part in its dissemination, such as booksellers who sell books containing libellous material, libraries or museums which exhibit libellous books, or newsvendors who sell libellous newspapers. Such disseminators have a defence to an action for libel if they can show (i) that at the time they disseminated the newspaper or book they did not know that it contained libellous matter, and (ii) that it was not due to any negligence in conducting their business that they did not discover the libel.⁹ It is a question of fact in each case as to whether the

⁵ *Huth v. Huth* [1915] 3 K.B. 32.

⁶ See generally Winfield and Jolowicz, *op. cit.* pp. 295-297

⁷ [1962] 2 W.L.R. 151

⁸ See *Watt v. Longsdon* [1930] 1 K.B. 130

⁹ *Vizetelly v. Mudie's Select Library Ltd.* [1900] 2 Q.B. 170; *Awolowo v. Kingsway Stores Ltd.* [1968] 2 All N.L.R. 217.

defendant was negligent or not, the onus being on the defendant to establish his lack of knowledge of the libel and the absence of carelessness on his part.¹⁰

A Nigerian case in which the defence of innocent dissemination was raised is *Awolowo v. Kingsway Stores Ltd.*¹¹ Here the defendants had sold copies of a book entitled "The One-Eyed Man is King", portions of which were highly defamatory of the plaintiff. In answer to the plaintiff's action for libel, the defendants pleaded innocent dissemination. Adefarasin J. held that the defence failed. The defendants had been negligent in not discovering that the book contained libellous matter since its title was an intriguing one, and their book buyer, one H, admitted in evidence that he had only "glanced through it." After reviewing the relevant authorities, the learned judge said¹²:

I will not go so far as to say that a bookseller has a duty to read every book which he puts out for sale.... What I am saying is that if circumstances exist about any book, which such book sellers are putting out on sale, which ought to put them on their guard or which ought to have led them to suppose that such a book contains a libel, they would be liable if they acted negligently and put such a book out for sale.... In the instant case the book is about Nigeria and Nigerians. In such a case I think a reasonable bookseller ought to satisfy himself that the book does not contain any defamatory matter particularly when one is dealing with a book with the title 'The One-Eyed Man is King.' The same duty may not be required in respect of books of an entirely different character such as fiction, poetry, literature, art etc.

DEFENCES

In addition to the defences of unintentional defamation and innocent dissemination already considered, there are four major defences which can be relied upon in actions for defamation: justification, fair comment, absolute privilege and qualified privilege. Each of these must now be considered in turn.

¹⁰ *Awolowo v. Kingsway Stores Ltd.*, *Ibid* at pp. 247, 257.

¹¹ [1968] 2 All N.L.R. 217

¹² At p. 252

(1) Justification (i.e. truth)

It is a complete defence to an action for libel or slander that the words complained of were true in substance. Where a defamatory statement is uttered, the plaintiff does not have to prove that it is false, for the law presumes this in his favour^{12a}; but if the defendant can prove it's truth, he will defeat the plaintiff's claim.

This is so even if the defendant was actuated by malice or some important motive, for "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 *damnum absque injuria*,"¹³ In *Onwuchekwa v. Onovo*,^{13a} for instance, the plaintiff brought an action for defamation in respect of the defendant's statement that the plaintiff was a lunatic and a proper subject of confinement. Evidence was given at the trial by a senior consultant psychiatrist to the effect that when she had seen the plaintiff at the Yaba Psychiatric Centre, the plaintiff was "very irritable and in a fighting mood, that she felt victimised and was very suspicious, aggressive and paranoid." Kassim J. accepted that this, together with certain other evidence of abnormal behaviour on the part of the plaintiff was sufficient to establish the defence of justification. He pointed out that "the law will not allow a man to recover damages for injury to a character he is in fact not entitled to bear. For example, if the allegation in a libel is that the plaintiff is addicted to drink, it is admissible for the defendant to show in justification thereof that on the day succeeding the day of the libel he (plaintiff) was suffering from delirium tremens."

The defendant should not, however, plead justification unless he has good reason to believe it will succeed, for failure to establish the defence will surely inflate any damages awarded against him, the court treating it as an aggravation of the original injury.¹⁴ The mere fact that the defendant has a plea of justification on the record is a matter which may be taken into consideration in assessing damages, even though the defendant withdraws the plea at the trial or abandons it and relies on an alternative plea of privilege.¹⁵

^{12a} *Akurefe v. The Sketch Publishing Co. Ltd.* (1971) 1 U. I. L. R. 13 at p. 16.

¹³ *Gatley, op. cit.* para. 351; *Nthenda v. Alade* (1974) E. S. C. L. R. 470 at p. 478, per Bello S. P. J.

^{13a} (1974) 12 CCHCJ 1919.

¹⁴ *Eyo v. Eastern Nigeria Information Service* (1963) 7 E. N. L. R. 144 at p. 148, per Palmer J.; *Adewunmi v. Oshinowo* (1977) 2 CCHCJ 187 at p. 197, per Adefarasin CJ.

¹⁵ *Oweh v. Amalgamated Press of Nigeria Ltd.* [1957] L. L. R. 6 at p. 10, per Abbott J.

It is sufficient if the defendant proves his statement to be true in substance. If it is inaccurate only in minor details which do not add to the "sting" of the charge, the defence will still succeed.^{15a} Thus, for example, where the defendants published a notice that the plaintiff had been sentenced to a fine of £1.00 with three weeks' imprisonment in default of payment because he had travelled on a train without the appropriate ticket, it was held that the defence of justification could succeed on proof that the plaintiff had been so convicted and fined £1.00 with two weeks' imprisonment in default.¹⁶

At common law every material charge must be justified. Thus if the defendant makes four distinct defamatory allegations against the plaintiff and succeeds in proving the truth of only three of them, the defence will fail altogether.¹⁷ But this rule has been modified by statute.¹⁸ The Defamation Law 1961, section 7,¹⁹ 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.

Thus if for example, the defendant alleges (i) that the plaintiff stole certain property and (ii) that he received other property knowing it to have been stolen, the defendant may succeed in a plea of justification if he can prove that the first allegation is true, even though he cannot prove the truth of the second, since the second charge does not materially injure the plaintiff's reputation in view of the truth of the first.

^{15a} *Edwards v. Bell* (1824) 130 E. R. 162; *Pedro v. Orafidiya* (1974) 12 CCHCJ 51 at p. 61; *Visas v. Daily Times of Nigeria Ltd.* (1975) 6 CCHCJ 997 at p. 1000.

¹⁶ *Alexander v. North Eastern Railway Co.* (1865) 122 E. R. 1221. In *Akurefe v. The Sketch Publishing Co. Ltd.* (1971) 1 U. I. L. R. 13 at p. 16, Ighodaro J. held that the fact that the plaintiff had been acquitted of the offence which the defendants had attributed to him did "not preclude the defendants from setting up a plea of justification," (although they would "find it very difficult to establish their plea"), for "the record of the plaintiff's acquittal is not competent evidence of his innocence to meet the plea of justification."

¹⁷ Though these circumstances would be relevant in assessing damages: *Street, op. cit.* p. 304.

¹⁸ The common law rule still applies in the northern states.

¹⁹ Cap. 34, Laws of Lagos State. See also the identical provisions of the Defamation Law (eastern states), Cap. 33, s. 8, and Defamation Law (western states), Cap. 32, s. 11.

Where the defendant repeats a defamatory statement originally made by someone else, he must prove that the statement was true, not merely that it was made. "I tell the tale as it was told to me" is no defence.²⁰ Thus, for example, if the defendant says to Z, "X tells me that Y has stolen his (X's) bicycle," he will have a defence to an action by Y only if he can prove that Y did steal the bicycle. It is not sufficient for him to prove simply that X made the accusation against Y. Similarly, if the defendant states that there is a suspicion that the plaintiff has murdered X, he must prove that the plaintiff did murder X, not merely that X was suspected of it.

(2) Fair comment

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. It is important to preserve the fundamental right to freedom of expression, and the defence is available to all who comment "fairly" (within the legal definition) on all matters which may be said to be the legitimate concern of the public. Although the defence is particularly useful to publishers of newspapers, it is not the exclusive preserve of the press.

Requirement for the defence

- (a) The matter commented on must be one of public interest. Such matters include, *inter alia*
 - (i) the affairs of government, both national and local²¹;
 - (ii) the administration of justice²²;
 - (iii) the management and affairs of public institutions, such as hospitals, prisons, schools and universities²³;
 - (iv) the public conduct of those who hold or seek public office or positions of public trust²⁴;
 - (v) church matters²⁵;
 - (vi) the conduct of private businesses which affect the community at large²⁶;
 - (vii) published books and public theatrical, artistic or musical performances²⁷;

²⁰ Salmond, *op. cit.* p. 159

²¹ Gatley *op. cit.* paras 735, 739.

²² *Ibid.* para. 737.

²³ *Ibid.* para. 738; *Nthenda v. Alade* (1974) E. C. S. L. R. 470 at p. 478 (university).

²⁴ *Ibid.* para. 734.

²⁵ *Ibid.* para. 736; *Oke v. Gansallo* (1923) 4 N. L. R. 109.

²⁶ *Ibid.* para. 738; *South Hetton Co. v. North-Eastern News* [1894] Q.B. 133; *Saraki v. Soley* (1972) 2 U.I.L.R. 271 at p. 282 (private hospital).

²⁷ *Ibid.* paras. 740-747

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- (viii) anything which may fairly be said to invite comment or challenge public attention.²⁸

(b) The statement must be a comment or opinion and not an assertion of fact. It is essential to the defence of fair comment that the defamatory matter must appear on its face to be a comment or opinion and not a statement of fact. If it is the latter, then the defence will not be available, and the defendant will have to rely on justification. In *Nthenda v. Alade*,²⁹ for instance, where the defendants had published an article in the *Lagos Weekend* newspaper which stated that the plaintiff, a university lecturer, had engaged in an immoral association with a female student, the defence of fair comment failed since it was quite clear that "the whole of the publication complained of, from its caption to the last sentence, contains salient and plain statements of fact and there is not an iota of comment."³⁰

It is not always easy to distinguish comment from fact. For example, a statement that a man is "immoral" or "corrupt" could be interpreted as fact or opinion, depending on the circumstances. In *Bardi v. Maurice*,³¹ for instance, the defendant wrote of the plaintiff that his "tenure as Sekondi-Takoradi Ibo head was suspicious and inimical to the welfare and interest of the Ibos at large." Although at first sight these words might appear to be comment, the West African Court of Appeal held that they were a statement of fact, not comment or criticism, since they carried the meaning that the plaintiff was corrupt and dishonourable, and "to allege a disreputable motive, as was done here, is to make an allegation of fact."³² The plea of fair comment failed.

(c) *The comment must be based upon facts truly stated.* For comment to be fair, it must normally be based upon true facts in existence when the comment was made. "You cannot invent untrue facts about a man and then comment on them."³³ As Adedipe J. stated³⁴:

It is a defence to an action for libel or slander that the words complained of are fair comment on a matter of public interest,

²⁸ *Ibid.* para. 748; *Ibrahim v. Bakare* (1970) 1 U.I.L.R. 244 at p. 251.

²⁹ (1974) 4 E.C.S.L.R. 740. See also *Ebuwa v. United Africa Co. Ltd.* (1955) 14 W.A.C.A. 56; *Okon v. C.O.R. Advocate Ltd.* (1961) 5 E.N.L.R. 21 *Ibrahim v. Bakare* (1970) 1 U.I.L.R. 244 at p. 247.

³⁰ *Ibid.* at p. 479, per Bello S.P.J.

³¹ (1954) 14 W.A.C.A. 414.

³² At p. 415.

³³ Winfield and Jolowicz, *op. cit.* p. 305.

³⁴ *Bakare v. Oluwide* [1969] 2 All N.L.R. 324 at p. 332.

but the defendant must prove that the facts on which the comment is founded are true and that the comment on those facts is fair. If the facts upon which the comment purports to be made did not exist, the defence of fair comment must fail. Comments based on matters of opinion only which may or may not be true equally affords no defence.

There are numerous Nigerian cases in which pleas of fair comment failed because this requirement was lacking.³⁵ In *African Press Ltd. v. Ikejiani*,³⁶ for instance, the defendant's comments that the plaintiff was "dishonest," "fraudulent" and a "quack," "were based on the alleged facts that he had 'claimed to have obtained a doctorate degree in medicine,' that 'the degree was a fake,' and that consequently the plaintiff had been 'kicked out of the University.'" The West African Court of Appeal held that the defence of fair comment must fail as the main fact upon which the comment was based, namely that the plaintiff's degree in medicine was a fake, was untrue.

At common law a defendant who pleads fair comment must prove the truth of every fact, however minor or unimportant contained in the libel.³⁷ But now the Defamation Law 1961, s.8,³⁸ provides that in an action for libel or slander in respect of words consisting partly of allegations of fact and partly of expressions of opinion, a "defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved."³⁹

The rolled-up plea. The usual form of this plea is as follows:

In so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest.

³⁵ e.g. *Enahoro v. Associated Newspapers of Nigeria Ltd.* [1960] W.N.L.R. 219; *Anunobi v. Nigerian National Press Ltd.* [1964] L.L.R. 12; *African Press Ltd. v. Ikejiani* (1953) 14 W.A.C.A. 386.

³⁶ *Supra*.

³⁷ The common law rule still applies in the northern states.

³⁸ See also Defamation Law (eastern states), s. 9; Defamation Law (western states), s. 12.

³⁹ For an example of the operation of this section see *Ibrahim v. Bakare* (1970) 1 U.I.L.R. 244 (overruled by the Supreme Court on another point). See also *Saraki v. Soley* (1972) 2 U.I.L.R. 271 at p. 282.

The purpose of this plea is to make it clear in a defence of fair comment that the defendant proposes to prove that the facts on which he based his comment are true. The wording of the plea, however, led some judges and practitioners to believe that the plea was one of justification and fair comment "rolled-up" together. This misconception was finally laid to rest in *Sutherland v. Stopes*,⁴⁰ and it is now clear, as Adefarasin J. emphasised in *Saraki v. Soley*,⁴¹ that "it raises only one defence—the defence of fair comment." Accordingly, "it seems reasonable . . . for a pleader who wishes to rely on a plea of justification on the ground of truth to add a separate plea of justification."⁴²

(d) *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 test is not whether a reasonable man would hold and express such an opinion, but whether the defendant honestly expressed his real view. As Lord Denning M.R. explained⁴³:

If the defendant was an honest man expressing his genuine opinion on a subject of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless he has a good defence of fair comment. His honesty is the cardinal test.

On the other hand, comment must not be used as a cloak for a personal attack on the plaintiff. In particular, an imputation of corrupt or dishonourable motives made against the plaintiff will be protected by the defence of fair comment unless the defendant shows not only that he honestly believed the imputation to be true, but also that he had reasonable foundation for his belief. In the words of Cockburn C.J.⁴⁴:

It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and

⁴⁰ [1925] A.C. 47.

⁴¹ (1972) 2 U.I.L.R. 271 at p. 281. See also *Odutola v. West African Pilot Ltd.* [1960] L.L.R. 27.

⁴² *Ibid*.

⁴³ *Slim v. Daily Telegraph Ltd.* [1968] 2 Q.B.157 at p. 170.

⁴⁴ *Campbell v. Spottiswoode* (1863) 32 L.J. Q.B. 185 at p. 199.

that you have no right to impute a man in his conduct as a citizen—even though it can be open to ridicule or disapprobation—base, sordid, dishonest and wicked motives, unless there is so much ground for the imputation that a jury shall be of opinion, not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause.

(e) *The comment must not be actuated by express malice.* A plea of fair comment will be defeated if the plaintiff proves⁴⁵ that the defendant, in making his comment was actuated by "express malice" which was defined by the Supreme Court in *Bakare v. Ibrahim*⁴⁶ as "any corrupt motive or wrong motive" or "making use of the occasion for some indirect purpose."

Express malice may be established by, for example evidence of the defendant's personal hostility towards the plaintiff both out of court and during the trial itself, or by evidence of some previous dealings between the parties which engendered resentment or a desire for revenge on the part of the defendants. In *Ebuwa v. United Africa Co. Ltd.*,⁴⁷ for instance the defendants had caused an article to be published in a newspaper accusing the plaintiff of unfair and improper conduct in the management of the plaintiffs' bulk oil plant. Evidence of malice sufficient to destroy the defence of fair comment was found in the facts that (i) one of the defendants, who were in competition with the plaintiffs in the buying of oil, had tried to exceed his bulk allocation but the plaintiffs had foiled this attempt and reported the matter to the Department of Marketing and Exports, and (ii) the defendants had failed to persuade the Department to introduce a system of allocation giving the defendants preferential treatment. And in *African Newspaper Ltd. v. Coker*,⁴⁸ evidence of malice was found in the defendants' persistent campaigning for a Government investigation into alleged acts of corruption on the part of the plaintiff, despite the existence of a report already published by the Government which had exonerated the plaintiff. "Such persistent campaigning would inferentially be evidence of malice, sufficient to destroy the defence of fair comment."⁴⁹

⁴⁵ The plaintiff must deliver a reply giving particulars of the facts and matters from which malice is to be proved: *Bakare v. Ibrahim* (1973) 6 S.C. 205 at p. 215; *Ibe & Co. Ltd. v. Reveille Printing and Publishing Co. Ltd.* (1975) 5 E.C.S.L.R. 26 at p. 43.

⁴⁶ *Ibid.* at p. 216

⁴⁷ (1955) 14 W.A.C.A. 56, at p. 60

⁴⁸ [1973] 1 N.M.L.R. 386.

⁴⁹ At p. 396

(3) Absolute privilege

Absolute privilege is a complete defence to an action for libel or slander, however false or defamatory the statement may be and however maliciously it may have been made. It arises in those circumstances, such as proceedings in the Legislature or in a court of law, where public policy demands that persons should be able to speak or write with absolute freedom, without fear of liability for defamation.

Absolute privilege covers the following:

- (a) *Statements made in the course of and with reference to judicial proceedings by any judge, juryman, advocate, party or witness.*

The privilege is given a wide interpretation so that, for example, anything which a witness says in the witness-box with reference to the subject-matter of the proceedings will be protected, even though the statement may not be strictly relevant in law. It has been suggested, however, that if a man, when in the witness-box, were to take advantage of his position to utter something having no reference whatever to the proceedings in hand in order to assail the character of another, he would not be protected.⁵⁰

The privilege extends to defamatory statements contained in trial and pre-trial documents, such as pleadings and affidavits, and to communications between advocates or solicitors and witnesses before the trial. In *Foley v. Asfour*,⁵¹ Wheeler J. held that an affidavit sworn with reference to and in the course of judicial proceedings was absolutely privileged notwithstanding that there was no express reference to the affidavit in the record of those proceedings. And in *Adene v. Oyeyemi*⁵² the same learned judge held that an affidavit sworn for use in interlocutory proceedings before the High Court was so privileged.

Absolute privilege extends not only to proceedings in the regular court, such as the Supreme Court, Federal Court of Appeal, High Courts and magistrates courts, but to other tribunals recognised by law⁵³ (e.g. courts martial and disciplinary committees such as the Legal Practitioners Disciplinary Committee) so long as they are exercising judicial and not purely administrative functions.⁵⁴ In *Majekodunmi v. Olopade*,⁵⁵ it was held that certain

⁵⁰ *Seaman v. Netherclift* (1876) 2 C.P.D. 53 at pp. 56, 57 per Cockburn C.J.

⁵¹ [1970] N.N.L.R. 74.

⁵² [1969] N.N.L.R. 37.

⁵³ *O'Connor v. Waldron* [1935] A.C. 76 at p. 81.

⁵⁴ *Ibid.* See also *Suleman v. Sayani* [1963] E.A. 603.

⁵⁵ [1963] W.N.L.R. 12. But the statement was held to be qualifiedly privileged.

defamatory statements made to an anti-corruption officer were not protected by absolute privilege since the officer was performing administrative and not judicial functions, and in *Saraki v. Soley*⁵⁶ certain defamatory allegations made against a medical practitioner and published to the Nigerian Medical Council were held not to be protected by absolute privilege, since "it is true to say that the work of the Council is in the main administrative even though it is clear that it has a responsibility for receiving complaints concerning medical and dental practitioners.... It seems to me that the Nigerian Medical Council had no quasi-judicial foundation."⁵⁷

In *Omenwa v. Okonkwo*,⁵⁸ Kaine J. held that a domestic forum which derives its authority solely from the consent of the parties is not a judicial tribunal for the purposes of the defence of absolute privilege. In *Agoaka v. Ejiofor*,⁵⁹ Aniagolu J. held that a village gathering convened for the purpose of trying the issue of theft with a view to imposing upon the convicted party a fine or other punishment, such as public disgrace, was an illegal court, so that defamatory statements uttered during the proceedings were not privileged.

(b) *Statements made in proceedings of the Legislature*

Statements made in the course of proceedings by members of the State or House of Representatives of the Federal or State legislatures are absolutely privileged.⁶⁰ This is properly regarded as a matter of immunity from legal action rather than as a defence.⁶¹ The privilege covers statements made in debate or in committee and includes statements made by witnesses called to give evidence before a committee.⁶²

(c) *Communications made by one officer of state to another in the course of his official duty.*

The leading case is *Chatterton v. Secretary of State for India*,⁶³ where it was held that a letter from the United Kingdom Secretary of State for India to his Parliamentary Under-Secretary, which provided material for the answer to a question raised in Parliament,

⁵⁶ (1972) 2 U.I.L.R. 271. The statement was qualifiedly privileged.

⁵⁷ At pp. 280, 281.

⁵⁸ (1963) 7 E.N.L.R. 189.

⁵⁹ (1972) 2 E.C.S.L.R. 109.

⁶⁰ Reports, papers, votes and proceedings of parliament are also absolutely privileged by s. 1 of the Parliamentary Papers Act 1840.

⁶¹ *Carter-Ruck, op. cit.* p. 130.

⁶² *Goffin v. Donnelly* (1881) 44 L.T. 141.

⁶³ [1895] 2 Q.B. 189.

was absolutely privileged. The privilege certainly includes communications between high-ranking officers of state such as Ministers⁶⁴ or Ambassadors and High Commissioners,⁶⁵ but it is not clear how far down the hierarchy of civil servants it extends. As far as the armed forces are concerned, it has been held⁶⁶ that a defamatory report on a lieutenant-colonel made by a major general was absolutely privileged, but the authority of the decision has been doubted.⁶⁷ Probably the better view is that communications between civil servants of below ministerial rank are only qualifiedly and not absolutely privileged⁶⁸ and the same should apply to all communications between army officers.

In *Keh v. Kofi*⁶⁹ the defendant, a paramount chief and a member of the native authority of his State, wrote two defamatory letters to administrative officers of the Government objecting to the election of the plaintiff to the native authority. The West African Court of Appeal held that the defence of absolute privilege was not available to the defendant. Foster-Sutton P. said:

Although [*Chatterton v. Secretary of State for India*] is authority for the proposition that a document of state is one which cannot form the subject-matter of an action because, on the ground of public policy, the Court cannot allow it to be given in evidence, or secondary evidence of it to be given, it is no authority for the proposition that a letter written in the circumstances here, objecting to the plaintiffs election to the native authority, must be regarded as a 'state matter and as such absolutely privileged.

As Evatt J. said in *Gibbons v. Duffell*⁷⁰:

Absolute immunity from the consequences of defamation is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cast across this elementary right of civic protection, and any extension of the area of immunity must be viewed with the most jealous suspicion until its necessity is demonstrated.

⁶⁴ *Szalatnay-Stacho v. Fink* [1946] 1 All E.R. 303.

⁶⁵ *Isaacs v. Cook* [1925] 2 K.B. 391.

⁶⁶ *Dawkins v. Paulet* (1869) L.R. 5 Q.B. 94.

⁶⁷ *Dawkins v. Rokeby* (1873) L.R. 8 Q.B. 255 at p. 272.

⁶⁸ *Street, op. cit.* p. 307.

⁶⁹ (1954) 14 W.A.C.A. 480.

⁷⁰ (1932) 47 C.L.R. 520 at p. 534.

I am unable to agree that public policy demands that a communication such as the one we have under consideration in the present case should be regarded as absolutely privileged.

(d) *Reports of judicial proceedings*

By the Defamation Law (eastern states),⁷¹ s. 11,⁷² "a fair and accurate report in a newspaper of proceedings publicly heard before a court exercising judicial authority within Nigeria shall, if published contemporaneously with those proceedings, be privileged," but 'nothing in this section shall authorise the publication of blasphemous or indecent matter. "By section 12, the protection is extended to broadcast reports from a broadcasting station within Nigeria; "Broadcasting, includes both radio and television broadcasts."⁷³

The absolute privilege conferred by the statute is additional to the qualified privilege which fair and accurate reports of judicial proceedings enjoy at common law.⁷⁴

(4) *Qualified privilege*

Both absolute and qualified privilege exist for the same fundamental purpose: to give protection to persons who make defamatory statements in circumstances where "the common convenience and welfare of society"⁷⁵ demands such protection; but whereas absolute privilege is limited to a few well-defined occasions, qualified privilege applies to a much wider variety of situations in which it is in the public interest that persons should be able to state what they honestly believe to be true without fear of legal liability. The main difference between the two defences is that a plea of qualified privilege will be defeated if the plaintiff proves that the defendant, in publishing the words complained of, was actuated by express malice, whereas in absolute privilege the malice of the defendant is irrelevant.

Occasions of qualified privilege

(i) *Statements made in the performance of a legal, moral or social duty.* Here the defendant must show both that he was under a legal, moral or social duty to communicate the defamatory matter to a third party, and that the third party had a corresponding interest

⁷¹ Cap. s. 3.

⁷² See also s. 10 of the Defamation Law, Cap. 34 (Lagos State) and s. 16 of the Defamation Law, Cap. 32 (western states).

⁷³ Section 2 Cfs. 2 (1) of Cap. 34 (Lagos State) and s. 3 of Cap. 32 (western states) p. 171 post.

⁷⁵ *Toogood v. Spyring* (1834) 149 E.R. 1044, per Parke B.

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in receiving it.⁷⁶ A common instance of such an occasion is where a former employer of the plaintiff gives a damaging reference to the plaintiff's character to a prospective employer. In *Ayoola v. Olajure*,⁷⁷ for instance, the plaintiff had been employed as a secretary/typist by the defendants. Upon leaving the service of the defendants she took up employment with S.Ltd. who wrote a letter to the defendants asking for a confidential report concerning her ability and character whilst in the latter's employment, and for the reasons for her leaving that employment. In reply, the defendants wrote a confidential letter to S.Ltd. stating that the plaintiff had been dismissed on account of her poor performance, that she had been warned several times for lateness and flippancy, and that she had made several unsuccessful efforts to ruin the defendants' good image with the Immigration Office. The letter concluded with the word: "we therefore doubt if she would be an asset to your Company."

Dosunmu J. held that the defendants were entitled to rely on the defence of qualified privilege. He said⁷⁸:

I am not in doubt that the said letter is privileged in the circumstances that [the defendants] are under a moral duty to answer the enquiries made of it by a party who has a legitimate interest in the information sought.... It is so manifestly for the advantage of society that those who are about to employ a servant should be enabled to learn what his previous conduct has been, that it may be deemed the moral duty of the former employer to answer enquiries to the best of his belief. Such privilege is only destroyed by proof of express malice.... On the whole, I hold that no express malice is proved and the defendants are entitled to the verdict of the court.

Whether a legal, moral or social duty to communicate the defamatory matter exists in the particular case is a question of law to be decided by the judge. If it is a legal duty which is relied upon (e.g. the duty of a citizen to report the commission of a crime to the police), the judge's task will normally be straightforward; but where the defendant pleads a moral or social duty, it is more difficult. In deciding whether such a moral or social duty existed he must ask himself the question: "would the great mass of right-minded men in the position of the defendant have considered

⁷⁶ *Watt v. Longsdon* [1930] 1 K.B. 130.

⁷⁷ (1977) 3 CCHCJ 315. See also *Okotcha v. Olumese* [1967] F.N.L.R. 174.

⁷⁸ At p. 316.

it their duty, under the circumstances, to make the communication?"⁷⁹ It is an objective and not a subjective test which is applied. Thus if the judge decides that a reasonable right-minded person would not have recognised a duty to communicate the defamatory matter, it will be no defence for the defendant to plead that he believed honestly and in good faith that there was such a duty.⁸⁰

According to one leading textbook,⁸¹ a communication which is volunteered, that is to say made without any request for information by a person possessing a lawful interest, is unprivileged "unless there is such a confidential or other relationship between the parties that creates a duty to speak without being asked." However, Jibowu F.J. in *Economides v. Thomopoulos*,⁸² a case in which there was voluntary communication of a libel preferred the view of Hamilton L.J.⁸³ that "it is not true that the issue of privilege or no privilege can turn on whether the information was volunteered or not. Privilege must depend on the relations of the parties, on the duty thereout arising, and on the occasion which is used or abused, not on the mere accident, who spoke first.... There is no general rule that a statement which would be privileged if made in answer to an inquiry ceases to be so when the informant has not waited to be asked."

Thus it was held by the Supreme Court in *Economides'* case that a letter sent by the managing director of a company to the Assistant Commissioner of Income Tax which suggested that the plaintiff, a former employee of the company, had been guilty of tax evasion, was privileged, despite the fact that the information had not been requested by the Commissioner.

Whether a moral duty existed to communicate a defamatory statement may be particularly difficult to determine in the family or domestic situation. It has been held that a father or near relative may warn a young man as to the character of an associate⁸⁴ and that a near relative or intimate friend of a lady may warn her about the character of the man whom she proposes to marry⁸⁵ but it has been said that "as a general rule it is not desirable for anyone even a

⁷⁹ *Stuart v. Bell* [1891] 2 Q.B. 341 at p. 350, per Lindley L.J., cited with approval in *Economides v. Thomopoulos* (1956) 1 F.S.C. 7 at p. 12 per Jibowu J.

⁸⁰ *Hebditch v. Macilwaine* [1894] 2 Q.B. 54.

⁸¹ Salmond, *op. cit.* p. 166.

⁸² (1956) N.L.R. 7 at p. 11.

⁸³ *Greenlands v. Wilmhurst* [1913] 3 K.B. 507 at p. 535.

⁸⁴ *Moffat v. Coates* (1906) 44 Sc.L.R. 20.

⁸⁵ *Adams v. Coleridge* (1884) 1 T.L.R. 84.

mother-in-law, to interfere in the affairs of man and wife."⁸⁶ In the leading case of *Watt v. Longsdon*⁸⁷ it was held that a report by the defendant, a company director, to the chairman of the company concerning the alleged immoral conduct of an employee was privileged, but that in the circumstances the defendant had no duty to communicate this information to the employee's wife, so that he was liable for the latter publication.

(ii) *Statements made to the proper authorities in order to obtain redress for public grievances.* A private grievance in this context means a grievance suffered by the defendant as an individual and not by the public as a whole; whilst a public grievance is one which affects the general public and which any member of the public whether he is personally affected or not, has an interest in bringing to the attention of the proper authorities.' An instance of the former occurred in *Ajala v. Showunmi*,⁸⁸ where Dosunmu J. held that a communication by a citizen to the Chief of Staff, Nigerian Army, complaining of the alleged threatening behaviour of an army officer towards the citizen and his family would have been protected by qualified privilege were it not for the presence of express malice on the part of the citizen. The learned Judge cited⁸⁹ with approval the following passage from Gatley⁹⁰:

Where a man believes that he has suffered a grievance at the hands of another, he is entitled to bring his grievance to the notice of the person or body whose power or duty it is to grant redress or to punish or reprimand the offender, or merely to enquire into the subject-matter of the complaint, and any statement made is privileged, if made in good faith and not for the purpose of slandering the plaintiff.

A case in which there was a statement concerning a public grievance is *Dikey v. Odeniyi*.⁹¹ There the defendant wrote a letter to the Chairman of the Education Committee of the Mushin District Council in which he made certain allegations of immoral behaviour against the plaintiff, who was headmaster of a local school. Duffus J. held that the communication was qualifiedly privileged because the Chairman was the proper authority to whom a public

⁸⁶ *Watt v. Longsdon* [1930] 1 K.B. 130 at p. 150, per Scrutton L.J.

⁸⁷ *Ibid.*

⁸⁸ (1977) 1 CCHCJ 25.

⁸⁹ At p. 29.

⁹⁰ *Op. cit.* para. 572.

⁹¹ [1960] W.N.L.R. 102. This case may also be considered to fall under head 1 of qualified privilege (statements made in the performance of a legal moral or social duty), pp. 165-167, *ante*

grievance of this nature should be addressed. And in *Saraki v. Soleye*,⁹² Adefarasin J. held that a letter from the defendant who was Permanent Secretary in the Ministry of Health and Social Welfare of Kwara State, addressed to the Nigerian Medical Council concerning alleged malpractices in the plaintiff's hospital, was protected by qualified privilege since (i) the matter was one of public concern, (ii) the Council had the power to set in motion the machinery for investigating the complaint, and (iii) the defendant had a duty to make the communication.

(iii) *Statements made in self-defence.* A defamatory statement made in order to protect the defendant from an attack upon his reputation or property by the plaintiff is qualifiedly privileged. This is illustrated by *Osborn v. Boulter*.⁹³ In that case a publican had complained to the brewery, which supplied him with beer for sale to his customers, that the beer was of poor quality. The brewery replied that they had heard rumours to the effect that the poor quality of the beer was due to its being watered down by the publican, and they published this statement to a third party. It was held that this statement was qualifiedly privileged since it was made in defence of the defendants' own property and reputation.

In defending himself, however, the defendant is not entitled to make unnecessary imputations on the private life of his attacker which are wholly unconnected with the attack and irrelevant to his vindication. "The privilege extends only so far as to enable him to repel the charges brought against him, and not to bring fresh accusations against his adversary."⁹⁴ This rule was applied in *Majekodunmi v. Olopade*⁹⁵ where, in answer to certain allegations made against him by the plaintiff before the Anti-corruption Officer, an official of the Government of Western Nigeria, the defendant had made a number of allegations of fraud and dishonesty against the plaintiff which were not relevant for the purposes of his defence. Duffus J. held that the defendant's statements were not protected by qualified privilege since "a person cannot... in his defence charge his accuser with offences unconnected with and not relevant to his defence of the charge against himself."⁹⁶

(iv) *Statements made between parties having a common interest.* A statement made by A to B which is defamatory of C will be

⁹² (1972) 2 U.I.L.R. 271. This case may also be considered to fall under head 1 of qualified privilege, pp. 165-167 *ante*.

⁹³ [1930] 2 K.B. 226. See also *Adam v. Ward* [1917] A.C. 309.

⁹⁴ *Gatley*, *op. cit.* para 586; *Dwyer v. Esmonde* (1878) 2 L.R. Ir. 243, at p. 254, *per* May C.J.

⁹⁵ [1963] L.L.R. 12.

⁹⁶ At p. 17.

protected by qualified privilege if A and B had a common interest in the subject-matter of the communication. The privilege may arise in a wide variety of cases and "it is impossible to classify the cases in which such a common interest arises."⁹⁷ The common interest may be pecuniary, for example, where an insurance company writes to a policyholder warning him against dealing with a former agent of the company,⁹⁸ or professional, for example, where an auctioneer writes to other auctioneers in the district informing them that a person has purchased goods at an auction and received them without paying.⁹⁹ In *Obikoya v. Ezenwa*,¹ a pools company caused the following statement to be published in a national newspaper:

Warning. The public are hereby informed that Mr. O.O. is not the manager, director or chairman or managing director of Pool House Group (Nig.) Ltd. and has no authority to so represent himself or transact any business for and on behalf of the Company. Any person who deals with him in any capacity whatsoever or have so dealt with him does so or has done so at his/her own risk.

The case came before the Supreme Court on a point of pleading only, and so no decision was given as to whether the defence of qualified privilege succeeded. However, it is submitted that such a statement would be qualifiedly privileged as made between parties having common pecuniary interest.

(v) *Fair and accurate reports of proceedings in the legislature.* A report in a newspaper, a radio or television broadcast, or other medium, of proceedings in either House of the Federal or any State Legislature will be protected by qualified privilege, provided it is fair and accurate. The meaning of "fair and accurate" was considered by Abbott J. in *Oweh v. Amalgamated Press of Nigeria Ltd.*,² where a report in the defendants' newspaper of proceedings in the Western House of Assembly stated that a member of the House had said that the plaintiff was "one of the N.C.N.C. crooks referred to by Dr. A." The learned judge said³:

I must now consider if the report is fair and accurate. It is not necessary that it should be verbatim. An abridged or

⁹⁷ *Winfield and Jolowicz op.cit.* p. 326.

⁹⁸ *Neville v. Fine Art and General Insurance Co.* [1897] 1 A.C. 68.

⁹⁹ *Boston v. Bagshaw* [1966] 11 W.L.R. 1126.

¹ [1973] 1 All N.L.R. (Part 11) 64.

² [1957] L.L.R. 6. See also *Enahoro v. Associated Newspapers of Nigeria Ltd.* [1960] W.N.L.R. 219.

³ At p. 8.

condensed report will be privileged, provided it gives a correct impression of what took place. It is sufficient to publish a fair summarised account. If the whole report is a substantially accurate account of what took place, the fact that there are few slight inaccuracies or omissions is immaterial. But where the inaccuracy is of a substantial kind, the report is not privileged although the publisher exercised reasonable care and diligence in endeavouring to ascertain the facts, and though the mistake was an honest mistake.... It is clear that a report of parliamentary proceedings which states that a speaker said things which were not said at all is not a fair and accurate report.

Abbott J. then went on to hold that since the member of the House never uttered any such words as those stated in the report, "the words complained of were not a fair and accurate report" and the defendants could not rely on qualified privilege.

(vi) *Fair and accurate reports of judicial proceedings.* A similar defence is available to those who publish fair and accurate reports of proceedings in any court of justice.⁴ The requirement of fairness and accuracy is the same as that which applies to reports of proceedings in the legislature. Thus if, for example, the report states that a judge or counsel "said things which were not said at all, it is not a fair and accurate report."⁵ In *Omo-Osagie v. Okutobo*,⁶ for instance, the *Lagos Weekend* newspaper published a report of certain matrimonial proceedings in the High Court of Lagos under the bold caption: "Chief Justice tells a teacher: 'you are a bad woman.'" Adefarasin J. held that since the evidence showed that the Chief justice never used those words, the report was not fair and accurate. He said⁷:

Learned counsel for the defence submitted that the words constituted a fair and accurate report of proceedings in which the public was interested. While I accept the submission that a newspaper has a right to publish either a verbatim or an abridged and condensed report of what transpired in a court of justice, I think the principle has been well laid that such publication must be done fairly and honourably so as to convey a just impression of what had transpired there.... There can be no doubt that the report ... is not only grossly inaccurate it is most unfair and cannot be said to have been done fairly and honourably."

⁴ *African Newspapers of Nigeria Ltd. v. Coker* [1973] 1 N. M. L. R. 386 at p. 397.

⁵ *Oweh. v. Amalgamated Press of Nigeria Ltd.* [1957] L. L. R. 6 at p. 8.

⁶ [1969] 2 All N. L. R. 175.

⁷ At p. 179.

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The words were published "in a manner to create sensation. The inaccuracy here is of a rather substantial character, and in my view the defence of qualified privilege is not available. To my mind it is not a fair and accurate report to attribute words such as 'you are a bad woman' to the judge when he never said these words or even words which were in any way close to these.

Again, in *Bello v. Oyebola*,⁸ a report published in the *Daily Times* of proceedings in a magistrates' court which stated that the plaintiff, a well-known musician and bandleader, was ordered by the chief magistrate to be detained by the police for questioning, was held by Dosunmu J. to be unprivileged since the chief magistrate made no such detention order but simply directed the police to make further investigations into a matter in which the names of the plaintiff and three others were mentioned. "I have no doubt that the report is inaccurate and unfair, and the defence of privilege is not available to the defendants in the circumstances."

It was held in the recent case of *Lardner v. The Sketch Publishing Co. Ltd.*⁹ that the defence of qualified privilege does not protect the publication of the contents of documents not brought up in open court. Thus, the publication in the defendants' newspaper of contents of a statement of claim alleging that a legal practitioner had committed a fraud against his client, was unprivileged, since the statement of claim, though filed, had not yet been read, in open court.

(vii) *Statements privileged under the Defamation Acts.* The schedules to the Defamation Law 1961¹⁰ (Lagos State) and the Defamation Laws of the eastern¹¹ and western¹² states list a number of statements which are to be qualifiedly privileged when published in a newspaper. These are divided into two parts: (1) statements privileged without explanation or contradiction, and (2) statements privileged subject to explanation or contradiction. Statements set out in Part 1 (e.g. fair and accurate reports of proceedings of the legislature or any part of the Commonwealth outside Nigeria: fair and accurate reports of the proceedings of an international court or of a court in any part of the commonwealth outside Nigeria) do not give any right on the part of the complainant to publication of a statement by way of explanation

⁸ (1977) 1 CCH Cj 21.

⁹ At p. 23.

¹⁰ (1979) 3 L. R. N. 276.

¹¹ Cap. 34, s.9.

¹² Cap. 33, s.10.

¹³ Cap. 32, s.14.

or contradiction of the report, provided it is fair and accurate and not published maliciously. Statements set out in Part II (e.g. fair and accurate reports of the findings or decisions of various associations formed in Nigeria for the promotion of art, science, religion or learning, or for the promotion of any trade, business, industry or profession; fair and accurate reports of the proceedings of any local authority, commission of inquiry or tribunal; fair and accurate reports of any notice or other matter issued for the information of the public by or on behalf of any governmental department, officer of State, local authority or superior police officer)^{12a} give a right to a complainant to publication of a reasonable statement by way of explanation or contradiction of the report, and if the newspaper refuses or neglects to publish such statement after having been requested to do so, or does so in an unreasonable or inadequate manner, the newspaper will lose the protection provided by the statutes. The protection given to newspaper reports also extends to radio broadcasts.

Excess of privilege

Privilege, whether qualified or absolute, is forfeited if it is exceeded, that is to say if the defamatory words are published more extensively than the occasion requires. Thus, if the privilege is limited to publication to certain persons only, as for example under heads (1) – (5) of qualified privilege, publication to a wider readership will not be protected. This is so whether the excess of privilege is intentional or negligent. For instance, a report which would be privileged if sent in confidence to the proper authority would be unprivileged if published in a newspaper; and a message which would be privileged if sent in a closed letter will lose the privilege if sent by telegram, for then it would be published to the telegraph operator.¹³

Privilege is not exceeded, however, where a defamatory statement made on a privileged occasion is published to a third person in the usual course of business.¹⁴ Thus in *Saraki v. Soley*,¹⁵ a defamatory letter sent to the Nigerian Medical Council on a privileged occasion remained privileged despite its publication to

^{12a} For an example of the application of this statutory defence, see *Akurefe v. The Sketch Publishing Co. Ltd* (1971) 1 U. I. L. R. 13.

¹³ See p. 153, *ante*.

¹⁴ *Edmondson v. Birch & Co Ltd.* [1907] 1 K. B. 371.

¹⁵ (1972) 2 U. I. L. R. 271.

office staff of the Council for "privilege covers all the incidents of its transmission and treatment which are in accordance with the reasonable and usual course of business."¹⁶ And it is established that there is no excess of privilege where a letter defamatory of C. which is sent by A to B on a privileged occasion, is first of all dictated by A to his secretary and typed by her.¹⁷ This applies equally where a letter which is defamatory of C is sent by A to C himself – which, as we have seen is no publication for the purpose of the law of defamation¹⁸ – after having been dictated to A's typist.¹⁹ Such a situation arose in *Aruna v. Taylor*,²⁰ where the defendant, the general manager of a company, sent to the plaintiff, an employee, a letter accusing the plaintiff of having divulged trade secrets to a rival company. The only publication proved was to the defendant's confidential secretary who typed out the letter from the defendants' draft. Dosunmu J. held that the communication was made on a privileged occasion and, the publication to the typist being within the usual course of the defendant's business, was covered by the privilege.

Malice

Just as malice on the defendant's part destroys the defence of fair comment,²¹ so will it destroy qualified privilege. Malice in this context means the use of privileged occasion for some improper purpose.²² In *Oweh v. Amalgamated Press of Nigeria Ltd.*²³ Abott J. said²⁴:

Actual malice does not necessarily mean personal spite or ill will, and it may exist even though there be no spite or desire for vengeance in the ordinary sense. Any indirect motive other than a sense of duty is what the law calls malice. Malice means making use of the occasion for some indirect purpose.

In *Oweh's* case, the defamatory statement was made in order to damage the political advance of the plaintiff, which was an "indirect notice, other than a sense of duty" and so could not be protected by qualified privilege. Again, in *Okon v. The C.O.R. Advocate Ltd.*²⁵ a publication defamatory of the plaintiff was held

¹⁶ At p. 283.

¹⁷ *Edmondson v. Birch*, *supra*.

¹⁸ See p. 151, *ante*.

¹⁹ *Osborn v. Thomas Boulter & Son* [1930] 2 K. B. 226; *Bryanston Finance Ltd. v. De Vries* [1975] Q. B. 703.

²⁰ (1977) 1 CCHCJ 15.

²¹ See p. 161, *ante*.

²² *Carfer-Ruck, op. cit.* p. 152.

²³ [1957] L. L. R. 6.

²⁴ At p. 9.

²⁵ (1961) 5 E. N. L. R. 21.

to be unprivileged because the defendant's purpose was not to defend his own political party from attack, which would have been a legitimate object, but to discredit the plaintiff in his office as principal of a secondary school.

Evidence of malice may be either (i) intrinsic (i.e. found in the words themselves) or (ii) extrinsic (i.e. found in external circumstances unconnected with the publication itself). There may be intrinsic evidence of malice where the language used by the defendant is violent,²⁶ insulting²⁷ or utterly disproportionate to the facts.²⁸ However, it has been said that, when considering whether the actual expression used can be treated as evidence of malice, "the law does not weigh words in a hair balance,"²⁹ and if, in the circumstances, the defendant might honestly and reasonably have believed that his words were true and necessary for his purpose, he will not lose the protection of privilege merely because he expressed himself excessively in strong or exaggerated language.³⁰

Extrinsic evidence of malice may be found, for instance, where there is proof that the defendant knew at the time he published the statement that it was false,³¹ or that he was indifferent to its truth or falsity.³² On the other hand, mere carelessness as to the truth of the statement is not in itself evidence of malice,³³ "for what the law requires is not that the privilege should be used carefully, but that it should be used honestly"³⁴ Also, proof of bad relations between plaintiff and defendant³⁵ before the making of the statement, or hostile conduct on the part of the defendant towards the plaintiff at any time up to and including the trial itself, may be extrinsic evidence of malice.³⁶

A wider publication of the defamatory matter than was necessary may also be evidence of malice, as well as an excess of privilege, but this depends upon the particular circumstances.³⁷ In *Edmondson v. Njie*,³⁸ a defamatory letter sent by the defendant to the Attorney-General of the Gambia on a privileged occasion was

²⁶ *Salmond, op. cit.* p. 176; *African Press Ltd. v. Ikejiani* (1953) 14 W. A. C. A. 386 at p. 388.

²⁷ *Salmond, ibid.*

²⁸ *Winfield and Jolowicz, op. cit.* p. 330.

²⁹ *Salmond, ibid.*

³⁰ See *Keh v. Kofi* (1954) 14 W. A. C. A. 480 at p. 483.

³¹ *Clark v. Molyneux* (1877) 3 Q. B. D. 237; *Payne v. Cole* (1899) 1 N. L. R. 25. at p. 32; *Ajala v. Shoyunmi* (1977) 1 CCHCJ 25, at p. 29.

³² *Carter-Ruck, op. cit.* p. 153.

³³ *Thompson v. Dashwood* (1883) 11 Q. B. D. 43; *Horrocks v. Lowe* [1974] 2 W. L. R. 282; *Mutual Aid Society Ltd. v. Akerle* [1966] N. M. L. R. 257, at p. 261.

³⁴ *Carter-Ruck, ibid.*

³⁵ *Ibrahim v. Bakare* (1970) 1 U. I. L. R. 244 at p. 252.

³⁶ *Winfield and Jolowicz, op. cit.* p. 330, *Gatley, op. cit.* para. 262.

³⁷ *Winfield and Jolowicz, ibid.*

³⁸ (1954) 14 W. A. C. A. 576.

not marked "private" or "confidential." The trial judge held that since the defendant must have had sufficient knowledge of office routine to be perfectly aware that a letter not so marked was bound to pass through one or more hands before it reached the addressee, there had been excessive publication which was evidence of a malicious intention to injure. Foster-Sutton P., delivering the judgment of the West African Court of Appeal, reversed this finding, however, holding that he did not think "the method of addressing the letter can reasonably be said to be outside the usual procedure as to justify an inference of malice, and it follows that I am unable to agree that the defendant's failure to mark the envelope 'confidential' justifies the conclusion that the privilege by that omission was abused."³⁹

When a defamatory statement is published jointly by several persons on a privileged occasion, or where several persons, such as the author, printer and publisher of a newspaper, take part in its dissemination, only those against whom express malice is actually proved will be liable in defamation. This was decided in the case of *Egger v. Chelmsford*,⁴⁰ which overruled earlier authority to the contrary.⁴¹ Thus, whereas the malice of an agent may make his innocent principal liable on ordinary principles of vicarious liability, the malice of the principal cannot make the innocent agent liable. The agent would be liable only if express malice were proved against him personally.

³⁹ At p. 578

⁴⁰ [1965] 1 Q. B. 248.

⁴¹ *Smith v. Streatfield* [1913] 3 K. B. 764

CHAPTER 8

TRESPASS TO LAND

Trespass to land, called *trespass quare clausum fregit*, is committed where the defendant, without lawful justification,

- (1) Enters upon land in the possession of the plaintiff, or
- (2) Remains upon such land, or
- (3) Directly places or projects any material object upon such land.¹

As its name implies, trespass *quare clausum fregit*² was originally conceived as a remedy against forcible and aggressive entry on to the land of others; but later it was extended to include any wrongful entry, whether forcible or not, as well as merely remaining on the land unlawfully, or wrongfully placing a material object on it. The original association of the tort with violent entry has survived in that the courts still regard the action as a valuable means of preventing breaches of the peace which are likely to occur when one man wilfully trespasses upon the land of another.³ However, the functions of the tort are no longer limited to the maintenance of public order. The action is now frequently employed as a means of settling boundary disputes and of establishing title to land,⁴ and in Nigeria many actions in trespass are combined with claims for declarations of title. It is paradoxical that an action designed to protect possession of land should be so frequently used to establish title^{4a} i.e. ownership. The explanation seems to be that the right to possession of land is one of the incidents of ownership, and where two parties both claim ownership of a particular piece of land, and both carry out acts on the land (e.g. the planting of crops or the cutting of trees) which amount to an assertion of title, the one who succeeds in an action of trespass against the other will indirectly establish his better title. Moreover, in *England v. Palmer*,⁵ the West African Court of

¹ *Onasanya v. Emmanuel* (1974) 9 CCHJC 1477 at p. 1481, per Omolulu-Thomas J.

² Meaning that the defendant "broke the close" of the plaintiff.

³ *Fleming, op. cit.* p. 37; *Oguche v. Iliyasu* [1971] N.N.L.R. 157 at p. 163, per Jones S.P.J.

⁴ This use of the action has been facilitated by the principle that trespass to land is actionable *per se*.

^{4a} "Title" is here used in the sense of "ownership." It should be pointed out, however, that "title" can also mean "possessory title," i.e. a right to possession of land falling short of ownership.

⁵ (1955) 14 W.A.C.A. 659 at p. 660 per Coussey J.A. See also *Onasanya v. Emmanuel, supra* at p. 1483.

Appeal took the view that:

in a trespass action, an averment of ownership is consistent with and... amounts to an averment of possession, for ownership may be proved by proof of possession. 'As mere possession is sufficient to maintain trespass against anyone who cannot show a better title, the plaintiff's allegation that the defendant broke the close of the plaintiff (the use of the word "close" being an averment of ownership) is satisfied prima facie by proof that the defendant broke a close in the possession of the plaintiff: and this is not only prima facie, but ultimately, sufficient against anyone who cannot avoid the effect of it by showing that, notwithstanding the actual possession by the plaintiff, he, the defendant, has a better right to it.'⁶

ACTS OF TRESPASS

(1) Trespass by wrongful entry

This is the most frequent form of trespass, consisting of a "personal entry by the defendant, or by some other person through his procurement, into land or buildings occupied by the plaintiff."⁷ The slightest crossing of the boundary for the plaintiff's land is sufficient, since "every invasion of property, be it ever so minute, is a trespass."⁸ Thus, for example, it is trespass to put one's hand through the window of the plaintiff's house or to sit on his wall, and since the tort is actionable *per se*,⁹ the plaintiff can recover damages despite the fact that the trespass has caused him no harm.

Where the defendant's entry is intentional, in the sense that he consciously sits, walks, rides, drives or otherwise places himself upon the plaintiff's land, he will be liable in trespass, and it is no defence that he honestly, though mistakenly, believed that he was on his own land,¹⁰ or that he had a right of entry,¹¹ or that the land was public land, or that he acted under any other mistake of fact or law.¹² Where the entry is intentional, however, for example where a car-driver skids off the road and entered into the plaintiff's

⁶ *Whittington v. Boxall* (1843) 114 E.R. 1201 at p. 1203 per Lord Denman C.I.

⁷ *Salmond, op. cit.* p. 38.

⁸ *Entick v. Carrington* (1765) 19 St. Tr. 1030 at p. 1066.

⁹ *Ashby v. White* (1703) 87 E.R. 810.; *Dabira v. Adelaja* (1973) 11 CCHCJ 97 at p. 100

¹⁰ *Basely v. Clarkson* (1681) 83 E.R. 565.

¹¹ *Hewlitt v. Bickerton* (1947) C.L.C. 10504

¹² But in cases of mistake where no harm is caused, only nominal damages will be awarded; see p. 289, *post*.

compound, the latter cannot recover in trespass but must make out a case of negligence against the entrant.¹³ And where the entry is onto the plaintiff's land by a malicious third party, the defendant will not be liable in trespass, though the third party will.¹⁴

An intentional trespasser is strictly liable for all damage caused by his presence on the land, whether such damage is done wilfully or accidentally. Thus he will be liable not only for such deliberate act as, for example, cutting down the plaintiff's trees or uprooting his crops, but also for accidental damage, for instance where he collides with the occupier in the dark and injures him, or where he accidentally dislodges and breaks a loose pane of glass in the plaintiff's window.¹⁵

(2) Trespass by remaining on land

A person is liable in trespass if, having entered another's land lawfully, he remains there after his right of entry has come to an end. "To refuse or omit to leave the plaintiff's land is as much a trespass as to enter originally without right."¹⁶ Thus, for example, a person who pays for admission to a cinema, and thus enters lawfully, will become a trespasser if he omits to leave at the end of the show, or if having misbehaved, his licence to be on the premises is revoked by the management and he ignores a demand to get out.¹⁷ In *Balogun v. Alakija*,¹⁸ B was employed by A as a rent-collector. One night, A called at B's house after business hours in order to demand an account of rent collected. B allowed A to enter, but shortly afterwards an argument ensued and B asked A to leave. A became abusive and assaulted B, and he did not leave the house until about 15 minutes after he had been requested to do so. De Lestang C.J., in the High Court of Lagos, held that where a person is lawfully on the premises of another, once his licence or invitation is terminated, he is only allowed a reasonable time in which to leave and thereafter he becomes a trespasser. Since A had not complied with B's request to leave within a reasonable time, he was liable to B in trespass.

The position of tenants who "hold over" by remaining in possession of the land after the expiration of their tenancies is somewhat different. Whereas a licensee becomes a trespasser if he omits to leave the premises within a reasonable time after the accomplishment of the purpose for which he was permitted to be there, whether or not the licensor has asked him to leave, a tenant

¹³ *Nickells v. Melbourne Corporation* (1938) 59 C. L. R. 219.

¹⁴ *Smith v. Stone* (1647) 82 E. R. 533.

¹⁵ See *Fleming, op. cit.* p. 38.

¹⁶ *Salmond, op. cit.* p. 41.

¹⁷ See *Wood v. Leadbitter* [1843-60] All E. R. Rep. 190.

¹⁸ [1963] 2 All N. L. R. 175.

who holds over at the end of his tenancy does not become a trespasser unless and until the landlord has required him to give up possession and quit the premises.¹⁹ Until such a demand for possession is made, the tenant's position is that of a "tenant at sufferance"²⁰ and he can himself maintain an action in trespass against any intruder.²¹

(3) Trespass by placing things on land

It is trespass to place any material object on the land of another, or to bring any object into direct physical contact with another's land without lawful justification, for example to fire a gun into the soil,²² to drive a nail into²³ or place a ladder against a wall²⁴ to remove a door or window from a house,²⁵ to encourage a dog to enter premises,²⁶ or to blow noxious gas into a house.²⁷

It is essential for liability in trespass that the placing or projecting of the object on to the plaintiff's land should be *direct*.²⁸ If it is indirect, there can be no liability on trespass but only in nuisance, in which case the plaintiff must prove damage. Thus, for instance, to plant a tree on the plaintiff's land is a direct invasion and therefore a trespass, but to allow the roots of a tree to spread from adjacent land on to that of the plaintiff is indirect and therefore a nuisance,²⁹ to throw stone on to neighbouring land is trespass, but to allow a stone wall to become ruinous and to collapse on to such land is only nuisance.

The distinction between direct and indirect invasion of land is illustrated by *Onasanya v. Emmanuel*.³⁰ In this case the plaintiff

¹⁹ *Hey v. Moorhouse* (1839) 133 E. R. 20; *Ogbakumanwu v. Chiabolo* (1950) 19 N. L. R. 107 at pp. 108, 109, per Hallinan J. (a case of customary tenancy)

²⁰ *Nwabueze, Nigerian Land Law*, p. 577.

²¹ Since he remains in *de facto* possession.

²² *Pickering v. Rudd* (1815) 171 E. R. 70.

²³ *Simpson v. Weber* (1925) 133 L. T. 46.

²⁴ *Westripp v. Baldock* [1939] 1 All E. R. 279.

²⁵ *Lavender v. Betts* [1942] 2 All E. R. 72.

²⁶ *Beckwith v. Shordike* (1767) 98 E. R. 91.

²⁷ *McDonald v. Associated Fuels Ltd.* [1954] 3 D. L. R. 775. But to deprive an occupier (e. g. a tenant) of facilities by cutting off the gas or electricity supply is not trespass, nor indeed any tort. At most, it may be a breach of covenant. See *Adollo v. Deyemi* [1967] L. L. R. 87 at pp. 88-90, per Taylor C. J.

²⁸ *Salmond, op. cit.* p. 42.

²⁹ *Smith v. Giddy* [1904] 2 K. B. 448 at p. 451.

³⁰ (1973) 4 CCHCJ 1477. See also *Lawani v. West African Portland Cement Co. Ltd* (1974) 2 W. S. C. A. 36 at pp. 41, 42.

complained that the defendant, in laying the foundations of a building, had encroached by about ten feet upon land in the plaintiff's possession. He also complained that the defendant had thrown water and refuse on to his land, and had allowed excreta to escape from a salga on to his premises. Omolulu Thomas J. held that the throwing of water and refuse on to the plaintiff's land were direct acts and thus amounted to trespass, but that the escape of excreta was indirect invasion and therefore not trespass but nuisance.

CONTINUING TRESPASS

Where a person wrongfully enters and remains upon another's land or where he wrongfully places some object there, he will be liable not only for the initial intrusion but also for the failure to remove himself or the object from the land. So long as he or the object remains on the land there is a "continuing trespass" giving rise to actions *de die in diem* (from day to day) until the condition is abated by the removal of the person or thing.³¹ In *Lajide v. Oyelaran*,^{31a} for instance, the defendant had entered the plaintiff's land and there laid the foundations of a building. He was held liable for "a continuing trespass by means of his building foundations which were and are still on the plaintiff's land, and ... the fact that the defendant stopped personal entry into the land... is not a defence to this kind of action."

Cases of continuing trespass must, however be distinguished from cases where the consequences of a trespass, and not the trespass itself, are continuing. For example, if D trespasses on P's lands, digs a pit there and removes the soil, the trespass comes to an end as soon as D leaves the land, and D will be liable only for the original digging. He is not liable in trespass for his omission to restore the land to the same condition in which he found it (i.e. for his failure to fill up the pit).³²

TRESPASS ABOVE AND BELOW THE SURFACE OF LAND

The basic maxim of law is "*cujus est solus, ejus est usque ad coelum et usque ad inferos*" "whoever owns or possesses the surface of land also owns or possesses everything above it to the heavens and everything below it to the centre of the earth."³³ Thus, according to the maxim, any invasion of the ground beneath the surface, at

however great a depth, and any invasion of the airspace above, at however great a height, will constitute a trespass to the possessor of the surface. But the modern cases establish, at least in relation to airspace, that the maxim cannot be taken literally. Thus it has been held that an occupier's rights in the airspace above his land extend only to such a height as is necessary for the ordinary use and enjoyment of land and buildings on it, so that no trespass was committed where the defendant flew his aircraft at a height of several hundred feet above the plaintiff's house.³⁴ Furthermore, section 9 of the Civil Aviation Act^{34a} provides that "no action shall lie in respect of trespass or nuisance by reason only of or of the ordinary incidents of flights of an aircraft over any property at a height above the ground which is reasonable, having regard to wind, weather and all the circumstances of the case"; but that if damage is caused to any person or property by an aircraft in flight, taking off or landing, or as a result of person or thing falling from such aircraft, then the owner of the aircraft will be liable for the damage without proof of negligence or intention."

There were actionable trespasses, however, where a crane when in operation swung over the roof of the plaintiff's factory at a height of only fifty feet,³⁵ and where a signboard fixed on adjacent premises projected into the airspace a few feet above the plaintiff's shop.³⁶

The position with regard to entry beneath the surface of land is less clear. In principle, there seems to be no reason why the rule applicable to invasion of airspace should not apply equally here, so that there will be no trespass if the point of entry is below the area which could reasonably be used and enjoyed by the occupier³⁷; but there appears to be no direct authority on the point. Such authority as there is concerns the exploitation of minerals beneath the surface. It has been held, for example, that there was an actionable trespass where the defendant slant-drilled under the plaintiff's land in order to extract oil³⁸; similarly, where the defendant tunnelled under land in the possession of the plaintiff

³⁴ *Bernstein v Skyviews Ltd.* [1977] 3 W.L.R. 136. But there would have been a trespass if the aircraft or anything from it had fallen to the ground.

^{34a} 1964, No. 30.

³⁵ *Woollerton Ltd. v. Costain Ltd.* [1970] 1 W.L.R. 411.

³⁶ *Kelsen v. Imperial Tobacco Co. Ltd.* [1957] 2 Q. B. 334. But protruding branches of trees are regarded as consequential, not direct encroachments and so constitute nuisance, not trespass; the occupier in such case, is entitled to abate the nuisance by cutting off the branches. *Leamon v. Webb* [1895] A.C. 1

³⁷ See *Fleming, op.cit.* 42, 43.

³⁸ *Ibid.*

³¹ See *Salmond, op. cit.* p. 42.

^{31a} (1973) 2 W.S.C.A. 93

³² *Clegg v. Dearden* (1884) 116 E.R. 986

³³ *Corbett v. Hill* (1870) L.R. 9 Eq. 671

for the purpose of exploiting a coal-seam.³⁹ Where mining rights have been granted by the owner of the surface, there will of course be no trespass where the grantee exercises those rights in conformity with the agreement.

INTERFERENCE WITH POSSESSION

It is fundamental that the law of trespass is designed to protect possession of land rather than ownership.⁴⁰ Thus, the owner of land who has let the land to a tenant, and thereby given up possession to the tenant for the duration of the tenancy, cannot maintain an action in trespass during that period unless he can show that the trespass has caused or will cause permanent damage to the property and so affect the value of his reversionary interest. Possession here means *de facto*, i.e. actual possession.⁴¹ Thus, protection is extended not only to those who are lawfully in possession (such as owners in fee simple, holders of statutory or customary rights of occupancy or tenants or sub-tenants under valid leases⁴² or sub-leases) but also to persons whose possession is wrongful and who have no legal, equitable or customary right to it. The principle was explained by Fatayi-Williams J.S.C. in *Amakor v. Obiefuna*⁴³:

It is trite law that trespass to land is actionable at the suit of the person in possession of the land. That person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession of the land gives the person in such possession the right to retain it and to undisturbed enjoyment of it against all wrong-doers except a person who could establish a better title. Therefore, anyone (other than the true owner) who disturbs his possession of the land, can be sued in trespass, and in such action, it is no answer for the defendant to show that the title to the land is in another person. To resist the plaintiff's claim, a defendant must show either that he is the one in actual possession or that he has a right to possession.

Accordingly, even a plaintiff who is himself a trespasser can, if in *de facto* possession, maintain an action in trespass against a

³⁹ *Bulli Coal Mining Co. v. Osborne* [1899] A.C. 351

⁴⁰ See *Okolo v. Uzoka* [1978] 1 L.R.N. 192.

⁴¹ *Oguche v. Iliyasu* [1971] N.N.L.R. 157 at p.163.

⁴² A tenant in possession can maintain an action in trespass against his own landlord: *Dabira v. Adelaja* (1973) 11 CCHCJ 97 at p. 99

⁴³ (1974) 3 S.C. 67 at p. 75. See also *Adeshoye v. Shiwoniku* (1952) 14 W.A.C.A. 86; *Owe v. Oshinbanjo* [1965] 1 All N.L.R. 72 at p. 76

defendant who subsequently enters the land, unless the latter can show that he has a better title or a better right to possession than the plaintiff:

An original trespasser... can, if he is in exclusive possession of the land, maintain an action in trespass against a later trespasser whose possession, whether taken by force or not would be clearly adverse to that of the original trespasser.⁴⁴

An important case, which illustrates the sufficiency of *de facto* possession in the context of the Land Tenure Law 1962,⁴⁵ is *Oguche v. Iliyasu*.⁴⁶ Here the plaintiff, an employee of the Kano State Ministry of Works and a native of Kwara State, was in possession of a plot of land in the former state on which he built a house. The land had been granted to him by the owner in breach of sections 27 and 32 of the Land Tenure Law 1962, which respectively provide that land may not be alienated to a "non-native" without the consent of the Commissioner for Lands, and that any alienation without such consent shall be null and void. The defendant, suspecting that the plaintiff had used some Ministry of Works material and labour on the house, and purporting to act on behalf of the Ministry, caused a bulldozer operator to enter the plaintiff's land and demolish the house. In the plaintiff's subsequent action for trespass, the defendant's counsel argued that the statutory prohibition against transfer of possession contained in sections 27 and 32 of the Law prevailed over the common law rule that the person *de facto* occupying the land can maintain an action in trespass against all but the true owner or anyone acting under his authority.

Jones S.P.J. considered this argument to be "attractive" but "not correct." He said⁴⁷:

The basis of the common law rule is the prevention of breaches of the peace ... 'This protection which the law gives to bare possession seems to be nothing more than an extension of the protection that it accords to the person; possession implies to some extent personal presence, and the inviolability of the person extends to those sorts of disturbance by which the person might at any time be interfered with'⁴⁸ It is bare,

⁴⁴ *Ibid.* at p. 76.

⁴⁵ Cap. 59 Laws of Northern Nigeria.

⁴⁶ (1971) N.N.L.R. 157; see also *Solanke v. Abed* [1962] 1 All N.L.R. 230.

⁴⁷ At p. 163.

⁴⁸ Clerk and Lindsell, *Torts* (12th ed.) p. 1141.

de facto, physical possession or occupation which entitles a person to bring an action for trespass.

The plaintiff therefore had a good cause of action in trespass.

PROOF OF POSSESSION

In an action for trespass, the onus is on the plaintiff to show that he was in *de facto* possession of the land at the material time.⁴⁹ In *Wuta-Ofei v. Danquah*,⁵⁰ the Judicial Committee of the Privy Council held that in order to establish possession it was not necessary "for a claimant to take some active step in relation to the land such as enclosing the land or cultivating it. The type of conduct which indicates possession must vary with the type of land. In the case of vacant and unenclosed land which is not being cultivated, there is little which can be done on the land to indicate possession." Moreover, "the slightest amount of possession would be sufficient to entitle the person who is so in possession . . . to recover as against a mere trespasser."

Where both plaintiff and defendant claim to be in possession of land, the court will resolve the doubt in favour of the one who can prove title, that is to say the one who has "the right to possess."⁵¹

As Idigbe J. stated in *Efana v. Adekunle*⁵²:

if there is a dispute as to which of two persons is in possession, the presumption of law is that the person having title to the land is in possession. In the well-known case of *Jones v. Chapman*⁵³, Maule J. observed that . . . if there are two persons in a field each asserting that the field is his, and each doing something in assertion of the right of possession, and . . . if the question is, which of those two is in actual possession, the answer is that the person who has the title is in possession and the other is a trespasser.

Thus, for example, if both P and D claim to be in possession of land as tenants of X, the one who can show that he has a valid lease granted by X will be able to exclude the other and maintain an action in trespass against that other.⁵⁴

Furthermore, a plaintiff in *de facto* possession of land cannot maintain an action in trespass against one who can show that

⁴⁹ *Bossor v. Kessie* (1934) 2 W.A.C.A. 65, *Tongi v. Kalil* (1953) 14 W.A.C.A. 331. [1961] 1 W.L.R. 1238 at p. 1243;

⁵⁰ *Salmond, op. cit.* p. 45; *Winfield and Jolowicz, op. cit.* p. 337.

⁵¹ (1961) 5 E.N.L.R. 55 at p. 57 *Umeobi v. Otukoya* (1978) 1 L.R.N. 172 at p. 180.

⁵² (1849) 154 E.R. 717, at p. 724.

⁵³ See *Umeobi v. Otukoya, supra*.

he has a better title or right to possession.⁵⁵ To put it another way, "it is a defence to an action for trespass that the defendant has a right to possession of the land, or acted under authority of the person having such right."⁵⁶ However, it is a well-settled rule that a defendant who is sued for trespass to land cannot plead the *jus tertii*; that is to say he cannot justify his trespass by showing that a *third party* has a better title or right to possession than the plaintiff who is in *de facto* possession, unless the defendant entered under the authority or as the agent of such third party.⁵⁷

The case of the defendant does not come for consideration until the plaintiff has established his case. See *Aromire vs Awoyemi* (1972) 1 All NLR. part 1 page 101.

TRESPASS BY RELATION

Under the doctrine of "trespass by relation," a person having the right to immediate possession who enters the land in the exercise of that right, is deemed by legal fiction to have been in possession from the time his right of entry accrued, so that he can sue for any trespass committed during the period he was in fact out of possession.⁵⁸ Thus a lessor who is entitled to re-enter after the termination of the lease may, after re-entry, sue in respect of any trespass committed between the time the lease determined and his re-entry.⁵⁹

TRESPASS AS BETWEEN CO-OWNERS

Since both joint tenants and tenants in common of land enjoy "unity of possession," one joint tenant or tenant in common cannot maintain an action in trespass against his co-tenant except where the latter has excluded or ousted the plaintiff from the land or committed destructive waste of common property.⁶⁰ The effect of unity of possession is that each co-owner is entitled to the possession of the whole property jointly or in common with his fellows, and each is entitled to his share of the rents and profits of the property. If any tenant takes more than his proper share of the

⁵⁵ *Yussuf v. Abina* [1968] 2 All N.L.R. 167; *Amakor v. Obiefuna* (1974) 3 S.C. 67; *Atta v. Fagbola* (1974) 7 CCHCJ 1123; *Delaney v. Smith* [1946] K.B. 393 at p. 397.

⁵⁶ *Oguche v. Iliyasu* [1971] N.N.L.R. 157 at p. 164, per Jones S.P.J.

⁵⁷ *Amakor v. Obiefuna* (1974) 3 S.C.67 at p. 75; *Lajide v. Oyelaran* (1973) 3 W.S.C.A. 93 at p. 95; *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch. 84.

⁵⁸ *Barnett v. Guildford* (1855) 156 E.R. 728.

⁵⁹ *Salmond, op. cit.* p. 47.

⁶⁰ *Murray v. Hall* (1849) 137 E.R. 175.

profits, he does not commit any tort against his co-tenants, and their only remedy is an action for an account.⁶¹

TRESPASS *ab initio*

If the defendant, having entered the plaintiff's premises under authority of law (e.g. where a bailiff enters to levy execution against a defaulting judgment debtor; or where a police officer enters under the authority of a search warrant or a warrant for the arrest of a felon) then abuses his authority by doing some positive wrongful act, for example, assaulting the plaintiff or wilfully damaging his property, the doctrine of trespass *ab initio* will apply.⁶² Under this doctrine, the defendant is treated as if he had been a trespasser from the moment he entered the land, so that damages will be assessed on the basis that his entire conduct and not merely his subsequent wrongful act was tortious.⁶³

RECOVERY OF LAND

As we have seen, the action in trespass is available only to a plaintiff who is in actual possession of the land at the time of the unauthorised entry by the defendant.⁶⁴ If the plaintiff is *out of possession* (but has immediate right to it) and the defendant is wrongfully in possession, the plaintiff's remedies are:

- (i) to enter the land and physically remove the defendant and his belongings⁶⁵; or
- (ii) to bring an action in court for recovery of the land.

Physical entry is a form of self-help which the law of torts allows, but it is a dangerous and inadvisable remedy since, apart from the risk of a serious breach of the peace:

- (i) if the entry is forcible *i.e.* effected by breaking outer doors or windows, or accompanied by personal violence or threats, an offence will have been committed under section 81 of the Criminal Code⁶⁶;
- (ii) if more force is used than necessary to eject the wrongful possessor and to remove his belongings, the plaintiff will

⁶¹ Salmond, *Ibid.*

⁶² *Six Carpenter's Case* (1610) 77 E.R. 695.

⁶³ *Oxley v. Watts* (1785) 99 E.R. 944.

⁶⁴ See pp. 183-185, *ante*.

⁶⁵ *Hemmings v. Stoke Poges Golf Club* [1920] 1 K.B. 720.

⁶⁶ But the entrant will not be civilly liable in trespass, provided no more force than necessary is used: *Aglionby v. Cohen* [1955] 1 Q.B. at p. 562; *Akodu v. Omidiji* (1927) 8 N.L.R. 55 at p. 58.

be civilly liable for trespass to the person or to goods as the case may be⁶⁷; and

- (iii) the plaintiff will be liable for trespass to land if it transpires that he did not have a better title or right to possession than the defendant.

The better course for the plaintiff, therefore is to bring an action for recovery of the land. This is "the modern equivalent of the old action for ejectment" and is "a species of the action of trespass."⁶⁸ It is available to a person who can show (i) that he has a better title than the person in actual possession, and (ii) that he has a right to the immediate possession of the land.

The term "recovery of land" would seem to suggest that the plaintiff must have previously been in possession, and that his action is to "recover" the possession he once had but has since lost. An action certainly would lie in such circumstances, for example, where the defendant has wrongfully ousted the plaintiff and the plaintiff sues to recover the land. But there is no necessity for the plaintiff to show such previous possession. Thus in *Adeyemi v. John*,⁶⁹ the plaintiff succeeded in an action for recovery of possession of certain land which he had purchased from the defendant's mortgagee, the court rejecting the defendant's contention that no action for recovery lay because the plaintiff had never previously been in possession.

It seems that, unlike in trespass, in recovery of land the defendant may plead the *jus tertii*, that is, he can rely on the defence that the title or right to possession is in a third party.⁷⁰ This follows logically from the principle that in an action for recovery of land the plaintiff "must recover upon the strength of his own title, and not by the weakness of the defendant's."⁷¹ But the defendant cannot plead the *jus tertii* in one instance; namely, where he has acquired possession from the plaintiff himself or from one through whom the plaintiff claims.⁷² Thus, for instance, it is a well-known rule that if the defendant is the plaintiff's tenant, he is estopped from pleading, in action for recovery of the land brought by the plaintiff, that title or the right to possession is in a third party, or that the plaintiff title is defective.⁷³

⁶⁷ *Aglionby v. Cohen*, *supra*.

⁶⁸ *Bramwell v. Bramwell* [1942] 1 K.B. 370 at p. 373, *per* Goddard L.J. *Akano v. Okunade* (1978) 1 L.R.N. 130 at p. 135.

⁶⁹ (1953) 20 N.L.R. 147.

⁷⁰ See Winfield and Jolowicz, *op. cit.* pp. 349, 350.

⁷¹ *Roe d. Haldane v. Harvey* (1769) E.R. 302 at p. 304, *per* Mansfield C.J.

⁷² *Dalton v. Fitzgerald* [1897] 2 Ch. 86.

⁷³ *Dudley v. Brown* (1888) 14 V. L.R. 655.

In *Shittu v. Akpan* (1979) 2 LRN page 390 it was held that a tenant could not dispute his landlord's title until the interest of his landlord in the property is determined. In the absence of the determination of the interest of his landlord in the property the tenant cannot dispute his title. See also *Ajose v. Agosto* (1968) 1 All NLR page 9.

However where property is disposed of by the order of the court or by the mortgagee in the exercise of his or its power of sale under the deed of legal mortgage the tenant can deny the title of his landlord to the property and the tenant must pay rent to the purchaser of the property. If the landlord sells the property on his own then his tenants can deny his title and the tenants must pay rent to the purchaser of the property.

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TRESPASS TO CHATTELS, CONVERSION AND DETINUE

The three torts of trespass to chattels, conversion and detinue protect the possessor of a chattel from wrongful interference therewith. This area of the law of torts is, for historical reason,¹ somewhat complex, and it has been rightly said that "we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches."² Furthermore, because of the separate and piecemeal development of each tort and the unsystematic way in which the old forms of action were gradually extended to cover novel situations, each tort overlaps with the others at several points, and trespass, conversion and detinue cannot therefore be regarded as three watertight compartments. For purposes of exposition, however, each tort must be considered separately.

TRESPASS TO CHATTELS

This tort may be defined as a direct and wrongful interference with a chattel in the possession of the plaintiff, such interference being either intentional (the normal case) or negligent. The interest of the plaintiff which the tort protects are:

- (i) his interest in retaining possession of the chattel³;
- (ii) his interest in the physical condition of the chattel; and
- (iii) his interest in protecting the chattel against intermeddling.⁴

Acts of trespass

Trespass to chattels may take various forms such as destroying,⁵ damaging⁶ or merely using goods⁷, or wrongfully moving them from one place to another.⁸

¹ For the historical background to the torts, see Fifoot, *History and Source of the Common law*, Chaps. 2, 3 and 6.

² (1903) 21 L.Q.R. 43 (Salmond).

³ This interest is also protected by the tort of conversion.

⁴ *Forson v. Koens* [1975] G.L.R. 479 at p. 484; *Street, op. cit.* p. 30.

⁵ *Sheldrick v. Abery* (1793) 170 E.R. 278 (killing an animal); *Heyden v. Smith* (1610) 123 E.R. 970 (cutting and taking away trees).

⁶ *Fouldes v. Willoughby* (1841) 151 E.R. 1153 at p. 1157, *per* Alderson B. (scratching the panel of a coach); *Slater v. Swann* (1730) 93 E.R. 906 (beating an animal).

⁷ e.g. driving a car, riding a horse or filling a bottle: *Penfold's Wines Pty Ltd. v. Elliot* (1946) 74 C. L. R. 204 at pp. 214, 215.

⁸ *Kirk v. Gregory* (1876) 34 L. T. 488 (moving rings from one room to another); *G. W. K. v. Dunlop Rubber Co.* (1926) 42 T. L. R. 376 (removing a tyre from a car on show and replacing it with another.)

A Nigerian case in which there was an actionable trespass to a chattel is *Davies v. Lagos City Council*.⁹ There the defendant council had granted the plaintiff a hackney carriage licence to operate a taxi-cab in the Lagos area. The plaintiff was well aware that the permit was for his exclusive use and was not transferable, but he nonetheless caused it to be transferred to a third party, who operated a taxi-cab on the strength of it. On learning of this, certain officials of the Council, in the purported exercise of their power to revoke the permit, seized the plaintiff's taxi and detained it at the L. C.C. pound. In action for trespass brought by the plaintiff, Adefarasin J. held that the council was entitled to revoke the plaintiff's permit for non-compliance with the regulations governing the use of hackney carriage licences, but it was not entitled to seize the vehicle or otherwise take possession of it. The Council was therefore liable to trespass. The learned judge said¹⁰:

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

Trespass actionable *per se*

Like other forms of trespass, trespass to chattels is actionable *per se*, that is to say, without proof of actual damage.¹¹ Thus the mere wrongful moving or touching of a chattel without any harm being caused is actionable,¹² for example, where D, contrary to instructions, touches an animal in a zoo or a work of art in a museum¹³; where D wrongfully takes P's letter and shows it to X¹⁴; or where D without authority plays P's record or tape. In all these cases the plaintiff will be entitled at least to nominal damages.¹⁵

It is no defence in an action for trespass to chattels that the tort was committed when carrying out the instruction of the executive arm of government as distinct from judicial act. In *Ajao vs. Ashiru* (1973) 1 All NLR part II page 51, the plaintiff's pepper mill was seized by the defendant and the defence of the defendant to the claim of

⁹ (1973) 10 CCHCJ 151.

¹⁰ At p. 154.

¹¹ *Penfolds Wines Pty Ltd. v. Elliot* (1946) 74 C.L.R. 204 at pp. 214, 215.

¹² *Kirk v. Gregory* (1876) 1 Ex. D. 55; *Davies v. Lagos City Council*, *supra*.

¹³ See *Pollock, Tort*, p. 265.

¹⁴ *Thurston v. Charles* (1905) 21 T.L.R. 659

¹⁵ *Kirk v. Gregory*, *supra*; *Salmond, op. cit.* p. 93.

the plaintiff was that the pepper mill was seized by the police. The court held the defendant liable on the ground that the police acted at his instance in seizing the pepper mill of the plaintiff.

The Supreme Court in the case of *Ajao v. Ashiru*, *supra* emphasised that the law of Nigeria is that those who set a ministerial rather than a judicial officer in motion in this way are as liable for the wrongful seizure of another's property as if they had done it themselves. Police officers must, therefore, be wary of being inveigled into a situation in which they find themselves becoming partisan agents of wrong doers in the pursuit of a private vendetta.

Intention or negligence

Originally, trespass to chattels was a tort of strict liability, and it was unnecessary for the plaintiff to prove that the defendant's act was intentional or negligent, but the modern rule is that either intention or negligence must be established,¹⁶ and there is no liability for an interference with goods which is merely accidental. Thus a contractor who, in the course of carrying out excavations on land in the possession of a third party, struck and damaged the plaintiff's underground cable, was held not liable in trespass since he did not know of the presence of the cable and there was no fault on his part.¹⁷ But accidental trespass must be distinguished from cases of trespass by mistake, for if the interference with the chattel is intentional, it is no defence that the defendant would not have committed the trespass if he had not been mistaken as to his right to interfere, or that he did not realise he was committing a trespass. For example, if D uses P's toothbrush thinking that it is his own, he is liable in trespass since his act in using the tooth brush is intentional, and the fact that he did not realise he was committing a trespass is immaterial; whereas in the case of the interference with the cable,¹⁸ the act of the defendant was entirely unintentional.

Another manifestation of the principle that the plaintiff must prove intention or negligence is the rule that a person whose chattel is damaged on or near the highway by the defendant's vehicle (e.g. where his car is damaged on the road, or where the good in his shop adjoining the highway are damaged) must prove that the harm was caused by the negligence of the defendant or of someone for whom the defendant is vicariously liable, and it is not sufficient

¹⁶ By analogy with the rule established in trespass to the person in *Fowler v. Lanning* [1959] 1 Q.B. 426.

¹⁷ *National Coal Board v. Evans* [1951] 2 K.B. 861.

¹⁸ *Supra*.

for him to assert merely that the defendant's vehicle came into contact with and damaged his property.¹⁹

Protection of possession

Like trespass to land,²⁰ trespass to chattels protects possession rather than ownership. The plaintiff in an action for trespass to a chattel must have had actual possession of it at the time of the interference by the defendant.²¹ This principle has the following consequences:

- (i) even the owner of a chattel will be liable in trespass if he interferes with it at a time when it is in the lawful possession of another person, such as a bailee.²² Thus, for example, a finance company which lets out goods on hire purchase will be liable if it wrongfully seizes the goods whilst they are in the possession of the hirer; and the owner of a car who leaves it at a garage for servicing or repairs will be liable if he retakes the car before the bailment has come to an end by completion of the work and settlement of bill;
- (ii) a person who acquires possession of goods wrongfully can maintain an action in trespass against any person who interferes with the goods except the owner or a person acting under the authority of the owner.²³ Thus, for example, if X wrongfully takes Y's bicycle and, while it is in X's possession, Z makes away with it, X can sue Z in trespass since he had actual, albeit wrongful, possession at the time of the interference by Z, and Z cannot plead the *jus tertii*, that is, that Y and not X was the true owner.²⁴ But X will not succeed against Z if Z was acting under the authority of Y;
- (iii) the owner of a chattel cannot maintain an action in trespass if he did not have actual possession of it at the time of the interference.²⁵ Thus, in the above example, X could not

¹⁹ *Gayler and Pope v. Davies & Son* [1924] 2 K.B. 75, *Holmes v. Mather* (1875) L.R. 10 Ex. 261 at p. 267, *per* Bramwell L.J.

²⁰ See p. 183, *ante*

²¹ *Ward v. Macauley* (1791) 100 E.R. 1135. There are a few exceptions to this rule, e.g. a trustee out of possession of goods can maintain an action for trespass against a third party on the strength of the trustee's right to immediate possession (*Barker v. Furlong* [1891] 2 Ch. 172), and since the title of an executor or administrator relates back to the death of the deceased, he can sue for trespass to chattels of the deceased committed between the date of the death and that of the grant (*Tharpe v. Stallwood* (1843) 134 E.R. 766)

²² *Keenan Bros. Ltd. v. C.I.E.* (1962) 97 I. L.T. R. 54.

²³ *Woodson v. Newton* (1727) 93 E.R. 842.

²⁴ *Salmond, op. cit.* p. 95.

²⁵ *Wilson v. Barker* (1833) 110 E.R. 587.

sue Z in respect of his tortious act, since he did not have actual possession of the bicycle at the time Z made away with it (though he could of course sue Y in respect of Y's original trespass).

CONVERSION

Conversion may be defined as an intentional dealing with or exercise of control over a chattel which seriously interferes with the plaintiff's possession or right to possession of such chattel. Conversion is similar to trespass in that it primarily protects possession rather than ownership of goods, and there are undoubtedly many acts of interference with goods which will give rise to liability for both torts,²⁶ but conversion differs from trespass in that:

- (i) in conversion the interference must be intentional whereas in trespass it may be intentional or negligent;
- (ii) unlike in trespass, in conversion it is not necessary for the plaintiff to have had actual possession of the goods at the time of the interference: it is sufficient if he had an immediate right to possession;
- (iii) it is not conversion merely to move a chattel from one place to another without any intent to take possession of it or dispute the owner's title,²⁷ but such act would amount to trespass.²⁸

Intentional conduct

A defendant will be liable in conversion only where his conduct in relation to the plaintiff's goods was intentional. An interference resulting from merely careless conduct is not actionable in conversion. Thus, for example, a car-park attendant who negligently allowed a thief to drive the plaintiff's car away,²⁹ and a transporter who carelessly lost his client's goods³⁰ were not liable in conversion.

To amount to conversion, the intent of the defendant must be to deal with the plaintiff's goods by exercising dominion over them on his own behalf or on behalf of someone other than the plaintiff. If such intent is present and there is in fact an interference with the

²⁶ See, e.g. *Davies v. Lagos City Council* (1973) 10 CCHCJ 151; *Tormekpey v. Aliable* [1975] 2 G.L.R. 432.

²⁷ See p. 196, *post*

²⁸ See p. 191 *ante*

²⁹ *Ashby v. Tolhurst* [1937] 2 K.B. 242.

³⁰ *Joule Ltd. v. Poole* (1924) 24 S.R. (N.S.W.) 387. But a carrier who mistakenly delivers goods to the wrong person is liable in conversion. See p. 201, *post*.

plaintiff's rights over the goods, the defendant will be liable in conversion "though he may not know of or intend to challenge the property or possession of the [plaintiff]."³¹ In other words, it is no defence that the defendant acted in good faith or that he was mistaken as to the plaintiff's rights. In the words of *Cleasby B.*³²:

The liability... is founded upon what has been regarded as a salutary rule for the protection of property, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.

Thus an auctioneer who, mistakenly believing that certain goods belonged to his client, sold and delivered to a purchaser and handed over the proceeds of sale to the client; was held liable in conversion to the true owner of the goods, it was no defence that he had acted throughout in good faith and under a genuine mistake.³³

Furthermore, by an application of the principle that a man is presumed to intend the natural and probable consequences of his act, if the defendant deals with the plaintiff's chattel in circumstances in which there is a serious risk of loss, he will be liable in conversion if the loss in fact occurs, and he cannot be heard to say that the result was unintended by him. Thus where D borrowed P's car and used it to transport smuggled watches, he was held liable in conversion when the car was confiscated by customs officials, since he had intentionally followed a course of conduct which was likely to lead to the seizure of the car.³⁴

ACTS OF CONVERSION

The following kinds of act will amount to conversion.

(1) Conversion by taking

It is conversion to take goods, without lawful justification, out of the possession of the person entitled to them with the intention of exercising a permanent or temporary dominion over them.³⁵ Thus, for example, the thief who steals the plaintiff's watch, the sheriff who in the course of unlawful execution, seizes the plaintiff's television set, and the acquaintance who, without permission, drives the plaintiff's car away and returns it the next day,³⁶ are all liable in conversion, since in each case the plaintiff has been deprived

³¹ *Caxton Publishing Co. Ltd v. Sutherland Publishing Co. Ltd.* [1939] A.C. 178 at p. 202

³² *Fowler v. Hollins* (1872) L.R. 7 Q.B. 616 at p. 639.

³³ *Consolidated Co. Ltd. v. Curtis & Son* [1892] 1 Q.B. 495

³⁴ *Moorgate Mercantile Co. Ltd. v. Finch* [1962] 2 Q.B. 701.

³⁵ *Fouldes v. Willoughby* (1841) 151 E.R. 1153.

³⁶ See *Aitken v. Richardson* [1967] N.Z. L.R. 65

of the possession of the chattel to which he is entitled at all times. It is essential, however that the defendant should have intended to exercise dominion over the chattel. If he merely removed the chattel from one place to another without intending to assume possession or otherwise to deprive the plaintiff of possession, he will be liable in trespass but not in conversion. Thus, for example, it is clearly not conversion for D to move P's goods to one side in order to reach his own, even if D fails to replace P's goods with the result that they are stolen by a third party.³⁷ Nor was a ferry man liable in conversion when, after an argument with a passenger, he removed the passenger's horse from the ferry and left them on the river bank, for there was no assumption of dominion over the horses.³⁸

An example of conversion by taking in Nigeria is the case of *Davies v. Lagos City Council*,³⁹ where the defendant Council was held liable in both trespass and conversion for the act of its officials in wrongfully seizing the plaintiff's taxi cab. Another example is the Ghanaian case of *Tormekpey v. Ahiabile*.⁴⁰ There the defendant had sold and delivered a lorry to the plaintiff under a credit sale agreement, the effect of which was that property in the lorry passed to the plaintiff on delivery, with no right of seizure reserved to the defendant upon any contingency. Several months later, the defendant wrongfully seized the lorry and refused to hand it back to the plaintiff. The Court of Appeal of Ghana held the defendant liable in conversion as well as in trespass and detinue. Anin J.A. said⁴¹:

The learned [trial judge] found as a fact that at the date of the defendant's seizure of the lorry the plaintiff had made part payment of the purchase price. He held, correctly in our respectful view, that the seizure of the lorry was wrongful in the circumstances. Since the contract was one for outright sale with no contingent right of seizure reserved

³⁷ *Bushel v. Miller* (1718) 93 E.R. 428. But if the defendant's act *does* constitute conversion, because he intended to exercise dominion over the chattel, he will be strictly liable for the loss of the chattel and must therefore pay its full value to the plaintiff, for "he who wrongfully takes possession of another's good has them at his own risk." Salmond, *op. cit.* p. 96.

³⁸ *Fouldes v. Willoughby*, *supra*. But if D moves P's chattel to a distant or unreasonable place, he may be liable in conversion. See *Forsdick v. Collins* (1816) 171 E.R. 437.

³⁹ (1973) 10 CCHCJ 151. See p. 191, *ante*

⁴⁰ [1975] 2 G.L.R. 432.

⁴¹ At p. 434.

to him the defendant could not legally seize the lorry, property in which had duly passed to the plaintiff on delivery. Even if the plaintiff defaulted in paying the balance of the purchase price, the defendant's remedy was to sue for the balance of the purchase price.⁴² Accordingly, the trial judge was right in holding that the plaintiff had established his claim.

(2) Conversion by destruction, consumption or alteration

Intentionally⁴³ to destroy or consume the plaintiff's chattel constitutes conversion⁴⁴ for example, where the defendant smashes the plaintiff's window or drinks his brandy. Merely to damage the chattel of another is not conversion but trespass.⁴⁵ In each case it is a question of degree as to whether or not the damage is so great as to amount to destruction.⁴⁶ It is also conversion to alter the identity of a chattel for example, to sew cloth into a dress, to grind wheat into flour, or to turn grapes into wine.⁴⁷

(3) Conversion by using

If the defendant uses the plaintiff's chattel as if it were his own, his act is inconsistent with the rights of the plaintiff and he will be liable in conversion. "If a man takes my horse and rides it and then redelivers it to me, nevertheless I may have an action against him, for this is a conversion."⁴⁸ Thus it has been held actionable to wear the plaintiff's jewellery,⁴⁹ to use his wine bottles to store the defendant's wine,⁵⁰ and to pour the contents of his carbolic acid drums into the defendant's tank.⁵¹

Where the defendant finds the plaintiff's chattel, he does not commit conversion merely by keeping it in his possession, but he will be liable if he uses it.⁵² In an old case⁵³ it was said that:

.... no law compels him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten, or if one finds a horse, and give it no sustenance: but if a man finds a thing and uses it, he is answerable, for it is

⁴² Following *Waya v. Byrouthy* (1958) 3 W. Af.L.R. 413.

⁴³ A merely negligent destruction may give rise to liability in negligence, but not in conversion. See p.72, *ante*.

⁴⁴ *Hollins v. Fowler* (1875) L.R. 7 H.L. 754 at p. 768.

⁴⁵ *Simmons v. Lillystone* (1853) 155 E.R. 1417.

⁴⁶ *Street, op. cit.* p. 45.

⁴⁷ See *Hollins v. Fowler, supra*, at p. 768.

⁴⁸ Rolle, *Abridgment*, tit. Action sur Case, 5.

⁴⁹ *Petre v. Heneage* (1701) 88 E.R.1491.

⁵⁰ *Penfolds Wines Ltd. v. Elliot* (1946) 74 C.L.R. 204.

⁵¹ *Lancashire and Yorkshire Rly. Co. v. McNicholl* (1918) 88 L.J. K.B. 601.

⁵² *Mulgrave v. Ogden* (1591) 78 E.R. 475.

⁵³ *Ibid.*

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conversion: so if he purposely misuses it: as if one finds paper, and puts it into water. But for negligently keeping no law punishes him.

Where the defendant is lawfully in possession of the plaintiff's chattel, as bailee, he will be liable in conversion (i) if he uses it contrary to an express term in the contract of bailment prohibiting use by bailee, or (ii) where there is no express prohibition of user, if he uses it for a purpose so contrary to the terms of the bailment contract as a whole that it constitutes a material breach thereof.⁵⁴

Driving out a car without the permission of the owner may render the person who drives the car liable in an action for trespass and conversion. See *Agbahowe vs Osayobasa* (1966) NMLR page 360.

(4) Conversion by receiving

Where X, without lawful authority, transfers P's chattel to D, the mere voluntary reception of the chattel by D constitutes conversion as against P, even though D may have acted innocently (e.g. where he was unaware of P's title). Thus, for example, a buyer who receives goods which the seller has no right to sell is liable in conversion to the true owner⁵⁵, unless he can bring himself within one of the exceptions enumerated below⁵⁶: so also is a bank which receives a cheque from a person who has no title to it and credits the proceeds to that person's account.⁵⁷ The basis of liability in such cases is that the receiver, however innocent he may have been, has been a party to denial of the plaintiff's title and to the interference with his right to the possession of the goods. However, a carrier or warehouseman who in good faith receives the plaintiff's goods from X for carriage or safe custody, as the case may be, is not liable in conversion⁵⁸ since the purpose of the transfer to him is not to pass any property or interest in the goods.

There are a number of exceptions to the principle that receiving another's goods is conversion. These exceptions have been developed to meet the demands of commercial convenience.

⁵⁴ See *Street, op. cit.* p. 46.

⁵⁵ *Winfield and Jolowicz, op. cit.* p. 423; *Street, op. cit.* p. 46; *Fleming op. cit.* p. 57 *Contra Salmond, op. cit.* p. 102, who takes the view that the recipient does not commit conversion unless and until he refuses to hand the goods over to the true owner or he wrongfully disposes of them.

⁵⁶ p. 199 *post*.

⁵⁷ *B. E.W. A. C. Ltd. v. African Continental Bank Ltd.* (1971) 6 CCHCJ 12. *Lloyds Bank Ltd. v. Chartered Bank Ltd.* [1929] 1 K.B. 40. Though a collecting bank which acts in good faith and without negligence is protected by section 2 of the Bills of Exchange Act. No. 20 of 1964. See pp. 203, 204. *post*.

⁵⁸ *Hollins v. Fowler* (1875) L.R. H.L.757 at p. 767.

They include the following:

- (1) where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods and does not commit conversion provided he buys them in good faith and without notice of any defect of title on the part of the seller.⁵⁹
- (2) where a mercantile agent, having authority in the ordinary course of his business to dispose of goods, is in possession of such goods with the consent of the owner, any disposition of them made by him in the course of the business of a mercantile agent to a bona fide purchaser for value is as valid as if he had the authority of the owner.⁶⁰ Thus, for example if the owner of a car leaves the vehicle and its registration book in the possession of a car dealer but without instructions to sell, any person who buys the car in good faith from the dealer will acquire a good title and does not commit conversion as against the owner even though the sale was unauthorised.⁶¹
- (3) A person who acquires a negotiable instrument bona fide and for value from a transferor having no title to it does not commit conversion as against the true owner by receiving it from such transferor.⁶²
- (4) Where a seller or pledgor has a voidable title to goods, and his title has not been avoided at the time of the sale or pledge, a buyer or pledgee from him in good faith and without notice of the defect in his title will acquire a good title to the goods and commits no conversion.⁶³

(5) Conversion by wrongful transfer of title or possession

It is conversion to deprive the plaintiff of the possession of his goods by wrongfully transferring or disposing of them to another whether by sale and delivery,⁶⁴ pledge,⁶⁵ or delivery *simpliciter*.⁶⁶ This aspect of conversion includes a wide variety of circumstances, some of which may be listed as follows:

⁵⁹ Sale of Goods Act 1893, s. 22; Sale of Goods Law (western states), Cap. 44, s. 31.

⁶⁰ Factors Act 1889, ss 1. (1), 2(1)

⁶¹ See *Pearson v. Rose and Young Ltd.* [1951] 1 K.B. 275.

⁶² Bills of Exchange Act 1882, s. 82.

⁶³ Sale of Goods Act 1893, s. 23; Sale of Goods Law, Cap. 115, s 32.

⁶⁴ *Hollins v Fowler* (1875) L.R. 7 H.L. 757, *Emodi v. Thomas Aplin & Co. Ltd.* (1973) 4 CCHCJ 146.

⁶⁵ *Parker v. Godin* (1728) 93 E.R. 866.

⁶⁶ Whether wilfully or by mistake. See p. 201, post.

(a) In certain exceptional circumstances it is possible for a person, having no title to or right to sell goods, to convey a good title to a bona fide purchaser, free from the rights of the true owner. One such circumstance is a sale in market overt.⁶⁷ Where such a sale takes place, the purchaser acquires a lawful title and is unaffected by the rights of the true owner, but the vendor is liable to true owner in conversion, whether or not actual delivery has taken place.⁶⁸

(b) Apart from such exceptional cases, it is not possible for a person, having no title to or right to sell goods, to effect a change of property in those goods. Thus where D, without lawful authority purports to sell P's goods to X, the transaction is void, X acquires no rights in the goods, and D cannot be liable in conversion provided the goods have not been delivered to X.⁶⁹ If the goods have been delivered to X, however, then D will be liable in conversion on the ground that he has deprived P of the possession to which he is entitled. In *Chukwurah v. C.F.A.O. Motors Ltd.*⁷⁰ for instance, the plaintiff took his car to the defendants' garage for repairs. After the work had been completed, the plaintiff refused to pay the bill presented to him or to remove the car from the defendants' premises. Nine months later, the plaintiff still having failed to settle the bill or to remove the car, the defendants had the vehicle re-registered in the name of a third party who thereafter used the car as his own. Oputa J. held the defendants liable in conversion, on the following grounds⁷¹:

I admit that the [defendants] had a lien on the car and could refuse to deliver it to the plaintiff until their bill was honoured. But could they in exercise of this right of lien. . . sell or part with the possession of the plaintiff's car? I do not think so, A lien is nothing more than the right to retain possession of a thing until a claim is satisfied. A lien does not and generally cannot contemplate the effecting of any transference of the property in the thing the subject-matter of the lien, and therefore a lien generally cannot confer the right to sell or pass ownership of property. . . The plaintiff still retains the ownership of his car and is entitled to its possession. Registering the plaintiff's car... and delivering the same to R.S, [the third

⁶⁷ p. 199, ante.

⁶⁸ *Fowler v. Hollins* (1872) L.R. 7 Q. B. 616 at p. 627.

⁶⁹ *Weredu v. West Coast Co. Ltd.* (1955) 14 W.A.C.A. 718 at p. 721; *Fowler v. Hollins* -- *ibid*

⁷⁰ [1967] F.N.L.R. 168.

party], to my mind constitutes dealing with the plaintiff's car in a manner inconsistent with the plaintiff's right as the true owner of the car. From the facts and circumstances of this case it is reasonable to infer and impute to [the defendants] an intention of negating the rights of the true owner of the car, and of asserting a right inconsistent therewith. This amounts to the tort of conversion. Whether there was a sale to R.S. or not does not seem to be material or relevant to the issue of conversion. It would still be conversion if [the defendants] gave the car to R.S. for use and return.

(c) Where D, without lawful justification, sells and delivers P's goods to a third party, he will be liable to P in conversion, and it is no defence that D acted under an honest mistake. Thus, for example, an auctioneer who mistakenly sold the plaintiff's goods and handed them over to the buyer was held liable in conversion even though it was clear that he had acted honestly and in good faith.⁷² However, it seems that the defendant will be liable only where he has negotiated the transaction himself and delivered the goods in pursuance of it, and he will not be liable if he has not negotiated the sale himself but has merely delivered the goods to the order of the seller. Thus mere carriers⁷³ or warehousemen⁷⁴ who deliver goods to the order of their principals do not commit conversion as against the true owners of the goods; and where goods were deposited with an auctioneer to sell, but the seller eventually sold them himself, the auctioneer was held not liable in conversion to the true owner for subsequently delivering the goods to the buyer on the seller's instructions.⁷⁵

(d) If a carrier⁷⁶ or warehouseman⁷⁷ delivers goods to the wrong person, he will be liable in conversion to the person to whom they ought to have been delivered? but he will not be liable if the reason for his failure to deliver to the rightful owner is that the goods have been lost or destroyed whether by accident or by carelessness.⁷⁸

⁷² *Consolidated Co. Ltd. v Curtis & Son* [1892] 1 Q.B. 495.

⁷³ *Sheridan v. New Quay Co.* (1858) 140 E.R. 1234.

⁷⁴ *Glyn Mills & Co. v. East and West India Dock Co* (1880) 6 Q.B. D. 475 at p. 491.

⁷⁵ *National Mercantile Bank Ltd. v. Rymill* (1881) 41 L. T. 767 See also *Nakyauta v. Thomas* (1975) 5 S. C. 51 at pp. 53, 54.

⁷⁶ *Youl v. Harbottle* (1791) 170 E.R. 81.

⁷⁷ *Devereux v. Barclay* (1819) 106 E.R. 521.

⁷⁸ *The Arpad* [1934] p. 189 at p. 232.

(6) Conversion by detention

Where the defendant is in possession of the plaintiff's chattel without authority and refuses to surrender it to the plaintiff when asked to do so, he commits conversion.⁷⁹

See *Ajao vs. Ashiru*, *supra* where the defendant was held liable in conversion for the seizure of the pepper mill of the plaintiff.

The essence of this type of conversion is that the defendant, in refusing to hand over the plaintiff's goods, has shown an intention to keep it in defiance of the plaintiff's rights.⁸⁰ Thus, where no such adverse detention is shown, there will be no liability in conversion. "Merely to be in a possession of a chattel without title is not a conversion, nor indeed is it a tort of any kind."⁸¹ Thus, for instance, where a bailee retains possession of goods after the bailment has come to an end, he does not commit conversion by the mere act of "holding over"⁸²; he will be liable only if the bailor has made a demand for the return of the goods and the bailee has refused to comply with the demand. Similarly, a person who finds a chattel does not commit conversion merely by retaining possession of it⁸³; he will be liable only if he refuses to hand it over to its owner or shows in some other way that he intends to detain it adversely to the owner. The following further principles have been established by the authorities:

- (a) There is no obligation to take a chattel to its owner, in the absence of any contractual term to that effect. The only obligation is to permit the owner to come and get the chattel.⁸⁴
- (b) To be actionable, the refusal to surrender the goods must be categorical.⁸⁵ No conversion is committed if the refusal is qualified for reasonable and legitimate purpose, for example, where the defendant refused to deliver up the goods immediately, saying that he wishes first of all to verify that the claimant has a right to them.⁸⁶
- (c) No demand is necessary where conversion can be established in some other way, for example, where the defendant has used or consumed the goods, where he has disposed of

⁷⁹ He is also liable in detinue. See pp. 205-207, *post*.

⁸⁰ *Clayton v. Le Roy* [1911] 2 K.B. 1031 at p. 1052.

⁸¹ *Salmond, op. cit.* p. 98.

⁸² Though he may be liable for breach of contract.

⁸³ *Hollins v. Fowler* (1875) L.R.7 H.L. 757 at p. 766. See p. 205, *post*.

⁸⁴ *Capital Finance Co. Ltd. v. Bray* [1964] 1 W.L.R. 323 at p. 329.

⁸⁵ e.g. where the defendant intimates to the plaintiff that any attempt by the latter to recover possession will be treated as a trespass: *Caley v. Rogers* [1938] Q.S.R. 25.

⁸⁶ *Clayton v. Le Roy* [1911] 2 K.B. 103

them to a third party by way of sale or pledge, or where he acquired them wrongfully in the first place.⁸⁷

- (d) As in cases of failure to deliver goods, the defendant will not be liable in conversion for failure to return a chattel if such return is impossible by reason of the fact that the chattel has been lost or destroyed, whether or not such loss or destruction is due to his own carelessness.⁸⁸

(7) Conversion of negotiable and other instruments

Any chattel may be the subject-matter of conversion. Thus there is no difficulty in holding that a negotiable instrument, such as a cheque, bill of exchange or promissory note, is a chattel and therefore can be converted. Such documents are, however, special in that their value lies not in their tangible form as pieces of paper, but in their character as chosen in action, and in order to satisfy the demands of commercial convenience the courts have developed the rule that in an action for the conversion of a negotiable instrument the plaintiff can claim the full amount represented by the instrument.⁸⁹ Thus, for example, where a bank collects a cheque for a customer who has no title to the cheque and credits the amount represented by the cheque to the customer's account, the bank is liable in conversion to the true owner of the cheque, and the latter can recover the full amount represented by it.⁹⁰ In such a case the court treats "the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it."⁹¹

Section 2 of the Bills of Exchange Act 1964^{91a} provides a statutory defence for a collecting bank which acts in good faith and without negligence. This defence was unsuccessfully relied upon in *B.E.W.A.C. Ltd. v. African Continental Bank Ltd.*⁹² Here two fraudulent employees of the plaintiffs stole three cheques made out to the plaintiffs and opened an account at a branch of the defendant bank in the name of a fictitious company. The rogues

⁸⁷ *Brown v. Mackenzie* (1871) 10 S.C.R. (N.S.W.) 302.

⁸⁸ *Williams v. Gesse* (1837) 132 E.R. 637. But he will be liable in detinue. See p. 206, post.

⁸⁹ *Lloyds Bank Ltd. v. Chartered Bank Ltd.* [1929] 1 K.B. 40. It seems that this principle applies also to non-negotiable instruments wherever such instrument represents a particular intangible right, so that there must be conversion of, e.g. a guarantee (*McLeod v. McGhie* (1841) 133 E.R. 771) or a life insurance policy (*Watson v. McLean* 1858) 120 E.R. 436) and the plaintiff can recover the full value of the right represented by such instrument.

⁹⁰ *Ibid.*: *B.E.W.A.C. Ltd. v. African Continental Bank Ltd.* (1971) CCHCJ 12.

⁹¹ *Lloyds Bank Ltd. v. Chartered Bank Ltd.*, *Ibid.* at pp.55, 56 per Scrutton L.J.

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⁹² *Supra*

deposited the cheques with the bank for collection and the bank eventually credited the account with the amount of the cheques.

The plaintiffs sued the bank for conversion of the cheques and the bank pleaded section 2 of the Act. Lambo J. held that it was for the bank to establish that it had not been negligent in dealing with the cheques. This it had failed to do, for the evidence showed that the bank's officials had been careless in, *inter alia*, opening the account in the name of a company without asking for the customary references and proper particulars of the company, and in permitting the account to be operated by the rogues.

THE TITLE OF THE PLAINTIFF

Apart from the owner in possession or with an immediate right to possession of a chattel, who clearly has a sufficient interest to maintain an action in conversion, the following other classes of person may be entitled to sue.

(1) Bailees

A bailee of goods has lawful possession and so can maintain an action in conversion against any person who interferes with that possession. If the bailment is at will, the bailor also may sue since he is deemed to have an immediate right to possession.⁹³ Any wrongful act committed by the bailee with respect to the goods will have the effect of terminating the bailment forthwith, and the bailor may then sue. Thus, for example, if the bailee wrongfully sells the goods to a third party, the bailor may at once bring an action in conversion against both the bailee and the third party.⁹⁴

(2) Holders of liens

The holder of a lien has a right to possession of the goods which are subject to the lien. He may therefore maintain an action in conversion against any person who interferes with them. However, if he wrongfully parts with the possession of the goods he loses his lien and he will himself be liable to the owner in conversion.⁹⁵

(3) Finders

A person who finds a chattel acquires possession and therefore can maintain an action against any person who interferes with such possession⁹⁶ except (i) the true owner and (ii) (probably) the

⁹³ *Kahler v. Midland Bank Ltd.* [1950] A.C. 24 at p. 56.

⁹⁴ *Cooper v. Willomatt* [1843-60] All E.R. Rep. 556.

⁹⁵ *Mulliner v. Florence* (1878) 3 Q. B. D. 484

⁹⁶ *Armory v. Delamirie* (1722) 93 E.R. 664

owner of the land on which it was found, who have a better title and right to possession than the finder.

Where a chattel is found attached to or embedded under the surface of land it seems to be established that the owner of the land has a better title to the chattel than the finder.⁹⁷ But there is some uncertainty as to the position where the chattel is found lying on the land. In at least two cases it has been held that the finder of a chattel lying loose on land has a better right to possession than the owner of the land,⁹⁸ but in another case it was said that there is a "legal presumption" that the owner of the land is the owner of chattels found on the land."⁹⁹ One way of reconciling the cases is to accept that "whether the owner of the land possesses things found there depends on whether he intends, and has the power, to exercise physical control over them."¹ Where that chattel is attached to or embedded in the land, such control will be conclusively presumed; but where it lies on the surface of the land, various factors such as the nature of the chattel, the nature of the place (e.g. whether it was open to the public² or kept private), and whether the owner of the land was in occupation,³ may be taken into account in determining whether the owner has sufficient control to entitle him to claim the chattel as against the finder.

DETINUE

The action in detinue lies where:

- (i) the plaintiff has an immediate right to the possession of goods, and
- (ii) the defendant, who is in actual possession of those goods, fails or refuses to deliver them up after the plaintiff has made a proper demand for their return.

Detinue thus covers the same ground as conversion by detention; however, there are the following differences between the two causes of action:

- (1) The defendant will not be liable for conversion by detention where, prior to the demand for their return by the plaintiff, the goods have been lost or destroyed, whether by accident

⁹⁷ *Elwes v. Brigg Gas Co.* (1886) 33 Ch. D. 562; *South Staffordshire Water Co. v. Sharman* [1896] 2 Q.B. 44.

⁹⁸ *Bridges v. Hawkesworth* [1843-60] All E.R. Rep.122; *Hannah v. Peel* [1945] K.B. 509. See also *Parker v. British Airways Board* [1982] 2 W.L.R. 503 C.A.

⁹⁹ *Re Cohen* [1953] Ch. 88 at pp. 92, 93.

¹ *Street, op. cit.* p. 40

² Such as a shop

³ See *London Corp v. Appleyard* [1963] 2 All E.R. 834.

or by the negligence of the defendant.⁴ But the defendant will be liable in detinue in such circumstances, unless he proves that the goods were not lost or destroyed through his negligence.⁵ In this respect, therefore, liability in detinue is stricter than in conversion by detention.

- (2) Refusal to surrender on demand is the essence of detinue, but it is only one of several forms of conversion.
- (3) In detinue the plaintiff can claim specific restitution of the goods, but he cannot do so in conversion. Thus if the plaintiff wishes to recover the goods *in specie* and not merely their value in the form of damages he must sue in detinue for in conversion the defendant always has the option of keeping the goods and paying their value as damages.⁶ Even in detinue, however, the court's power to order specific restitution is discretionary and "ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of special value to the plaintiff, and where damages would fully compensate."⁷
- (4) In conversion, damages are generally assessed on the value of the goods at the date of conversion, whereas in detinue they are assessed on the value of the goods at the date of the trial. Thus, if the value of the chattel has increased between the date of the refusal to surrender and the date of the trial, the plaintiff should sue in detinue, but if there has been a decrease in value during the period, he should sue in conversion. ✓

In other respects, the same principles apply to detinue as apply to conversion by detention.⁸⁻⁹ Thus in both torts the defendant must have shown an intention to keep the chattel in defiance of the

⁴ See p. 203

⁵ *Coldman v. Hill* [1919] 1 K.B. 443; *Koroye v. West African Examinations Council* (1974) 12 CCHCJ 1853. There will be liability in both torts where the defendant wrongfully and intentionally parted with possession before the demand and refusal: *Jones v. Dowle* (1841) 152 E.R. 9.

⁶ *Whiteley v. Hilt* [1918] 2 K.B. 808 at p. 824.

⁷ *Ibid.* at p. 819. Thus in *Darefooh v. Karam* (1941) 7 W.A.C.A 113 it was held that the trial judge had rightly refused to order specific restitution of a lorry. See also *Oluwa Glass Co. v. Ehinlawo* (1990) 7 NWLR part 160 page 14 where it was held that in an action for detinue a successful plaintiff is entitled to an order of a specific restitution of the chattel or in default its value and also damages for its detention up to the date of judgment.

⁸⁻⁹ See pp. 202, 203, *ante*.

plaintiff and in neither tort is it sufficient merely to show that the defendant had the plaintiff's goods in his possession without any withholding of the goods from the plaintiff. In other words, both causes of action are founded on a demand by the plaintiff and a refusal by the defendant. A Nigerian example of a successful action in detinue is *Udechukwu v. Okwuka*.¹⁰ In that case the plaintiff bought a kit-car from the defendant and, after the sale, left it on the defendant's premises, having told his (plaintiff's) driver to hand over the earnings of the car to the defendant for safekeeping. Later, when the plaintiff went to collect the car, the defendant refused to allow him to take it away until "he (the defendant) saw the driver."

One of the arguments of the defendant was that he was not liable in detinue since his refusal to hand over the car was not categorical but merely conditional.¹¹ De Lestang FJ., delivering the judgment of the West African Court of Appeal, rejected this contention and held the defendant liable in detinue. He said¹²:

What must be established in a suit in detinue is wrongful detention by the defendant, that is to say, the defendant must have shown an intention to keep the kit-car in defiance of the plaintiff. This is usually shown by proving a demand and a refusal to deliver. When, however, the refusal is conditional it does not necessarily show a withholding of the chattel against the will of the plaintiff, provided that the condition is reasonable and not merely a device to put off the plaintiff. But where, as in the present case, the defendant/respondent knew that the kit-car was the absolute property of the plaintiff/appellant and had himself removed the appellant's driver and substituted his own driver in his place, his refusal to deliver unless the appellant brought the driver was unreasonable and without justification, and showed in my view a clear intention on his part to withhold it from the appellant. In other words, his refusal was conditional in form but not in substance."

Public Duty

The common law principle that a party may be liable in action for detinue and trespass to chattel by depriving the owner of the chattel of the possession of his chattel is not applicable if the tort of detinue

¹⁰ (1956) 14 W.A.C.A. 70

¹¹ See p. 202, *ante*

¹² At p. 71.

or trespass to chattel is committed by a person in the course of performance of public duty. In *Igbuya vs Deregare & others* (1990) 5 NWLR part 139 page 425, the plaintiff/appellant claimed in the high court the sum of ₦25,000 jointly and severally from the defendants/respondents being general and special damages for trespass into his private and approved abattoir and the removal from the abattoir a whole cow slaughtered for sale. There was no dispute that the 1st defendant/respondent entered the abattoir and removed the cow but the contention of the defendants/respondents is that the cow was seized and removed as unfit for human consumption by the 1st defendant/respondent in exercise of his power as a health officer pursuant to the provision of the Public Health Law of Bendel State. The claim of the plaintiff / appellant was dismissed on the ground that there is no evidence from a veterinary surgeon or officer that the cow is fit for human consumption and that the 1st defendant/respondent was entitled to seize and destroy the cow that he discovered was not fit for human consumption.