

Moshi Co-operative University

From the Selected Works of MWAKISIKI MWAKISIKI

Summer April 9, 2071

LAW OF TORTS IN TANZANIA

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MOSHI CO-OPERATIVE UNIVERSITY

LAW OF TORTS



A STUDENT TRAINING MANUAL

BY

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E.

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This Study Manual attempts to supplement many texts and cases which any average student will be expected to read. The Manual should be used as a minimal supplementary reading to standard Law Textbooks, Law Reports, Articles and Commentaries abound in libraries and bookstores. Always bear in mind that the basic aim of this Study Manual is to arouse in your minds an intelligent interest in the Law of Tort and in the unfamiliar art of interpreting Case Law or Judge Made Law.

❖ TOPIC ONE: INTRODUCTION TO LAW OF TORTS

➤ **At the end of TOPIC ONE you should be in a position to understand the following salient areas of the Law of Tort:**

1. Comprehensive Meaning of law of Torts, nature & its constituents
2. Reception of the Law of Torts in Tanzania.
3. Foundations of Tortious Liability and the criticism thereto.
4. Distinction between Tort and Other Forms of Liability eg. Breach contract
5. General and peculiar Rules patterning to Tortious Liability.

❖ INTRODUCTION



▪ DEFINITION OF THE TERM TORT

- Etymologically the term tort is the French equivalent of the English word ‘wrong’ and of the Roman law term ‘**delict**’. The word tort is derived from the Latin word **tortum** which means **twisted or crooked or wrong** and is in contrast to the word rectum which means straight.
- Tort now means a breach of some duty independent of contract giving rise to a civil cause of action and for which compensation is recoverable.
- In spite of various attempts an entirely satisfactory definition of tort still awaits its master. In general terms, a tort may be defined as a civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages. Some other definitions for tort are given below:-

❖ SCHOLARLY DEFINITIONS OF TORTS

- **SALMOND’s Definition:** Tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is NOT exclusively the breach of a contract, or, the breach of a trust, or, other merely equitable obligation.
- **WINFIELD’s Definition:** ‘Tortious liability’ arises from the breach of duty primarily fixed by law. This duty is towards persons generally and its breach is redressible by an action for unliquidated damages.

- **FRASER's Definition:** Tort is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.
- **POLLOCK's Definition:** 'Tort' is an act or omission (not merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is relate to a harm suffered by a determinate person, giving rise to a civil remedy which is not an action of contract.
- 'The law of tort's in civil wrongs is a collective name for the rules governing many species of liability which, although their subject matter is wide and varied have certain broad features in common, are enforced by the same kind of legal processes that are subject to similar exceptions.
- **CLERK & LINDSELLs Definition:** A tort may be described as wrong independent of contract, for which the appropriate remedy is common law action.

❖ ANALYSIS OF WINFIELD'S DEFINITION OF TORT

- **1. Duty primarily fixed by law:** An essential principle of tortious liability is that the duty is always fixed by law itself and NOT by any agreement between parties. Therefore parties cannot create a tortious liability through a contract, nor, can they 'negate' a tortious liability through a contract.
- For Example I am under a legal duty not to trespass on my neighbor's property. This is a duty primarily fixed by law on me. Similarly, by the same principle my neighbour cannot trespass into my property.
- As per Winfield's definition, liability arises from the breach of such duties fixed by law. Any person who commits such a breach can be proceeded against in a court of law by the person whose rights are breached.
- **2. Duty is towards persons generally:** Here, the word 'generally' implies that applies to all. For example I am duty bound not to trespass into my neighbor's land. Similarly he is also duty bound not to trespass into my land. Likewise, all our other neighbors and also others who are not our neighbor's are bound by the same law not to trespass into each other's lands.
- **3. Action for unliquidated damages:** In tort the damages are unknown and 'unquantified' till an action for damages arises in a court. Thereafter, the court decides the quantum of damages based on merits of the claim and circumstances of the case.

▪ **Criticism (shortcomings) of Winfield's definition:**

- a) In framing this definition, Winfield is not seeking to indicate what conduct is and what is not sufficient to involve a person in tortious liability, to distinguish from certain other branches of law
- b) The phrase 'duty towards persons generally' is vague and not adequate to include duties arising from special relationships like doctor and patient etc., and to exclude duties arising between guardian and ward or trustee and beneficiary etc. which fall outside the ambit of law of tort.
- c) The phrase 'liability arises from the breach of duty', may be true at an earlier stage of development of law of tort, but it is not applicable or appropriate to an important category of liability at the present day, for example, vicarious liability of a master for his servant's
- d) 'Unliquidated damages' is not the only remedy. There are other remedies such as self help, injunction and specific restitution of property also available.

❖ **ANALYSIS OF SALMOND'S DEFINITION OF TORT**

- **1. Tort is a civil wrong.** A 'Wrong' can be civil or criminal. Tort belongs to the category of civil wrongs. In the case of a civil wrong, the injured party institutes civil proceedings against the wrong doer and the remedy is damages.
- **2. Tort is other than Breach of Contract or Breach of Trust:** In order to determine whether the wrong is tort or not, the following steps are to be followed, a) Whether the wrong is civil or criminal. b) If it is civil wrong, it has to be further seen that whether it belongs to another recognised category of the civil wrongs, such as breach of contract or breach of trust. c) It is only when the wrong does not belong to any other category of the wrong that is, breach of contract or trust, it is tort and if the wrong is breach of contract or trust, it is not a tort.
- **3. Tort is redressible by action for unliquidated damages:** Damages is the most important remedy for a tort. After the commission of the wrong, it is not possible to undo the harm which has already been caused but it is the monetary compensation which can be awarded to the injured party.
- **Criticism of Salmond's definition:** The definition given by Salmond fails to underline the essential characteristics of tortious acts. According to this definition tort is a wrong

but it does not explain what is wrong and what kinds of wrong. Moreover the expression "civil wrong" itself requires explant's definition also suffers from all the shortcomings of Winfield's definition. While this definition is more informative, this is still far from perfect.

❖ **INGREDIENTS OF TORTS**

- Every wrongful act is not a tort. To constitute a tort:
 - There must be a wrongful act committed by a person;
 - The wrongful act must be of such a nature as to give rise to a legal remedy and
 - Such legal remedy must be in the form of an action for unliquidated damages.

▪ **1) Wrongful Act**

- An act which prima facie looks innocent may become tortious, if it invades the legal right of another person. In **Rogers v. Ranjendro Dutt**, the court held that, the act complained of should, under the circumstances, be legally wrongful, as regards the party complaining. That is, it must prejudicially affect him in some legal right; merely that it will however directly, do him harm in his interest is not enough.
- A legal right, as defined by Austin, is a faculty which resides in a determinate party or parties by virtue of a given law, and which avails against a party (or parties or answers to a duty lying on a party or parties) other than the party or parties in whom it resides.
- Rights available against the world at large are very numerous. They may be divided again into public rights and private rights. To every right, there corresponds a legal duty or obligation. This obligation consists in performing some act or refraining from performing an act.
- Liability for tort arises, therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.
- Liability for tort arises, therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

▪ **2) Damage**

- In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. In this connection we must have a clear notion with regard to the words damage and damages.

- The word damage is used in the ordinary sense of injury or loss or deprivation of some kind, whereas damages mean the compensation claimed by the injured party and awarded by the court. Damages are claimed and awarded by the court to the parties.
- The word injury is strictly limited to an actionable wrong, while damage means loss or harm occurring in fact, whether actionable as an injury or not.
- **The real significance of a legal damage is illustrated by two maxims, namely: *Damnum Sine Injuria, ubi Jus Ibi remedium and Injuria Sine Damno.***

▪ **DAMNUM SINE INJURIA**

- It means that harm which is caused without violation of legal right. This is to say causing of damage, however substantial, to another person is not actionable in law unless there is also violation of legal right by one results in consequential harm to the other
- “The mere fact that a man is injured by another’s act gives in itself no cause of action; if there is deliberate the party injured will have no claim in law even though the injury is intentional, so long as the other part is exercising”. Lord Wright a legal right. (**Grant v. Australian Knitting Mills¹**)
- According to this maxim “damage” is not the basis of action unless such damage is the results of violation of legal right of plaintiff.
- Also in the case of **Action v. Blundell²** the defendant by digging a coal pit intercepted the water which affected the plaintiff well, less than 20years old, at a distance of about one mill. It was held, they were not liable. It was observed “the person who owns the surface may dig therein and apply all that is there found to his own purposes, at him free will and pleasure and that if in the exercise of such rights he intercepts or drains off the water collected from underground springs in the neighbor’s well, this inconveniences to his neighbor fall within description damnum abseque injuria which cannot become the ground of action.
- In **Chesmore v. Richards³** the plaintiff, a mill owner, was using for his mill for about 60 years water from a stream which was fed by rainfall percolating through underground strata to the stream, but not flowing in defined channels. The defendant sunk a well on their land

¹(1935) ALLER 209.

² (1848) 12M, & W 324.

³ (1859) 7 HCL. 349.

and pumped large quantities of water, which would otherwise have gone to the plaintiff's stream, thereby causing loss to the plaintiff. For this the defendants were held not liable.

▪ **INJURIA SINE DAMNUM**

- This means an infringement of a legal private right without any actual loss or damage. In such a case the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man is hindered of his right.
- Every person has an absolute right to property, to the immunity of his person, and to his liberty, and an infringement of this right is actionable per se. actual perceptible damage is not, therefore, essential as the foundation of an action. It is sufficient to show the violation of a right in which case the law will presume damage. Thus in cases of assault, battery, false imprisonment, libel, trespass on land, etc., the mere wrongful act is actionable without proof of special damage.
- The court is bound to award to the plaintiff at least nominal damages if no actual damage is proved. This principle was firmly established by the election case of **Asby v. White**⁴, in which the plaintiff was wrongfully prevented from exercising his vote by the defendants, returning officers in parliamentary election. The candidate for whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election. The plaintiff was allowed damages by Lord Holt saying that there was the infringement of a legal right vested in the plaintiff

▪ **3) Remedy**

- The law of torts is said to be a development of the maxim ***ubi jus ibi remedium*** or 'there is no wrong without a remedy'. If a man has a right, he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without remedy; want of right and want of remedy are reciprocal.
- Where there is no legal remedy there is no wrong. But even so the absence of a remedy is evidence but is not conclusive that no right exists.

⁴ (1703) 2 Lord Raym 938.

❖ RECEPTION OF LAW OF TORTS IN TANZANIA

- Tanzanian tort law stems from English common law, and thus its history is that of English tort law as it developed from the twelfth century onwards. This is a history which has been well chronicled.
- Otherwise most of Tanzanian Law of Tort is Common Law based and was developed and shaped by socio-economic events taking place in England.
- Colonial Tanganyika had a dual Court System. There was a Court System for Natives (applying Customary Law and Islamic Law). There were also Subordinate Courts. Subordinate Courts were specifically tailored to cater for the Non-Natives. Subordinate Courts applied general laws of Tanganyika.
- Most of Tort cases we shall study originated from Subordinate Courts' System applying English Law of Torts. Dual Court system in Tanganyika was finally unified into single Court System by the Magistrates' Courts Act, 1963 which provided for the 3-tier Court system consisting of the High Court; District Court and Primary Court. It goes without saying that the history and development of the English Common Law is as relevant to England as it is for Tanzania.
- Common Law of Torts as applicable in Tanzania today emerged from a society wherein all facets of life were regulated according to classes (ie King and Royalty; Nobility and *Villein*) of people. To understand the Common Law of Tort as applicable in Tanzania it is imperative to understand its feudal origin in England. Land, in feudal Britain was the source and principal means of wealth and therefore the main source of power and the origin of the common law reflects this situation. Law of Torts emerged from simple conflicts on, over and pertaining to land.
- The **major sources of tort law** includes (I) Common Law of England received in Tanzania through the Reception Clauses as per section 2 (3) of JALA. (II) Statutory Laws: Parliament has made very little inroad into Law of Tort. The Tanzanian law of Tort is still basically Common Law of England. Parliament has enacted pieces of legislation such as Law Reform

(Fatal Accidents and Miscellaneous Provisions), Occupiers Liability Act just to mention a few. (III) Case laws or precedents form basic source of tort law too in Tanzania.

❖ **NATURE OF TORTS**

▪ **Tort and crime**

- Historically tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages.
- However, tort is a species of civil injury or wrong. The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law.
- A civil wrong is one which gives rise to civil proceedings. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused.
- Sometimes the same wrong is capable of being made the subject of proceedings of both kinds. For example assault, libel, theft, malicious injury to property etc. in such cases the wrong doer may be punished criminally and also compelled in a civil action to make compensation or restitution.
- Not every civil wrong is a tort. A civil wrong may be labeled as a tort only where the appropriate remedy for it is an action for unliquidated damages.
- Thus for example, public nuisance is not a tort merely because the civil remedy of injunction may be available at the suit of the attorney general, but only in those exceptional cases in which a private person may recover damages for loss sustained by him in consequence thereof.
- However it has to be born in mind that a person is liable in tort irrespective of whether or not an action for damages has been given against him. The party is liable from the moment he commits the tort. Although an action for damages is an essential mark of tort and its characteristic remedy, there may be and often other remedies also.

❖ **DIFFERENCES BETWEEN TORT AND CRIME**

- Being a civil injury, tort differs from crime in all respects in which a civil remedy differs from a criminal one. There are certain essential marks of difference between crime and tort they are:

- Tort is an infringement or privation of private or civil rights belonging to individuals, whereas crime is a breach of public rights and duties which affect the whole community.
- In tort the wrong doer has to compensate the injured party whereas in crime, he is punished by the state in the interest of the society.
- In tort the action is brought about by the injured party whereas in crime the proceedings are conducted in the name of the state.
- In tort damages are paid for compensating the injured and in crime it is paid out of the fine which is paid as a part of punishment. Thus the primary purpose of awarding compensation in a criminal prosecution is punitive rather than compensatory.
- The damages in tort are unliquidated and in crime they are liquidated.

❖ SIMILARITIES BETWEEN TORT AND CRIME

- There is however a similarity between tort and crime at a primary level.
- In criminal law the primary duty, not to commit an offence, for example murder, like any primary duty in tort is in rem and is imposed by law.
- The same set of circumstances will in fact, from one point of view, constitute a crime and, from another point of view, a tort. For example every man has the right that his bodily safety shall be respected. Hence in an assault, the sufferer is entitled to get damages. Also, the act of assault is a menace to the society and hence will be punished by the state.
- However where the same wrong is both a crime and a tort its two aspects are not identical. Firstly, its definition as a crime and a tort may differ and secondly, the defenses available for both crime and tort may differ.
- The wrong doer may be ordered in a civil action to pay compensation and be also punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him.

❖ DIFFERENCE BETWEEN TORT AND BREACH OF TRUST

- Firstly, in case if a breach of a trust the damages claimable by the injured party may possibly be liquidated simply because it is only the misused or mismanaged part of the property will be claimable by the injured party. In tort the damages claimable by the injured party are always unliquidated.

- Secondly, breach is distinguished from tort in another sense that the law relating to trust is an independent part of the law which is detachable from other parts of our law. The reason is more historical. The law of torts has its origin as a part of common law where breach of trust could be redressed in the court of Chancery.

❖ TORT VERSUS CONTRACT

- At the present day, tort and contract are distinguished from one another in that, the duties in the former are primarily fixed by law while in the latter they are fixed by the parties themselves.
- Agreement is the basis for all contractual obligations. “People cannot create tortious liability by agreement. Thus I am under a duty not to assault you, not to slander you, not to trespass upon your land because the law says that I am under such duty and not because I have agreed with you to undertake such duty.
- **Some of the distinctions between tort and contract are given below:**
 - A tort is inflicted against or without consent; a contract is founded upon consent.
 - In tort no privity is needed, but it is necessarily implied in a contract.
 - A tort is a violation in rem (right vested in some person and available against the world at large); a breach of contract is an infringement of a right in personam (right available against some determinate person or body).
 - Motive is often taken into consideration in tort, but it is immaterial in a breach of contract.
 - In tort the measure of damages is not strictly limited nor is it capable of being indicated with precision; in a breach of contract the measure of damages is generally more or less nearly determined by the stipulations of the parties.
- Another discrepancy between contracts and torts is seen in the nature of damages under each. In contracts the plaintiff will be claiming liquidated damages whereas in torts he will be claiming unliquidated damages. When a person has filed a suit or put a claim for the recovery of a predetermined and fixed sum of money he is said to have claimed liquidated damages. On the other hand when he has filed a suit for the realization of such amount as the court in its discretion may award, he is deemed to have claimed unliquidated damages.

❖ TORT VERSUS QUASI-CONTRACT

- Quasi contract cover those situations where a person is held liable to another without any agreement, for money or benefit received by him to which the other person is better entitled.
- According to the Orthodox view the judicial basis for the obligation under a quasi-contract is the existence of a hypothetical contract which is implied by law. But the Radical view is that the obligation in a quasi-contract is ***sui generis*** and its basis is prevention of unjust enrichment.
- **Quasi-contract contract differs from tort in that:**
 - There is no duty owed to persons for the duty to repay money or benefit received unlike tort, where there is a duty imposed.
 - In quasi contract the damages recoverable are liquidated damages, and not unliquidated damages as in tort.
- Quasi contracts resembles tort and differs from contracts in one aspect. The obligation in quasi contract and in tort is imposed by law and not under any agreement.

❖ FOUNDATION OF TORTUOUS LIABILITY

- **Tortious liability** is a legal obligation of one party to a victim as a results of a civil wrong or injury. This action requires some form of remedy from a court system.
- Tortious liability arises from the breach of a duty primarily fixed by law this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.
- There are different opinions among the jurist as to what constitute to the foundation of tortious liability, the following are theories arguing about the foundation of tortious liability:-
- **There are two theories with regard to the basic principle of liability in the law of torts or tort. They are:**
 - **Wider and narrower theory**-all injuries done by one person to another are torts, unless there is some justification recognized by law.
 - **Pigeon-hole theory**- there is a definite number of torts outside which liability in tort does not exist.

➤ **1st Theory**

- The first theory maintain that all injuries done to another person is a tort unless there is justification recognised by law. This view is supported by **Sir Frederick Pollock** and eminent judges and it also supported by **Professor Winfield**.
 - According to **Professor Winfield**, if I injure my neighbour he can sue me in court whether a wrong happen to have a particular name like assault, battery, deceit, slander or whether it has no such name at all and I shall be liable if I cannot prove lawful justification.
 - He added tort are infinitely various and therefore are not limited or confined and therefore a the court can create new tort as it was stipulated in **Chapman v. Picker S. Gill**.
 - It follows that the Courts are free to create new torts whenever in their discretion they consider that this is desirable. This theory is supported by two chief arguments. The first is that some eminent Judges, both ancient and modem, have expressed this view. Thus Lord Camden said in 1762, “Torts are infinitely various, not limited or confined and therefore courts have full power to create new torts (or more consistently with judicial caution) to extend the law of torts without any baptismal ceremony for each extension.
 - Professor Winfield’s second argument is based on the incontrovertible fact that the law of torts to-day is wider than it was one hundred and fifty years ago. New torts have been created to which specified names have been given. This must prove according to him that the Courts assume that they have the right to create new torts.
 - **But does it ?** No one can deny that the Courts have created new torts by the gradual and sometimes almost imperceptible extension of old torts, but this differs fundamentally from the view that they have the right deliberately to create new ones based on a general principle of liability.
-
- Generally this theory leads to the wider principle that all unjustifiable harms are tortious. This enables the courts to create new torts and make defendants liable irrespective of any defect in the pleading of the plaintiff.

- This theory resembles the saying, my duty is to hurt nobody by word or deed. Court's have repeatedly extended the domain of the law of torts. For example, negligence became a new specific tort only by the 19th century AD.
- Similarly the rule of strict liability for the escape of noxious things from one's premises was laid down in 1868 in the leading case of **Rylands v. Fletcher**.

➤ **2nd Theory**

- The second theory is known as **Pigeon-hole theory**. It resembles the ten commandments with their precise specification of sins.
- According to the theory the law of tort consist of net-set of pigeon holes, each containing a specific tort. If is the defendants wrong doesn't fit in any pigeon holes he has committed no tort.
- **Sir John Salmond** is a chief supporter of this theory. He argued that just as the criminal law consist of a body of rules establishing specific offences, so the law of tort so the law of tort consist the body of rules establishing specified injuries.
- Whether am prosecuted for an alleged offence or sued for an alleged tort, its for my adversary to prove that the case fills with a specific and established rule of liability and not for me to defend myself by providing that it is within some specific and established rule of justification or excuse⁵.
- For Salmond the law must be called The Law of Torts rather that The Law of Tort.

❖ **CRITICISM OF GENERAL LIABILITY PRINCIPAL**

- ❖ Having discussed the theories of Pollock, Salmond, and Winfield, it is now time to tabulate **criticisms of the “general liability” principle**.
- ❖ 1. There is no agreement concerning the nature of this general principle. Pollock says that it covers “willful,” but Winfield believes that it includes all harm.
- ❖ 2. There is no agreement concerning its origin. Winfield takes it back to the thirteenth century, Pollock says that it is modern, Allen believes that it is still to come.

⁵ S.P.Singh: Law of Tort: Universal Law Publishing. At p. 10

- ❖ 3. If this convenient general principle really does exist we might have expected to find hundreds of references to it in doubtful cases, but Winfield cites only one dictum which is directly in point.
- ❖ 4. This theory is based on a misinterpretation of the judicial process. It suggests that in such cases as **Pasley v. Freeman, and Rylands v. Fletcher**, the Courts were consciously creating new torts when in fact they thought that they were bringing in new instances under established principles.
- ❖ 5. If this theory were correct then much of the learning in tort law ought to be concerned with the nature of excuses and of justification. No textbook has, however, discussed these at any length, and in fact they are not even mentioned in the index to Professor Winfield's book.
 - By settling, the argument laid by the above two theories, **Professor William G**, simply said that *"there are some general rules creating liability and some equally general rules exempting from liability. Between the two is a stretch of disputed territory with the courts as an unbiased boundary commission."*
 - Meaning that in an unprovided case, if the decision parses for the plaintiff, it will be not because of a general theory of liability but because the court feels that there is a case in which existing principles of liability may properly be extended⁶.
 - Summing up his investigations into the controversy, **Professor Glanville Williams** says this:-
 - The first school has shown that the rules of liability are very wide. The second school has shown that some rules of absence of liability are also very wide.
 - Neither school has shown that there is any general rule, whether of liability or of non-liability, to cover novel cases that have not yet received the attention of the Courts.
 - In a case of first impression that is, a case that falls under no established rule or that falls equally under two conflicting rule, there is no ultimate principle directing the court to find for one party or the other.

⁶ S Deakin, A Johnston and B Markesinis, Tort Law (2003) 5th Ed. Oxford University Press

▪ **GENERAL CONDITIONS IN TORTS**

▪ **1. Act and Omission**

- To constitute a tort there must be a wrongful act, whether of omission or commission, but not such acts as are beyond human control and as are entertained only in thoughts. An omission is generally not actionable but it is so exceptionally. Where there is a duty to act an omission may create liability.

▪ **2. Voluntary and Involuntary Acts**

- A voluntary act has to be distinguished from an involuntary act because the former may involve liability and the latter may not. A self-willed act like an encroachment for business is voluntary, but an encroachment for survival may be involuntary. The wrongfulness of the act and the liability for it depends upon legal appreciation of the surrounding circumstances.

▪ **3. Malice**

- Malice is not essential to the maintenance of an action for tort. It is of two kinds, 'express malice' (or malice in fact or actual malice) and 'malice in law' (or implied malice).
- The first is what is called malice in common acceptance and means ill will against a person; the second means a wrongful act done intentionally without just cause or excuse. Where a man has a right to do an act, it is not possible to make his exercise of such right actionable by alleging or proving that his motive in the exercise was spite or malice in the popular sense. An act not otherwise unlawful, cannot generally be made actionable by an averment that it was done with evil motive. A malicious motive per se does not amount to injuria or legal wrong. Wrongful acts of which malice is an essential element are: defamation and malicious prosecution.

▪ **4. Intention, motive, negligence and recklessness**

- The obligation to make reparation for damage caused by a wrongful act arises from the fault and not from the intention. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent.

▪ **5. Malfeasance, misfeasance and nonfeasance**

- The term ‘malfeasance’ applies to the commission of an unlawful act. It is generally applicable to those unlawful acts, such as trespass, which are actionable per se and do not require proof of negligence or malice. The term ‘misfeasance’ is applicable to improper performance of some lawful act. The term ‘non-feasance’ applies to the failure or omission to perform some act which there is an obligation to perform.

▪ **6. Fault**

- Liability for tort generally depends upon something done by a man which can be regarded as a fault for the reason that it violates another man’s right. But liability may also arise without fault. Such liability is known as absolute or strict liability.

❖ **TOPIC TWO: INTENTIONAL TORTS**

➤ **This Topic will cover the following Tortious Liabilities Commonly known as Intentional Torts:**

- **1. Trespass to person**
- (a) Battery and Assault
- (b) False Imprisonment
- **(2). Malicious Prosecution**
- **3. Interference with Chattels**
- (a) Trespass to Goods
- (b) Conversion
- (c) Detinue
- **4. Trespass to land.**

❖ **INTRODUCTION**

- Injuries can occur for a variety of reasons. They can happen because another person was negligent or reckless, or because the person wanted to intentionally inflict an injury.
- Intentional torts occur when a person intentionally acts in a certain way that leads to another person's injury. Some common examples of intentional torts are assault, battery, trespass, and false imprisonment.

❖ **TRESPASS TO PERSON**



▪ **INTRODUCTION**

- The essence of trespass to the person is that it provides a claimant's protection against direct invasion of his bodily integrity. In 1959, it was established that in order to succeed in trespass, it was not enough for the claimant simply to prove a direct invasion of his bodily integrity.

- In **Fowler v. Lanning**⁷, the plaintiff's statement of claim alleged that on a certain date and at a certain place, the defendant shot the plaintiff and thus suffered injury. The defendant objected that this statement of claim disclosed no cause of action in that it did not allege that the shooting was intentional or negligent.
- Diplock J held that to succeed in trespass, it was not enough to prove a direct act; the plaintiff had in addition to prove that the direct act was done intentionally or negligently.
- This was affirmed by Lord Denning in the case of **Letang v. Cooper**⁸, While on holiday, in Cornwall, Mrs. Letang was sunbathing on a piece of grass where cars were parked. Mr. Cooper drove into the car park. He did not see her and ran into her legs injuring her. She claimed damages on both negligence and trespass to person.
- In his opinion Lord Denning went ahead to state that when the injury is not inflicted intentionally, but negligently, then the only cause of action is negligence and not trespass. If it were trespass, it would be actionable without proof. Thus, trespass to the person is actionable per se.
- Trespass to the person relates to direct and forcible injury to the person, Direct means that the injury must follow so closely on the act that it can be seen as part of the act. However, injuries caused by a car accident are not direct but are regarded as consequential. (Letang v. Cooper)
- **Forcibly**—used to describe any kind of threatened or actual physical interference with the person of another. **Injury**—includes any infringement of personal dignity or bodily integrity. Actual physical harm is however not an essential ingredient of trespass to the person since the tort is actionable per se.
- **Trespass to the person, has three components** which may either occur together or separately: **assault, battery and false imprisonment**. In their definitions, these components incorporate the words intentional and direct.
 - **ASSAULT**
- According to Winfield and Jolowicz at pg. 71, assault is defined as an act of the defendant which causes the claimant reasonable apprehension of the infliction of battery on him by

⁷(1959)1 Q.B 426

⁸(1964)2 ALL ER 929 CA

the defendant.

- Gold LJ in **Collins v Wilcock**⁹, defines assault as an act which causes another person to apprehend infliction of immediate, unlawful force on his person. An obvious example can be A pointing a loaded gun at B. In such a case by virtue of pointing the gun the claimant reasonably apprehends the infliction of an immediate battery.
- Assault means any direct and intentional act of the defendant, which puts a reasonable person in apprehension of an imminent physical contact with his body.¹⁰
- Unlike battery, assault involves no bodily contact. Rather, it involves the apprehension of imminent bodily contact, and the defendant has the capacity to carry the threat into action. Verbal threats of violence can also constitute an assault if there is sufficient apprehension of their immediate implementation.

- **INGREDIENTS OF ASSAULT**

- **CONDUCT**

- Conduct amounts to something which threatens the use of unlawful force. In addition to physical action, threats can also be conveyed verbally unlike in the past when threatening words could not amount to an assault.
- This has been attributed to by the rise of new means of communication e.g. telephone and email. where a verbal threat by these means can weigh the same as a gesture supported by threatening words which can however have the opposite effect by making it clear that the assailant does not intend to carry out the threat.
- In **Tuberville v. Savage**¹¹, Tuberville put his hand upon his sword and said ‘If it were not assize-time, I would not take such language from you.’ Savage later sued Tuberville for assault.
- The court held that to be liable for assault at least one of the following must be present: 1. an act intending to cause harmful control to another person, or imminent apprehension, or 2. a third person put in apprehension if he believes the person can do damage. An assault exists even if the other party can defend against the action and the action is not inevitable. Mere threats of future harm are insufficient.

⁹[1984]3 All ER 374

¹⁰ See, DK Srivastava, *The Law of Tort In Hong Kong* (2nd edn, 2005) p 53.

¹¹[1669]1 Mod Rep 3

- In this case the court held that the declaration of Tuberville was that he would not assault Savage at that point in time. To commit an assault there must be intention followed by an act. An assault is present if the fear is reasonable. The court held that in this case there was clearly no intention of assault. The intention as well as the act makes an assault.

- **REASONABLE FEAR**

- The victim's fear that the threat is likely to be carried out must be reasonable. This partly depends on a subjective test which looks at the victim's view of the situation.
- In **R v St George**¹², the judge said that it is an assault to point a weapon at a person though not loaded, but so near that if loaded, it might do injury. However, if the victim knew that the gun was unloaded, any fear would be regarded as unreasonable.
- The threat must be capable of being carried out at the time it is made. In cases of telephone threats, the House of Lords in **R v. Ireland** indicated that the fear should be that the assailant would be likely to turn up 'within a minute or two'.
- If the defendant were to be prevented from carrying out the threat, it would still amount to assault if he was advancing with that intent. In **Stephens v. Myers**¹³, it was decided that if the D was advancing with the intent, then it amounted to assault. A similar decision was made in the case of **Thomas v. National Union of Mineworkers (South Wales Area)**¹⁴. It therefore arises that ability to carry out the threat must exist at the time the threat is made.
- Assault can also be by means of verbal threat. Traditionally the use of threatening words alone could not amount to assault. **R v. Meade and Belt**¹⁵, but in the modern day there are other forms of communication such as telephone and emails that can be used as channels for assault.
- Examples: To throw water at a person is an assault but if any drops fall upon him it is battery. Pulling a chair as a practical joke from somebody who is about to sit on it is an assault until he reaches the floor because as he is falling he reasonably expects that the withdrawal of the chair will result in harm to him. When he hits the floor and gets hurt, then it is a battery.

¹² [1840] 9 C&P 483

¹³ [1830] 4 C&P 349

¹⁴ [1985] 2 All ER 1

¹⁵ [1823] 1 Lew CC 184

▪ **BATTERY**

- According to Salmond and Heuston (p125) battery is the application of force to the person of another without lawful justification.
- Goff LJ in *Collins v Wilcock* states that battery is the actual infliction of unlawful force on another person. He states that touching will only amount to a battery where it does not fall within the category of physical contact generally acceptable in the ordinary conduct of general life.
- Battery means an intentional and offensive touching of another without lawful justification.¹⁶ In battery, the defendant applies direct force with the plaintiff. In **Fagan v Metropolitan Police Commissioner**¹⁷, the court held that “it requires some positive act, as opposed to a mere omission, resulting in actual physical contact with the plaintiff’s body.” Also, it is no need to be flesh to flesh.¹⁸ In the case, Barry applies the force by throwing a vase at Sam and actually injures Sam indicate that Barry is intentional to hurt Sam. While, Happy and Cole apply the force of “throw the knife into Sam’s house” and cause Gavin injured constitute battery too.
- In **R. v. Rev. Father John Rwechungura**¹⁹, Kisanga J stated that in order to establish a battery it is necessary to prove two ingredients, (a) beating or touching of another person and (b) that the beating or touching was done in an angry, revengeful, rude, insolent or hostile manner, which adjectives can note an evil mind.

▪ **INGREDIENTS OF BATTERY**

▪ **INTENTION**

- For there to be liability for battery, the touching must be intentional whether or not the D intended to cause injury, and if it is non-intentional, then it amounts to negligence. (*Letang v. Cooper*). If the D misses the person he intends to hit and he hits someone else, the doctrine of transferred malice is considered. A intending to hit B, actually hits C, C will have action against A as’ intention to hit B is transferred to C.
- In **Livingstone v. Ministry of Defence**²⁰, a soldier in Northern Ireland fired a baton round

¹⁶ See Black’s Law Dictionary (Deluxe 9th edn, 2009) p 173

¹⁷ [1969] 1QB 439.

¹⁸ See *Scott v Shepherd* (1773) 2 W Bl 892.

¹⁹[1972] HCD 168

²⁰[1984] 356, NICA

targeting a rioter but he missed and hit the claimant instead. It was held that the soldier had intentionally applied force to the claimant.

▪ **DIRECT**

- The battery must be the direct result of the D's intentional act. In **Scott v. Shepherd**²¹, shepherd threw a lighted squib into a market house and it landed on the stall of a ginger bread seller. To prevent damage to the stall, Willis picked it up and threw it across the market. Ryal, to save his own stall, picked it up and threw it away. It struck the claimant in the face and exploded, blinding him in one eye. The D intended to scare someone although he did not intend to hurt the particular person who was actually injured, however he was held liable in battery.
- The force applied does not have to be personal contact e.g. in **Pursell v. Horn**²², Where the D threw water over the claimant. In **Nash v. Sheen**²³, the claimant had gone to the D's hairdressing salon where she was to receive a 'permanent wave' D was held liable in battery.
- There must be an intentional touching or contact by the D which must be proved to be a hostile touching. **Wilson v. Pringle**²⁴, A School boy admitted that he had pulled a bag which was over the shoulder of another boy making him fall and get injured. Summary judgment on the basis of battery was entered for the claimant. The school boy's act of pulling the bag was merely a prank, the necessary element of hostility was lacking.
- This was expounded in **R v. Brown**²⁵, Unlawful touching can also be described as unlawful. Though there is the issue of directness of touching, that is the touching must be applied directly from the defendant, case law dating back over the centuries just shows how widely courts are prepared to stretch the meaning of direct.
- In **Gibbons v Pepper**²⁶, the defendant whipped a horse so that it bolted and ran down the claimant. The defendant was liable in battery for claimant's injury.

²¹ [1773]2WM BI 892

²² [1838] 8 A\$E 602

²³ [1995] CLY 3726

²⁴ [1986]2 All ER 440

²⁵ [1994]2 All ER 75

²⁶ (1695) 1LD Raym 38

▪ **DEFENCES TO ASSAULT AND BATTERY.**

▪ **LAWFUL AUTHORITY**

- A person committing assault and/or battery and has legal authority for the action cannot be liable for that act. The statutes give this authority to;
- **Police officers**
- The powers of police officers are provided for in the statutes and, provide that they act within the scope of those powers, they cannot be charged with trespass to the person. If the action goes beyond what is permitted, then a police officer may be liable.
- In **Collins v. Wilcock**²⁷, a police officer needed to obtain a woman's name and address in order to caution her for soliciting for the purpose of prostitution. The officer detained the woman by holding her by the elbow. The woman scratched the officer and was charged with assaulting a constable in the execution of her duty. The police officer's action went beyond the generally acceptable conduct of touching a person to engage his or her attention.
- It therefore follows that the officer's action constituted a battery on the woman. Reasonable force may be used to make an arrest but that force must be reasonable and proportionate to the crime being prevented.

▪ **CONSENT**

- Where the claimant has consented to the actions of the D, he lacks any cause of action. Consent may be express or implied. In sports, where a person takes part in a contact sport, then he has consented to the touching which occurs in the playing of the game within the rules.
- In **Simms v. Leigh Rugby Football Club**²⁸, If the touching is not permitted within the rules, then it is unlawful and the D may be liable for trespass to the person. In medical treatment, consent must be real i.e. the victim must understand what it is that they are consenting to, for the D to be exempted from liability. A person with capacity of adult years and sound mind has an absolute right to give or withhold consent to treatment.
- In **Ms B v. An NHS Hospital Trust**²⁹, The claimant was completely paralyzed, able to move her head very slightly and to speak. She was being kept alive on a ventilator and had

²⁷ [1984] 3 All ER 374

²⁸ [1969] 2 All ER 923S

²⁹ [2002] EWHC 429

no hope of any recovery. She faced the rest of her life like this and informed those caring for her that she wanted the ventilator turned off. She was effectively saying that she withdrew her consent to the treatment. The doctors who had been caring for her for over a year found it impossible to accept her decision and argued that she lacked capacity to make her own decisions.

- The claimant sued for a declaration that she had the necessary capacity and that her continued treatment was a trespass to her person. The Defendants were therefore liable for trespass during the time the claimant had been treated against her will and a small sum by way of damages for battery was awarded. She later went to another hospital where her decision was respected.

- **NECESSITY**

- Where it is necessary to prevent harm to others then trespass to the person may be justified. It can also be used in medical cases to justify treatment to a person without capacity e.g. in cases of emergency.
- In **F v. West Berkshire Health Authority**³⁰, F aged 36 had serious mental disability and the mental capacity of a child of four. She had formed a sexual relationship with another patient and the doctors were concerned that pregnancy would be disastrous for her so they sought for a declaration from the court for an operation for her sterilization. It was held that it was in F's best interests to be able to maintain the sexual relationship hence the operation should take place.

- **PARENTAL AUTHORITY**

- A parent will not be liable for assault or battery for inflicting punishment on a child if the force used is reasonable and is proportionate to the wrong committed by the child. The child must understand the purpose of punishment which must be proportionate to the wrong committed by the child.

- **SELF-DEFENSE**

- A person is entitled to use reasonable force in self-defence or to protect others provided that the force used is proportionate to the danger.

³⁰ [1990]2 AC 1 HL

- In **Cockcroft v. Smith**³¹, There was a scuffle in court between a lawyer and a clerk where the clerk thrust his fingers towards the lawyer's eyes so the lawyer bit off one of the clerk's fingers. It was held not to be proportionate response to the threat.

❖ BATTERY VERSUS ASSAULT

- Battery & Assault are crimes as well as torts. An Assault in Criminal Law is rather different from the Tort of Assault: Read sections 240-243 of the Penal Code, Chapter 16 of the Laws of Tanzania.
- The Tort of Battery, On the other hand, exists where there is a voluntary act of the Defendant.
- Very often the threat of violence will be immediately followed by the actual application of violence to the Plaintiff's person, so that the Defendant would have committed both an Assault and a Battery.
- An example of a situation in which there would be a battery but no assault is where the Plaintiff is struck unexpectedly from behind, or when he is asleep.
- An example of an Assault without a Battery is where the Defendant aims a blow at the Plaintiff but his blow intercepted by a third Party.
- In Assault, the act of the Defendant must have been such a reasonable man might fear that violence was about to be applied to him. The fact that the Plaintiff was exceptionally brave and was not afraid [of threat of violence from the Defendant] will not prevent him from succeeding in his action if a Defendant of ordinary courage would have been afraid.
- Battery is the most common form of trespass to the person. It is committed by intentionally bringing about a harmful or offensive contact with the person of another. Battery action serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with his person, sense of honour and dignity:
- A battery includes an assault. It is mainly distinguishable from an assault in the fact that physical contact is necessary to accomplish it

- **FALSE IMPRISONMENT**

- It occurs when a person is unlawfully restrained, whether by arrest or confinement, or

³¹[1705]11 MOD43

prevented from leaving any place.

- It is an act of the D which directly and intentionally (or possibly negligently) causes the confinement of the claimant within an area delimited by the D. (street on torts)
- False imprisonment is actionable per se and must result from the direct act of the defendant.
- False imprisonment is any direct and intentional act of defendant, causing a total restraint on the freedom of movement of the plaintiff, with limits set by the defendant, without the plaintiff's consent or any lawful justification.³²
- In **Moris A. Sasawata v Mathias Malieko**³³, The respondent successfully sued the plaintiff for damages for F.I. The plaintiff appealed against the Order of the trial by the trial court ordering him to pay damages to the respondent on the ground that he was not responsible for the arrest and subsequent imprisonment of the respondent.
- Held: To constitute FI there must be restraint of the plaintiff's liberty; The actual perpetrator of an act which in law turns out to be a tort is personally liable for damages; In a suit for FI the plaintiff can recover damages for loss of reputation; It is the duty of the court in Civil proceedings to draw the attention of the parties to some ambiguity, factual error or omission in their pleadings.
- In **Mipawa v R**³⁴, the plaintiff was a teacher in Mwanza. There was an unexplained death and the plaintiff was arrested in connection with it. He was detained and released several times. He was in custody for a total of 16 months. After his complete discharge he sued the government for FI. Mapigano J. held that the government was liable. Condemning the police behavior in Mwanza the judge said:
 - **“This is a textbook example of how the powerful can, with total scorn for the Civil Rights and with singleness of purpose cause the machinery of criminal law to operate against a completely innocent subject.”** The arrests of the plaintiff and the detentions were without reasonable and probable cause and they were in fact activated by MALICE.

- **INGREDIENTS OF FI**

- **KNOWLEDGE OF CLAIMANT**

- False imprisonment can also occur even if the victim is unaware of it at the time. According

³²See DK *The Law of Tort In Hong Kong* (2nd edn, 2005) p 60.

³³[1980] TLR 158

³⁴[1981] HCT DSM, Civ. App. 254 of 1981 (Unreported)

to Lord Atkin, a person can be imprisoned while he is asleep, in a state of drunkenness, while unconscious or while he is a lunatic.

- In the case of **Merring V Grahame-white aviation co ltd**³⁵, the claimant was brought to his employer's office to be interviewed in connection with theft. Two guards had been stationed outside to prevent him from leaving and when the claimant found out, he brought an action for false imprisonment.
- Lord Atkin said," it appears to me that a person could be imprisoned without his knowledge.....it is quite unnecessary to go on to show that in fact the man knew that he was imprisoned" the defendants were therefore held liable for false imprisonment.
- However, if a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to cover not more than nominal damages.

▪ **THE CHARACTER OF THE D's ACT**

- There must be total or complete restraint such that there is no means of escape, if there is reasonable means of escape, the restraint cannot amount to false imprisonment. False imprisonment can also occur even if the victim is not aware at the time.
- False imprisonment need not be in a prison, however, how large the area of confinement can be largely depends on the circumstances so that the boundaries of the area of confinement must have been fixed by the defendant as stated by Lord Coleridge J in Bird v. Jones; 'Some confusion seems..... to arise from confounding imprisonment of the body with mere loss of freedom.... Imprisonment.... Includes the notion of restraint within some limits defined by a will or power exterior to our own.'
- Lord Denning however gave a dissenting judgment; 'As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else?... If I am locked in a room, I am not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water.....?'
- If the means of escape causes a risk of personal injury or if it is otherwise unreasonable for the victim to escape, then liability for false imprisonment arises. However the barriers to the means of escape need not be physical e.g. in a case where a commissioner in Lunacy wrongfully used his authority to dissuade the claimant from leaving his office, he was liable

³⁵ (1919) 122 LT 44

for false imprisonment.

- Once a restraint has been effected by an assertion of authority then it is enough for liability for false imprisonment to emerge e.g. restraint on movement in the street by a threat of force that intimidates a person to compliance without touching the victim is false imprisonment. (street on torts pg 249) once there is lawful detention then changes in the conditions of his detention will not render the detention unlawful e.g. in the case of prisoners being detained in unsanitary cells, this cannot be termed as false imprisonment.

- **DEFENDANT'S STATE OF MIND**

- In this tort, the D must intend to do an act which will substantially effect the confinement. However there is no need to prove malice because even where the D confines the claimant in good faith, he is still liable for the intentional confinement of the claimant.
- In **R v. Governor of Brockhill Prison**³⁶, in this case a prisoner governor who calculated the claimant's day of release in accordance with the law as understood at the time of her conviction was held liable when a subsequent change of the law meant that the prisoner should have been released 59 days earlier. An honest mistake whether negligently made or not as to the right to continue detention does not excuse a trespass to the person.
- In a similar case **Quinland v. Governor of Swalesdale Prison**, there was a judicial error that increased the sentence by three months longer than it ought to have been causing the claimant to be detained longer than it should have been. The C.A. stated that since the prisoner was unduly detained by virtue of a court order, there would be no remedy other than the correction of the arithmetical error that had been made in adding together the various periods of confinement attributable to the various offences of which the claimant had been convicted.
- Negligence should be enough to result to liability for false imprisonment for example where a person locks a door while being negligently unaware of the presence of somebody in the room.

³⁶ ex p Evans (No.2) [2001]2 AC 19

▪ **DEFENCES**

▪ **LAWFUL ARREST**

- Any lawful arrest made in accordance with the law cannot amount to false imprisonment. Any private citizen making citizen's arrest should be wary as a private citizen has protection if an arrestable offence has actually been or is being committed by the person arrested and the police have been involved. A police officer does not lose the protection even where the arrest is mistaken provided that it was reasonable.

▪ **DETENTION FOR MEDICAL PURPOSES**

- The lawful detention of persons suffering from mental disorder is provided for in the Mental Health Act 1983, but must be in accordance with the provisions and if the contrary happens then there is false imprisonment. In cases where a person is ill and in need of treatment but the illness does not meet the criteria for compulsory detention.

▪ **Difference between Malicious Prosecution and False Imprisonment**

- An action of both the Torts of Trespass and False Imprisonment will not lie, unless the Defendant intentionally caused the Plaintiff's bodily restraint. The Tort of Malicious Prosecution must be distinguished from the Tort of False Imprisonment.
- The Tort of False Imprisonment arising out of an improper arrest of a suspected criminal bears a resemblance to the Tort of Malicious Prosecution, which consists in the abuse of legal process by maliciously and without reasonable and probable cause instituting a groundless criminal prosecution.
- A person who brings about an arrest by merely setting in motion the formal process of law, as by making a complaint before a justice of the peace or applying for a warrant, is not liable for the Tort of False imprisonment because:
- He will be liable, if at all, only for the misuse of legal process by procuring an arrest for an improper purpose for which the appropriate remedy is an action for Malicious Prosecution.

❖ MALICIOUS PROSECUTION

- Is the institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause³⁷.
- Alternatively malicious prosecution may refer to institution of unsuccessful criminal proceeding maliciously and without reasonable and probable cause. When such prosecution cause such damage to the party prosecuted it is a tort for which he can bring an action.
- Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge.
- This tort balances competing principles, namely freedom that every person should have in bringing criminals to justice and the need for restraining false accusations against innocent persons.
- The foundation lies in the triangular abuse of the court process of the court by wrongfully setting the law in motion and it is designed to encourage the perversion of the machinery of justice for a proper cause the tort of malicious position provides redress for those who are prosecuted without cause and with malice.
- In order to succeed the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice and the case was resolved in the plaintiff's favor. It is necessary to prove that damage was suffered as a result of the prosecution³⁸.

▪ **COMMENCEMENT OF MALICIOUS PROSECUTION**

- The Prosecution is not deemed to have commenced before a person is summoned to answer a complaint.
- In **Khagendra Nath v. Jacob Chandra**³⁹, there was mere lodging of ejahar alleging that the plaintiff wrongfully took away the bullock cart belonging to the defendant and requested that something should be done. The plaintiff was neither arrested nor prosecuted.
- It was held that merely bringing the matter before the executive authority did not amount to prosecution and therefore the action for malicious prosecution could not be maintained.

³⁷Vivienne Harpword, Principle of Tort, 4th Edition, 2000

³⁸Winfield & Jolowicz, Tort, 18th edition, sweet &Maxwell publishers

³⁹A.I.R 1977 N.O.C 207

There is no commencement of the prosecution when a magistrate issues only a notice and not summons to the accused on receiving a complaint of defamation and subsequently dismissed it after hearing both the parties.

▪ **ELEMENTS OF MALICIOUS PROSECUTION**

- The tort of malicious prosecution provides redress for those who are prosecuted without cause and with malice. In order for the tort of malicious prosecution to succeed the plaintiff must prove that there was a prosecution without reasonable and just cause, initiated by malice, and the case was resolved in the plaintiff's favor. It is necessary to prove that damage was suffered as a result of the prosecution.
- **In an action of malicious prosecution the plaintiff must prove:-**
 - **1) That the plaintiff was prosecuted by the defendant**
- There must have been a prosecution initiated by the defendant. The word 'prosecution' means a proceeding in a court of law charging a person with a crime. To prosecute is to set the law in motion and the law is set in motion only by an appeal to some person clothed. The person to be sued is the person who was 'actively instrumental in putting the law in force. There was a conflict on the question whether there is prosecution of a person before process is issued calling upon him to defend himself. One view was that a prosecution began only when process was issued and there could be no action when a magistrate dismissed a complaint under section 203 of the code of criminal procedure. The other view was that a prosecution commenced as soon as a charge was made before the court and before process was issued to the accused.
- The proper test was indicated by the privy council in the **Mohammad Amin v. Jogendra Kumar Bannerjee**⁴⁰. The defendant had filed a complaint before the magistrate charging the plaintiff with cheating. The magistrate thereupon examined the complainant on oath and made an inquiry under s 202 of the code of criminal procedure. Notice of the inquiry had been issued to the plaintiff who attended it with his counsel and incurred costs doing so. The magistrate finally dismissed the complaint under section 203 of the code.
- In these circumstances the Privy Council held that there was a prosecution. The test is not whether the criminal proceedings have reached a stage at which they may be described as a prosecution, the test is whether such proceedings have reached a stage at which damage

⁴⁰[1948] 51CWN 723(PC)

to the plaintiff results. A mere presentation of complaint to a magistrate who dismissed it on the ground that is disclosed no offence may not be sufficient ground for presuming that damage was a necessary consequence. It will be for the plaintiff to prove that damage actually resulted.

- In the case of **Martin v. Watson**⁴¹ the House of Lords held that it is not necessary that defendant should be the prosecutor in any technical sense. What matters that he should in substance be the person responsible for the prosecution being brought. In this case the defendant made various charges to the police that the claimant had indecently exposed himself to her and this led to the prosecution of the claimant at which no evidence was offered against him.
- In another case **Yohana s/o Miyuni v. Isaya s/o Bakobi**⁴², The plaintiff sued the defendant for spoiling his reputation, maliciously imprisoning him and uprooting his crops. The parties were neighbor and had numerous disputes over the right of each in relation to the hand of the other. In the cause of one dispute the defendant made a report to the police that the plaintiff had threatened him and the plaintiff was arrested and remanded for two days. The criminal proceeding was terminated on the plaintiff's favor.
 - **2) That the proceeding complained was terminated in favour of the plaintiff**
- The plaintiff must prove that the prosecution ended in his favour. He has no right to sue before it is terminated and while it is pending. The termination may be by an acquittal on the merits and a finding of his innocence or by a dismissal of the complaint for technical defects or for non-prosecution.
- If however he is convicted he has no right to sue and will not be allowed to show that he was innocent and wrongly convicted. His only remedy in that case is to appeal against the conviction. If the appeal results in his favour then he can sue for malicious prosecution. It is unnecessary for the plaintiff to prove his innocence as a separate issue.
- In the case of **Festo v. Mwakabana**⁴³, the appellant having a dispute over ownership of land with his neighbour, harvested maize growing on the land. The respondent preferred a criminal complaint against the former. The appellant was tried and convicted by the trial

⁴¹[1996] A.C 74

⁴²[1969] HCD 25

⁴³[1983] TLR 154

magistrate but acquitted on appeal. The judge observed that it could not be disputed that so far as plaintiff was concerned the criminal proceedings had been terminated in his favour thereby satisfying. The essential requisite condition for bringing an action for malicious prosecution.

- in the case of **Reynolds v. Kennedy**⁴⁴, it was held that no action would lie of the claimant had been convicted even if his conviction was later reversed on appeal. The reasons apparently being that the original conviction showed conclusively that there was foundation for the prosecution. However this is no longer be regarded as good law.
- **3) That the prosecution was instituted against without any just or reasonable cause.**
- ‘Reasonable and probable cause was defined in the case of **Hicks v. Faulkner**⁴⁵ as “an honest belief in the guilt of the accused based on a full conviction founded upon reasonable grounds, of the existence of a circumstances, which assuming them to be true, would reasonably lead any ordinary prudent man and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed”.
- In the case of **Satyakam v. Dallu** the defendant, an illiterate, engaged the plaintiff, as his advocate in a dispute of his landed property. After the decision of this case, there was another dispute of some other property of the defendant and the plaintiff took up the case of the opposite party.
- The defendant object to the conduct of the plaintiff and filed to a complaint in the Bar council of India alleging professional misconduct. The Bar council gave the benefit of doubt to the plaintiff and dismissed the complaint. There after the plaintiff filed a suit for malicious prosecution against the defendant.
- The court observed that because of similarity between the two litigation and also high traditions of the legal professional, the plaintiff should not have accepted the case against the old client. Since there was reasonable cause and no Malice on the part of the defendant, it was not the case of malicious prosecution.

⁴⁴[1784] wils. 232

⁴⁵ [1878] 8 QBD 167

▪ **4) The defendant acted maliciously**

- For the purpose of malicious prosecution, malice means having any other motive apart from that of bringing an offender to justice. Thus is the presence of some other and improper motive that is to say the legal process in question for some other than its legally appointed and appropriate purpose.
- In the case of **Allen v. Flood**, a general rule was propounded that an act lawful in itself does not merely become unlawful because of the bad motives of the actor and some of them lordships in the House of Lords suggested that Malicious prosecution was not really an exception to this rule.
- The settled rule is that Malice is the gist of the action for malicious prosecution and must be proved by the plaintiff in the first instance. It is for the plaintiff to prove that there was an existence of Malice that is to say the Burden of proof lies upon the plaintiff. . Anger and revenge may be proper motives if channeled into the criminal justice system.
- The lack of objective and reasonable cause is not an evidence of malice but lack of honest belief is an evidence of malice.
- In **Peter Ng'homango v. Gerson M.K Mwanga**⁴⁶ .The court of appeal established malice when it found out that the principal of the college of Mpwapwa was in conflict with Peter (a tutor) stemming from the fact that Peter was a good and a very nice singer.

▪ **Evidence of Malice**

- Malice may be proved by previously strained relations, unreasonable or improper conduct like advertising of the charge or getting up false evidence.
- Though mere carelessness is not per se proof of malice unreasonable conduct like haste, recklessness or failure to prove enquiries would be some evidence.
- When there is absence of some reasonable cause owing to defendant's want of belief in the truth of his charge is the conclusive evidence of malice. However the converse proposition is not true because a person may be inspired by malice and also has a reasonable belief in the truth of his case.

⁴⁶Civil no. 1 of 1994 HC(Dodoma)

⁴⁶[1985] TLR 125

- There may be malice either in commencing a prosecution or continuing one, honestly began. The mere fact that criminal prosecution resulted in acquittal or discharge of the accused will not establish that the defendant had acted with malice.

- **5) That the plaintiff suffered some damage.**

- It has to be proved that the plaintiff has suffered damages as a result of the prosecution complaint of. Even though the proceedings terminate in favour of the plaintiff, he may suffer damage as a result of the prosecution.
- The damages may not necessarily be pecuniary. According to HOLT C.J., ‘classic analysis in **Savile v. Robert**, there could be three sort of damages any one of which could be sufficient to support any action of malicious prosecution.
- 1) The damage to a man’s fame as where the matter whereof he is accused is scandalous.
2) The damage done to a person as where man is put to a danger of losing his life, limb or liberty
- 3) The damage to a man’s property as where is forced to expend money in necessary charges, to acquit himself of the crime of which he is accused.
- The damage must also be the reasonable and probable results of malicious prosecution and not too remote. In assessing damage the court to some extent would have to consider
- 1) The nature of the offence the plaintiff was charged of
- 2) The inconvenience to which the plaintiff was charged to
- 3) Monetary loss and
- 4) The status and prosecution of the person prosecuted

- **Malicious Civil Proceeding**

- An action will not lie for maliciously and without reasonable and probable cause instituting suit the reason stated to be is that “ such a case does not necessarily and naturally involve damage to the party sued.
- The civil action which is false will be dismissed at the hearing. The defendant’s reputation will be cleared against all imputations made against him and he will be awarded costs against the opponent. The law does not award damage for mental anxiety, or extra costs incurred beyond those imposed on unsuccessful parties.

❖ TRESPASS TO CHATTELS

▪ TRESPASS TO CHATTELS

- This tort may simply be defined as every direct and unlawful interference with the chattel of another person (usually the possessor/plaintiff). Or in other words, Trespass to chattel is the intentional and wrongful interference of another person's personal property. Such interference could either be intentional or negligent.
- This tort was made or aims to protect the; The plaintiff's interest in retaining possession of the chattel. His interest in physical condition of the chattel, and to prevent unlawful intermeddling with chattel of a person.
- The acts of trespass to chattels may take various forms such as destroying, damaging or merely using goods or even wrongfully moving them from one place to another. This was illustrated in the case of
- The tort of trespass to chattels is actionable *per se*; this is to mean that without proof of actual damage, thus the mere wrongful moving or touching of someone's chattel without any harm is actionable *per se*. E.g., it is a trespass to chattel were someone parks his car and another person leans on it or even touch it.
- As aforementioned, trespass could be intentional; the intent to use or interfere with the personal property of another. It does not matter that the person interfering with the property did not know that the property belonged to a particular person. Instead, the determining factor is whether the interfering person damaged or possessed personal property that properly belonged to another. Or negligent; unknowingly, mistake or accident.

▪ CONVERSION

- This tort is defined as the unlawful and intentional dealing with the property of another person with the aim of having immediate possession of that chattel. In other words, is the inconsistent dealing with the property of another person with the aim of depriving the person of that property temporarily or permanently.
- Again, Conversion (or Trover) is the intentional and willful interference with any chattel whereby the plaintiff is deprived from the use and possession of it. It is an interference with another's ownership of property.

- A defendant would be liable in conversion where his conduct to the plaintiff's goods was intentional. An interference resulting from merely careless conduct is not actionable in conversion.
- To amount to conversion, the intent of the defendant must be to deal with the plaintiff's goods by exercise dominion over them on his own behalf of someone other than the plaintiff.
- The essence of conversion is not benefit to the wrongful taker but damage or loss on part of the rightful owner. At the time of conversion the plaintiff must have a right of property in the thing along with the possession of the same or have the right of immediate possession. Even a temporary possession is sufficient to commit the tort of conversion.
- **Armory V Delamirie**⁴⁷, Chimney sweep found a jewel, took it to the jewellers for valuation. Jeweler refused to return it, boy sued, held to be conversion. For conversion to occur there must be an act of some kind. Not necessarily a sale.
- In **Ashby v Tolhurst**⁴⁸, An attendant at a car park allowed a stranger to take away the plaintiff's car. His employers were not liable for conversion. An omission does not suffice in conversion.
- **There are acts that amount to conversion, these kinds of acts are mention and discussed below as follows:**
 - **Conversion by destruction, consumption or alteration:**
 - This is the intentional destruction, consumption or alteration of a plaintiff's chattel by the defendant. It is merely trespass to damage someone's chattel, what makes it conversion is the degree of damage, consumption, alteration done to the chattel in question.
 - **Conversion by using:**
 - This is an act were the defendant uses the plaintiff's chattel as if it were his own. His act is said to be inconsistent with that of the plaintiff and will be liable in conversion. An example is seen were a man takes another man's bottle he uses to store water to store wine.

⁴⁷[1722] K.B., 1 Strange 505, 93 ER 664

⁴⁸[1937] 2 K. B. 242.

- **Conversion by taking:**

- This act of conversion is when a person without lawful justification takes goods out of the possession of the person entitled to them with the intention of exercising a temporal or permanent dominion of them. Thus, a thief who steals a plaintiff's jewelry.

- **Conversion by receiving:**

- This is where a person without lawful authority transfers the chattel of someone else to another. The mere voluntary reception of the chattel by the former constitutes conversion as against the later, even though the former may have acted innocently. An example here is that of a buyer who receives goods which the seller has no right (stolen goods) to sell is liable in conversion to the true owner.

- **Conversion by detention:**

- A person is liable in conversion by detention where he is in possession of another person's chattel without authority and refuses to surrender it on the request of the rightful owner. 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. Thus where no adverse detention is shown, there will be no liability in conversion.
- The act constituting "conversion" must be an intentional act, but does not require wrongful intent, and is not excused by care, good faith, or lack of knowledge.

- **DETINUE**

- The term detinue is derived from the French word 'detenue' which means 'to hold back'. The tort of detinue involves interests in individual property and may be used to protect viable interests in goods and other chattels. It is a legal action where the plaintiff having an absolute right in goods, seeks to recover it from another who is in actual possession and refuses to redeliver them.
- The action in detinue lies where: The plaintiff has immediate right to the possession of goods, and 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.

- **Differences in the three forms of tort:**

- The first major distinguishing factor to be noted is that unlike conversion and detinue, in trespass to chattel, the chattel of the plaintiff need not be in direct possession of the plaintiff

nor need to be in possession of the defendant for a trespass to be committed, a mere touching or moving of a plaintiff's chattel without actual damage is enough to make the defendant liable in trespass to chattel, for this it is said to be actionable *per se*.

- Also in trespass to chattel, the intention of the defendant might not need to possess or withhold the plaintiff's chattel as regards to the torts of conversion and detinue.
- In the tort of trespass to chattel, a person who has no rightful ownership of a chattel can sue (excluding the rightful/legal/true owner) provided he is in immediate/actual possession of the chattel in question.
- As regards to the tort of conversion and detinue, in conversion, the defendant has an aim of having immediate possession of the chattel but in detinue, the defendant has actual possession of the chattel and has 'refused' to redeliver it to the rightful possessor.
- It is conversion when the defendant possesses the plaintiff's chattel temporarily or permanently. But it is detinue when the defendant refuses to 'return' the chattel on demand.
- In conversion, a temporary possession is sufficient to commit the tort of conversion.
- While on the other hand, a plaintiff will only be able to institute a case in detinue where he had made actual demand for his chattel which is in actual possession of the defendant who must have refused to return it.
- A suit in detinue will only be successful where the plaintiff has an immediate right to the possession of goods, and 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.
- Unlike conversion, a suit in detinue is filled from the actual day of demand and refusal of chattel.

▪ **Comparisons/similarities:**

- The first and foremost similarity with these three torts is that they seek to compensate damages in monetary form.
- The three torts are made to protect a person's property from unlawful intermeddling.
- In conclusion, trespass to chattel, conversion and detinue are very much intertwined and can be said to overlap each other in quite a number of ways, so have to be treated not far from each other.

❖ TRESPASS TO LAND ❖

▪ INTRODUCTION

- Trespass to land is the unlawful intrusion of an individual to another's land voluntarily. Involuntary intrusion does not amount to trespass. Maxim "*cui us est solum, eius est usque ad coelum et ad infernos*" which means whoever owns the land, owns it all the way to the heavens and to hell.
- Trespass to land can also be defined as any unjustifiable intrusion by one person upon land in the possession of another. The slightest crossing of the boundary is sufficient to establish a claim. It is therefore trespass to drive a nail into the wall of a neighbour, to grow creeper up another person's wall or to dump rubbish on someone else's land.
- Trespass to land is normally a civil wrong but it may give rise to criminal proceedings in some cases as trespasser can be prosecuted criminally if he enters on somebody's land with the intent to steal goods or commit any other offence.
- Otherwise trespass to land is a tort and it's actionable per se i.e. without proof of general damage, but again an action will not be normally brought for trespass without damage unless the claimant wishes to deter persistent trespassing or there are disputes over boundaries or rights of way.

▪ POTENTIAL CLAIMANT/ WHO CAN SUE FOR TRESPASS TO LAND

- The claimant should be the current possessor of land at the particular time a wrong of trespass took place. He may not be the superior owner but he can be an owner through free hold, leasehold, license, or exclusive possessions.
- Even when the possession is not legal e.g A squatter may sue a trespassing third party, but he cannot sue the real owner for the trespass.

- In **Wachira v. R**⁴⁹, Appellant was convicted of trespass upon private land in proceedings instituted by Mr. Kiroku as “occupier “ of the land .Evidence showed that the appellant was in occupation of some 14.9 acres of land in Kiambu district which had been conveyed by Mrs. Beckley to the land development and settlement board for an estate in fee in May 1963.
- Some months previously there had been negotiations between the appellant and settlement board in regard to a suggested loan of sh. 32000 from the board to assist him buy the land in question from Mrs. Beckley, but these negotiations were abortive. The settlement board later acquired the land and the trustees of the board renewed negotiations with the appellant in regard to sale of the land to him paying the deposit of sh. 8000, the appellant was allowed to take possession of that land.
- A loan was negotiated and first installment of the purchase price was to become due for payment on March 31st but the appellant did not sign the acceptance of the offer until August .He had not paid any money since payment of the deposit. The land was never conveyed to the appellant and the trustees sought to terminate the appellant’s interest and to reposes the land. The appellant had consistently refused to vacate and later the land was sold to Mr. Robert Kiroku but the appellant was still in possession of that land.
- It was held that “occupier in terms of Section 2 of the trespass act means the owner or the person lawfully in occupation of private land and private land means land which is owned or occupied by any person by virtue of private title. Proceedings under trespass act can only be brought by police or by owner or occupier of the land. Because the trustees had not conferred a freehold title on Mr. Kiroku, he was not the owner or occupier of that private land in question. The appeal was allowed and conviction quashed and sentence set aside.

⁴⁹E.A [1967]201

▪ **TYPES OF TRESPASS TO LAND**

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▪ **TRESPASS BY RELATION**

- It involves the immediate right to possess and signifies the lawful right to retain possession when one has it or one has acquired it i.e. once a person is entitled to immediate possession of land, he is deemed to have been in possession from the moment that his right to it is accrued.
- Plaintiff's possession of land relates back to the time when he first acquired the right to possess that land and is therefore deemed to have been in possession of it from that time.
- He can therefore sue for acts of trespass while he was actually out of possession and it also provides foundation for the claim for damage suffered by a person as a result of having been kept out of possession of his land.
- If A owns land which he sells to B passes before B has taken actual possession of the land and in the meantime C commits an act of trespass on the land, B may sue C for the trespass notwithstanding that he had not yet taken possession of that land when the act of trespass was committed. That means B's title relates back to the time when he first became entitled to take possession i.e. the time he bought the land from A.

▪ **TRESPASS ON AIRSPACE**

- Intrusion into airspace at a relatively low height constitutes trespass, however, it's now settled that land owner's rights in airspace extend only to such a height as is necessary for the ordinary use and enjoyment of land and structures on it.
- It means then that an aircraft flying several hundred feet above a house is not trespass at common law, however, if the aircraft or anything from it falls upon the land or comes into contact with a structure on the land, it results in trespass no matter the height from which it fell.

- In **Bensten v. Skynews and General ltd**⁵⁰, defendant used an overflying aeroplanes to obtain photographs of Lord Bernstein's country residence. Lord Bernstein claimed that in so doing the defendant was trespassing in his airspace and invading his right to privacy. The court held that the defendant was not liable for trespass. The rationale was "the problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantages of all that science now often in the use of airspace.
- In **Kelsen v Imperial Tobacco Co**⁵¹, D committed trespass by allowing an advertising board to project eight inches into P's property at ground level and another above ground level.

- **TRESPASS BY PLACING THINGS ON LAND**

- Is committed by him who places any material thing on the plaintiffs land or who allows such material to come into contact with or cross boundary of the plaintiff's land. **This type of trespass is similar to nuisance but the two are different in the following aspects:**
- In trespass, injury is direct since it affects the plaintiff's possession but in nuisance the injury is indirect because it is the plaintiffs comfort and convenience in the use and enjoyment of land that is affected rather than its possession.
- While trespass relates to possession of land, nuisance relates to the use or enjoyment of land i.e. in trespass possession of land is at stake, while in nuisance it is the use and enjoyment of the land that is at stake.

- **TRESPASS BY WRONGFUL ENTRY**

- Is committed where there is physical contact with another person's property on the land however slight. It includes acts of encroaching on the land or walking through it without authority, sitting on the plaintiffs fence, putting a hand through the plaintiffs window, abuse of right of entry i.e. a person authorized to enter premises for the purpose of repairing them becomes a trespasser when he picks and eats fruits on the premises without authority and throwing things on someone's land.

⁵⁰[1978] QB 479

⁵¹[1957] 2 QB 334

- In **Westripp v Baldock**⁵², Plaintiff and the defendant occupied adjoining houses included within a building scheme. Restrictions were enforceable by either of them against the other. The material restriction was that at no point should any building be erected as a shop, warehouse or factory or any trade or manufacture be carried out.
- Defendant was a jobbing builder and placed ladders, planks, sand against the wall of the plaintiff's house. At the rear of the house, the defendant had erected a shed touching the plaintiff's garden wall which he used as a store for builders fitting. Plaintiff brought an action alleging a technical trespass, damage by damp through the pointing being injured by these articles and breach of restrictive covenant by erection of a warehouse and carrying out trade.
- **Held:** placing of the ladders and other articles against the wall was a technical trespass which had damaged the pointing and the plaintiff was entitled to the cost of repainting the wall.
- Defendant was carrying on a trade within the meaning of the covenant, as the business of a jobbing builder involved the buying and selling of materials and plaintiff was entitled to an injunction.
- In **Henry Hiday Ilanga v Manyema Manyoka**⁵³, Respondent had sued appellant for damages for trespass and for wrongful removal of livestock, cotton and Sh.12, 000 cash. Appellant admitted the trespass and the taking away of property which he stated he had returned with the exception of 3 cattle and one sheep, but he denied taking the shs. 12000 as alleged.
- He stated that the livestock and property were seized to recover the price of a tractor which the respondent had sold to the appellant while still subject to hire purchase agreement and which had been seized by the owner from appellant and he accordingly counter claimed Sh. 14950 which he had paid to the respondent towards the tractor. The judge gave judgment that

⁵²[1938] 2 All ER 279

⁵³EACA [1961] 705

appellant should pay sh. 12000 for the whole amount claimed and awarded him further Sh. 5000 as damages for trespass.

▪ **TRESPASS BY REMAINING ON LAND**

- Is trespass committed by a person who having been originally authorized to enter upon the land, is subsequently asked to leave. Such a person then becomes a trespasser when he fails to leave the land within a reasonable time.
- If a license is withdrawn, a person is not a trespasser during the reasonable time which he takes to leave the premises.
- In **Minister of Health v. Bellotti**⁵⁴, The respondents were evacuees from the Gibraltar and occupied premises at an evacuee's centre under license from the Ministry of Health. The respondents were licensees for valuable consideration in respect of the premises which they occupied and licenses extended to allow them to live in their flats, to have furniture of their own and which in fact they did and also to have their wives and families there.
- Differences arose between the respondents and officials at the ministry and the respondents were each given a week to evacuate the premises. They failed to leave and after an attempt to eject those proceedings were taken in the county court to obtain orders for possession. It was contended that the notices were invalid on ground that the time given to vacate the premises was unreasonably short hence licenses were not effectively revoked.
- **Held:** the length of time to be given to licensees on the determination of the licenses must depend upon the circumstance of any particular case and in the present case, the time given was insufficient
- Notice determining a license revokes the license immediately on service and the notice becomes operative on expiration of a reasonable time from the date of service. This is so even though the notice states a period of time for vacation of the premises which is held to be too short.

⁵⁴[1944] KB 290

▪ **TRESPASS TO SUBSOIL**

- Any intrusion upon the subsoil is just as much trespass as entry upon the surface. The surface and the subsoil can be possessed by different persons. If A is in possession of the surface and B, the subsoil and I walk on the land that would result into trespass against A and not against B.
- If I dig a hole vertically in the land, that would be trespass against both A and B. If I bore a tunnel from my land into B's subsoil, that would be trespass against B only.
- Even if the land owner has been deprived of ownership of minerals by statute, intrusions beneath the surface such as pipelines in order to obtain the minerals still amounts to trespass, though in such a case the quantum of damages will be very limited.
- In **Bulli Coal Mining Co v Osborne**⁵⁵, the Ds mined from their land through to the P's land. This was held to be trespass to the subsoil.

▪ **CONTINUING TRESPASS**

- If the act constituting trespass remains without the trespasser doing anything to avoid it, there is said to be a continuing trespass. It arises for example where a trespasser chooses to remain on a plaintiff's land or fails to remove any matter from that land, which is causing trespass.
- Where there is continuing trespass, the plaintiff can bring a number of actions against the defendant. This is because as long as the trespasser continues, the plaintiff continues to suffer and there is a fresh cause of action.
- In **Holmes v Wilson**⁵⁶, the defendants erected buttresses to support a sinking road, necessitating trespass onto the claimant's land. The claimant sued and recovered damages, but the defendant failed to remove the buttresses so the claimant sued again.
- Transfer of that land by an injured party does not prevent transferee from suing the defendant for continuing trespass.
- There is no trespass if the defendant merely omits to restore land to the same condition (apart from removing anything which he has put on the land) in which he found it i.e. if he fails to fill

⁵⁵[1899] AC 351

⁵⁶[1839] 10 Ad and El 503

up a pit which he has dug on the neighbors land . He is only liable for the original digging and not for continuing trespass in allowing the pit to remain unfilled, however, he is liable for negligence if anyone falls into the pit.

- In **Clegg v. Dearden**⁵⁷, a trespasser had broken through a wall mine and after the statute had the original trespass, water had run through the hole and injured the plaintiff. It was held in an action on the case that there could be no recovery because leaving a hole there was not a continuing trespass and that running of the statute had already barred the trespass together with its results.
- Mistake is no defense to trespass. It will not avail the defendant that he innocently thought that he was on his own land

- **DEFENCES**

-

- **LINCENCE**

- Where a person has permission to enter land , either expressed or as implied by the property's owner, then he won't be held liable for trespass. Any member of the public has an implied license to approach premises with legitimate inquiry, even if that inquiry has nothing to do with the occupier's interest. In this case, a police officer without a search warrant is in the same position as a member of the public. This defense exists unless the defendant has exceeded the terms of the license.
- When the license is just bare (no consideration is offered by the defendant), the license can be revoked at any time. If the defendant takes more than reasonable time, she/he was given to move out, and then he/she is committing a trespass.
- A contractual license is revoked only when, There has been an expressed or implied time frame limit in the contract and Demand for injunction to prevent breach of contract.

⁵⁷[1848]12 QB 576 at 601

▪ **NECESSITY**

- Necessity is a defense to show that it was necessary for the defendant to enter the claimants land. Trespass may not arise where there is actual/perceived danger in relation to which steps are taken. For example, in case of fire, one may get into another person's land to prevent further harm.
- In **Rigby v. Chief Constable of Northamptonshire**⁵⁸, A young man broke into a gun shop and armed himself; the police fired a canister of CS gas into the shop so as to smoke out the young man. Unfortunately, the shop caught fire and the shop keeper sued for damages.
- It was held that the police could rely on the defense of necessity because the boy was a clear threat to the public and since the police had not contributed to that problem, they were not liable. It was held that necessity was a defense provided that there was no negligence on the part of the defendant in contributing to the state of necessity, thus the action for trespass failed.

▪ **ACQUIESCE**

- The defense of acquiesce or estoppels goes to encouragement or allowance of a party to believe something to his detriment. Mere delay by the plaintiff in complaining the action of the defendant is not of itself sufficient to establish the defense of acquiesce or etoppel. It must further be shown that the defendant had been misled to his detriment so that it would be unconscionable for the plaintiff to assert his rights like in the case of Jones v. Stones.

▪ **JUSTIFICATION BY LAW**

- Acts which would otherwise be trespass are not so when justification is provided for by the law. Where defendant is legally authorized to enter onto the claimant's land by statutory authority, he can't be liable for trespass on land e.g. the police have powers under the Police force and auxiliary services Act and Criminal Procedure Act to enter premises and search them. . However, abuse of the legal authority is punishable. When one had initial authority, then later did something unlawful it results into a doctrine known as ab initio.

⁵⁸[1985] 2 ALL ER 986

- In **Elias v Pasmore**⁵⁹, The police had lawfully entered the plaintiff's residence to arrest a man. The police took some documents, some of which were taken unlawfully. It was held that the original entry was not trespass, but there was trespass to goods when they took the documents.

- **CONSENT**

- A person or claimant who agrees to a certain action cannot complain or sue. In **Peters v Prince of Wales Theater Ltd**⁶⁰, The defendant employed a sprinkler system to protect the building from fire. The claimant also occupied the building and complained when she stock was damaged by water from the sprinklers. It was held that the water supply benefited both the claimant and defendant and therefore there was no liability.

- **REMEDIES AVAILABLE**

- **INJUNCTION**

- The court may order the defendant to move from the claimants land. It is a remedy to prevent further trespass. In cases of threatened trespass or where the trespass is of a continuing nature, the claimant may seek an injunction.

- **EXPULSION**

- The person who is entitled to procession may request a trespasser to leave and if the trespasser refuses, may remove him from the land, using no more force than is reasonably necessary. However, if the force used in turning out a trespasser is excessive the person who used such force himself commits a trespass upon the person of the person removed.

- **RE-ENTRY**

- The person entitled to possession can enter or re-enter the premises. He must do so in a peaceful manner subject to the common law rights to eject a trespasser.

⁵⁹[1934] 2 KB 164

⁶⁰[1943]KB 73

▪ **DAMAGES**

- If the trespass is trivial or there is no actual damage the damage will be nominal. If the damage is done to the land the measure of damage is usually to the diminution in value of the land, or such amount as will compensate the plaintiff for his loss. The cost of reinstatement for example rebuilding will sometimes be the correct measure.
- Exemplary damages may have been awarded where there has been arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the plaintiff's rights with the object of making a gain from his unlawful conduct.

▪ **SELF HELP**

- The party in possession may use reasonable force to resist wrongful entry by trespasser e.g by erecting fences and putting on barbed wire fences. In cases of security dogs, he should have control over it and notify people about the dog in every entrance.

▪ **ORDER OF POSSESSION OF LAND /DECLARATION**

- Was formerly called ejectment .It's an action by which the possessor of land seeks a court order to recover it? It's usually achieved by the claimant proving his /her title to land; he/she can now take action against the squatters.

▪ **MESNE PROFITS**

- This is usually an addition to the action for recovery of possession of land. They are consequential damages given to the claimant for the time he/she has been from that land. It aims at recovering the last use of property. An action lies for the damage which the claimant has suffered through being out of possession of land; this includes profits taken by the defendant during his occupation and damages for deterioration and the reasonable cost of getting possession.
- In the case of **Inverugie Investments Ltd v. Hackett**⁶¹, the Privy Council was called upon to calculate mesne profits in unusual circumstance. The claimant had been unlawfully kept out of

⁶¹(1995)1WLR 713

his property in the Bahamas for a period of 15 and half years. He was entitled to a reasonable rental value for the period based on the published rates at which the tour operators made ,”whole sale arrangements to use holiday accommodation”.

- It was held that the plaintiff could recover a reasonable rent for every apartment in the hotel block the defendant had built.
- Though the defendant objected that the flats had not been fully occupied, Lord Lloyd held that it was not a matter of actual loss and hence the calculation of the total sum.
- **DISTRESS DAMAGE FEASANT**
- Is where a chattel is unlawfully on the claimants land and has caused actual damage, then the claimant may retain the chattel until the damage has been paid for. A football kicked through the window may be retained until the damaged window is paid for.

❖ **TOPIC THREE: TORT OF NEGLIGENCE**

- **At the end of TOPIC THREE you should be in a position to understand the following salient areas of the Law of Tort:**

1. Comprehensive meaning of Negligence
2. Historical development of Negligence
3. Elements and Proof of Negligence
4. Specific Situations of Negligence

(a) Negligent Misstatements

(b) Nervous Shock

(c) Occupiers' Liability

(d) Vicarious Liability

(e) Employers' Liability

5. Defenses in tort of negligence

- **NOTE:** You kindly reminded that item **1, 2, 3 and 5** were sufficiently covered in the Legal Methods Two Manual especially in the topic entitled “***Development of Law/tort of Negligence***” thus there is no need of reproducing them here. It's wise therefore if you would make reference before inclining your mind in reading item 4. [**Emphasis is Mine**].

❖ **SPECIFIC SITUATIONS OF NEGLIGENCE**

- As already espoused above, this unit will cover some specific situations where a tort of negligence may arise and the discussion will dwell on aspects like negligent misstatements, nervous shock, vicarious and occupier liability just to mention a few.

❖ **DOCTRINE OF VICARIOUS LIABILITY**

▪ **INTRODUCTION**

- Generally, a man is liable for his own wrongful acts. He is not liable for wrongful acts of others. But under certain circumstances, a man may be held liable for the wrongful acts of others. This is technically known as **vicarious liability**.
- **Employer** is a person who has authority to give orders and to get the work done by the employee. **Employee** is a person who agrees to provide work and skill for the employer in return for payment and that he/she agrees expressly or impliedly to be subjected to the employer's control.
- The **doctrine of vicarious liability** generally operates within the law of torts. It has become well-established in English law and historically has been called "**Master and Servant liability**," which clearly indicates the circumstances in which the doctrine becomes applicable in tort law.
- The general rule in tort law is that a person who authorizes a tort will personally be liable for damage or harm as a result. However, vicarious liability defines the circumstances in which a person is liable for the torts of another without express authorization or ratification.
- The most common example of vicarious liability is the liability of an employer for the torts of his employees committed in the course of employment
- Thus, Employers are vicariously liable for the torts of their employees that are committed during the course of employment.
- The most important element to establishing a case for vicarious liability is that the wrongdoer be acting as a servant or employee, and that the wrong done be connected to the employee's course of employment. Vicarious liability can only be imposed if it is proved that the employee was acting "**in the course of employment**."
- This criteria is essential, and requires a clear connection between the employment duties and the employee's acts complained of. As such, most employer's will be insured in order to avoid such liability.
- In addition, in order to establish vicarious liability, it is necessary to show that an employee was employed under a **contract of service**, or in the case of an independent contractor, a **contract for services**.

- English law has also established that an employer can be held vicariously liable for a breach of statutory duty by an employee, for example in circumstances such as harassment or bullying within the workplace.
- In order for vicarious liability to be proved, three main prerequisites have to be fulfilled, namely;
 - That the tortfeasor is an employee of a principle.
 - That the employee did commit a tort against the plaintiff
 - That the employee was in the course of his/her employment when the tort was committed.
- The aforementioned position can further be supported by the case of **Century Insurance Co. Ltd V. Northern Ireland Road Transport Board**⁶², Where a driver of company A was hired to deliver petrol by company B, and in the process, he negligently lit a match that caused an explosion, damaging the property of B's client. The terms of the contract were that the driver would continue to be the employee of the original employer A. The court inter alia held that since the driver was and continued to be the servant of the original employer (A), and not of the hirer (B), A was liable for the negligence of the employee.
- In the case of **Twine V. Beans Express Ltd**⁶³, an employee of the defendants, a van driver had been forbidden from giving lifts to unauthorized persons. The driver gave a lift to such a person and due to his negligence, the passenger was killed. The widow sued the defendants and the court held that the action could not succeed since at the time of the accident, the driver was not acting within the course of his employment.

❖ REASON FOR VICARIOUS LIABILITY

- According to Michael A. Jones, Textbook on Torts, 2000, p379, several reasons have been advanced as a justification for the imposition of vicarious liability:
- (1) The master has the 'deepest pockets'. The wealth of a defendant, or the fact that he has access to resources via insurance, has in some cases had an unconscious influence on the development of legal principles.
- (2) Vicarious liability encourages accident prevention by giving an employer a financial interest in encouraging his employees to take care for the safety of others.

⁶²[1942] All ER .49

⁶³[1946] 175 LT 131.

- (3) As the employer makes a profit from the activities of his employees, he should also bear any losses that those activities cause.

❖ **DEVELOPMENT OF VICARIOUS LIABILITY IN ENGLAND**

- The idea at first was to hold a person responsible for his own fault and was also asserted by Plato in his laws that a person should be held responsible for his own sins.
- In Common Law the history of Vicarious Liability can be traced back in 1837 (early 19th C). This period was dominated by the economic theory of 'Laissez faire'. Under this theory, the welfare of the community was served by living each individual free to pursue his own interest. The status of employer's liability under that theory can be found in **PRISTLEY v. FOWLER**⁶⁴. In this case, the plaintiff was employed by the defendant (butcher).
- The plaintiff was instructed by the defendant to deliver goods which were overloaded in the van by another employee. The Van broke down and the plaintiff fractured his thigh. The plaintiff sued the defendant claiming to be compensated for the damage caused to him.
- It was held that the defendant was not liable because the act was due to negligent act of overloading the van by another servant. This was therefore the first case recorded to have established the doctrine of common employment.
- The doctrine of common employment excluded/relieved the master from liability for injuries caused to his servant by negligence of a fellow servant whom they are engaged in common employment.
- The court reached this decision because it was the age of 'Laissez faire' which required servants to take care of their own safety. The contract of service (assumption) contained an implied term that the servant agreed to run a risk incidental to the employment including the risk for negligence on the part of his fellow servant. This reason was, to a great extent, recognised by the court.
- There was an assumption that, it was necessary to limit the liability of the master (why?) because industries were at the earliest stage of development. Due to low level of science and technology there were many industrial accidents hence compensation

⁶⁴ [1837] 3 M & W 1

to victims of a vast number of industrial accidents appeared to place a heavy financial burden on employers which could put a break to economic development. Thus, the vast of those industrial accidents remained uncompensated.

- In **BARTONSHILL COAL CO vs. REID**⁶⁵, the court agreed with the application of the doctrine of common employment. It rejected the argument that the employee agreed to take the risk of negligence on the part of the employer himself. Until 1880 compensation to workmen (employees) who were injured from employment was through a common law action. The plaintiff was required to prove negligence on the part of the employer. But recovery of damages was limited by the following constraints:
- The defenses available to the employer such as; contributory negligence on the part of the employee, the doctrine of Volenti Non fit Injuria, and the doctrine of common employment. The right of action was personal to the injured employees hence died with him.
- In the 19th C more changes in favour of employees occurred. These were facilitated by the interaction between; public opinion; legislative policy; and judicial function
- In England, the Employer's Liability Act of 1880 to a great extent limited the application of the doctrine of common employment. The employer was made liable for any personal injury caused to an employee by any defects in ways of employment.
- The National Insurance (Industrial Injuries) Act of 1946 was also passed to compel Insurance of Servants against personal injuries arising out of and in the course of employment.
- Finally, in 1948 the doctrine of common employment was abolished by the Law Reform (Personal Injuries) Act, 1948 vide S. 1 (i). In Tanzania the Doctrine was abolished by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (CAP 360) Part VI S. 13 (Read with Part V S. 11)
- The influence of the judiciary in the development of employers liability appeared due to efforts of courts in limiting the application of the doctrine of common employment.

⁶⁵[1858] 3 Macq. 266

- In **SMITH vs. BARKER**⁶⁶, it was stated that in the contract of employment the employer is required to take reasonable care to provide adequate and safe system of work and maintain them in a proper condition. Also that the employer is required to carry out his operations so as not to expose those employed to unnecessary risks. Thus, here the court is imposing a duty to take reasonable care on the part of the employer.
- In 1938 the employers' duty was redefined in **Wilsons & Clyde Coal Co vs. English**⁶⁷, where Lord Wright held the duty to be three fold: The provision of competent staff, Provision of adequate material, Provision of proper system and effective supervision.
- The Employers' Liability concept is confined in a situation where there is employer employee relationship (contract of service).
- Salmond says, that: *"In general a person is responsible only for his own acts, but their exceptional cases in which the law imposes on him vicarious responsibility for the acts of other, however blameless himself."*

❖ DEVELOPMENT OF VICARIOUS LIABILITY IN TANZANIA

- This law of vicarious liability as the doctrine of Common Law was applied in Tanzania by virtue of Article 17 (2) of the Tanganyika Order in Council, 1920 during the British Colonial rule, latter after independence this law was applied in Tanzania by the virtue of Section 2(3) in the Judicature and Application of laws Ordinance, of 1963 which is now revised edited in Judicature and Application of Laws Act⁶⁸.
- In Tanzania the doctrine of vicarious liability can be traced by Tanganyika Order In Council of 1920 by which in section 17(2) it provided for application of common laws and doctrine of equity and statute of general application established that the doctrine of vicarious liability in Tanzania has existed for a time immemorial and it was recognized under customary laws, whereby it was contended in the decision of the case of **Kibaka v kitonto**⁶⁹ in which in that decision was adopted in the case of **Mariba wanyangi versus**

⁶⁶[1891] AC 325

⁶⁷[1938] AC 57

⁶⁸[CAP 358 R.E. 2002]

⁶⁹ (1965) E.A 278

Romare⁷⁰ and as well in the case of **Salim Ramadhan Versus Iddi Bakari Mussa**⁷¹ where it was contended that many of Tanzania tribes include warangi tribe recognize doctrine of vicarious liability.

- Therefore development of vicarious liability can be traced by passing through various case laws, as in establishing when person is on the course of employment in the case of **Machame Kaskazini corporation limited (Lambo estate) Versus Aikaeli Mbowe**⁷², the respondent had sued the appellant and one Simon Alfayo Msomari jointly and severally in negligence for damages caused to his house and goods as well as for loss of earning as result of such damage.
- As it was established in the fact that on material day, Simon after working hours and without the authority or knowledge of appellant took and drove a vehicle to visit his relative; on return at 8:15 p.m he crashed into respondent building and was subsequently charged and convicted of reckless driving.
- Despite the fact that Mr. Simon was not in the course of employment the High court found that the appellant was vicarious liable, the matter went further to the Court of Appeal whereby it was held that; it is the question of fact that whether the unauthorized act by servant is within or outside the scope of his employment
- Therefore it was argued that Simon was not engaged in his employer's business on the material time and the visit to his relative had absolutely no connection with his employment, in reaching decision court of appeal cited a case of **Marsh v Moore**⁷³, as to see whether an employee was in the course of employment in the case was established that the master is liable even for acts which he has not authorized provided they are so connected with the acts which he authorized and wrongfully acts of the servant is not connected with authorized acts of the servant as to be mode of doing it but it an independent act, the master is not responsible in such a case.
- Therefore the case established the rule that employer will not be liable act committed by his servant while on the frolic of his own.⁷⁴

⁷⁰ [1997] LRT n 9

⁷¹ Civil case No 71 Of 1992 High court Dodoma Registry (Unreported)

⁷² [1984] TLR 70 (CA)

⁷³ (1949) 2KB 208 at 215

⁷⁴ Binamungu C. S. (2004), Law of Tort in Tanzania, research and Publication Department Mzumbe

- In the case of **Rev Christopher Mtikila v The Editor Business Times and Augustine Lyatonga Mrema**⁷⁵, whereby the plaintiff sued the defendant in defamation for words altered by the first defendant, for the second defendant, a preliminary point was raised and argued to the effect that because the altered defamatory words, if they are at all altered must have been altered by second defendant in the course of discharging his ministerial duties and he cannot be sued in personal capacity rather the suit should be the suit against government in accordance with government proceeding Act⁷⁶.
- The High court of Tanzania after thoroughly and extensive research on vicarious liability held that, by vicarious liability the master is liable for tortious or omission of the servant and the two are joint tortfeasors either or both of them can be sued. Vicarious liability does not transfer the principle liability of the servant to the master.
- By vicarious liability an employer is vicariously liable for torts committed by his servants; but that does not absolve the liability of servant for the tort he has committed.
- In **Roseleen Kombe v Attorney General**,⁷⁷, the two police officers were sentenced to death after been found guilty of killing the deceased who was the director of intelligence. The officers killed the deceased when searching the stolen car and its thief, and they mistook the car, and they mistook the vehicle the deceased was driving for the stolen car, and the deceased for the thief.
- The defendant on behalf of herself and eight defendants sued the government for damage for death of her husband caused by police officer. The defendant denied that the government is not liable because the officers were not in the course of their employment. The most important point to note from this case is that the government is statutorily liable for the torts committed by its servant in a case like this one. The position of is what stated by Samatta, J.K. (as he then was) and cited the case of **Mtikila v Editor, Business Times and another**,
- *So vicarious liability means that one person takes the place of another so far as liability is concerned. Familiar instances are where the master shoulders the liability of his servant; or the principal shoulders the liability of his agent and so forth. Whenever the law imposes*

⁷⁵[1993] T.L.R 60

⁷⁶Act of 1967

⁷⁷[2003] TLR 347

vicarious liability, it does so for reasons of social policy reasons which commend themselves to the people at large. If a servant injures another by his negligence, his master should make good the loss. It does not matter whether the servant or agent is acting for the benefit of his master or principal or not. Suffice it that the master or principal has put him in a position where he may do injury to another; and should be liable for the way in which he conducts himself therein. It is true that the master or principal is not personally at fault. But it is only that he should be made vicariously liable. Otherwise it would mean that the injured person would get no redress; for, more often, the servant or the agent has not means to pay. In this way the innocent victim is not left to bear loss himself, it is distributed among the community. The employer is only liable because he is in a good position to pay than his employee, so the government is liable for the acts of his employees/servant.

❖ **EMPLOYEE OR INDEPENDENT CONTRACTOR?**

- Employers/masters will only be liable for the torts of their employees/servants. They will not usually be liable for the torts of their independent contractors (see below). It is therefore necessary to establish the status of the tortfeasor.
- The intention of the parties is not necessarily conclusive. Contrast, for example:
- In **Ferguson v Dawson Partners**⁷⁸, a building worker who at the time of hiring was expressed to be a 'labor only subcontractor' was held to be an employee because in all other respects he was treated as an employee. The statement had been made for tax and national insurance purposes.
- **Massey v Crown Life Insurance**⁷⁹, there was a detailed written contract and the parties' intention prevailed.
- Various tests for establishing an individual's employment status have been developed through the cases:

▪ **(a) The control test**

- This was the traditional test. In **Collins v Hertfordshire CC**⁸⁰, Hilbery J said: "The distinction between a contract for services and a contract of service can be summarized in

⁷⁸[1976] 3 All ER 817

⁷⁹ [1978] 2 All ER 576

⁸⁰ [1947] 1 All ER 633

this way: In one case the master can order or require what is to be done, while in the other case he can not only order or require what is to be done, but how it shall be done."

- But in **Cassidy v Ministry of Health**⁸¹, Somervell LJ pointed out that this test is not universally correct. There are many contracts of service where the master cannot control the manner in which the work is to be done, as in the case of a captain of a ship. He went on to say: "One perhaps cannot get much beyond this 'Was the contract a contract of service within the meaning which an ordinary person would give under the words?'".
- In **Yewens vs. Noakes**⁸², it was held that a servant is a person subject to the command of his master as to the manner in which he should do his work.
- In the case of **Short v J & Handson Ltd**⁸³, lord Thankerton laid down four tests for determining a contract of employment. Firstly is the power of the employer to select the employee; secondly, the power to pay wages or other remuneration; thirdly, the employer's right to control the method of doing work; and fourthly, the employer's right to suspend and dismiss his employee.
- He however continues to add that the control test is the best is the most important to determine the relationship between the employer and employee. This position is further supported by **Mercey Docks and Harbrum Board V. Coggins and Griffith**⁸⁴. In determining which employer is liable, the court laid down four major principles:
 - Firstly, there is a strong presumption that the general (original) employer continues to be the master; secondly, that the burden is on the general employer or permanent employer to prove that there is transfer of services, thirdly, that this burden can be discharged by proving that entire and absolute control was transferred to the hirer and that the employee has expressly or impliedly consented to the to the transfer. Fourthly, that a term in the contract between the general employer and the hirer stipulating as to who shall be the master of the servant.
- Lord Porter observed: *"I think the most satisfactory test by which to ascertain as who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged."*

⁸¹ [1951] 1 All ER 574

⁸²[1880] 6 QB

⁸³ (1951) ALL ER 574

⁸⁴ (1946)2 ALL ER 345

- The Control Test is used to determine the type of relationship involved, therefore establishing whether vicarious liability will apply. Mason J in **Stevens v Brodribb**⁸⁵, pointed out that the control test was based on the right to control the activities of the employee. The court looks more to the practice of the parties rather than the contract itself. If the Master controls what the employee does and how it is done, then the employee is a servant. The relationship will give rise to Vicarious Liability.

- **(b) The nature of the employment test**

- One accepted view is that people who have a 'contract of service' (an employment contract) are employees, but people who have a 'contract for services' (a service contract) are independent contractors (Ready Mixed Concrete v Minister of Pensions and NI [1968] 1 All ER 433).

- **(c) The 'integral part of the business' test**

- This test was proposed by Lord Denning in **Stevenson, Jordan and Harrison Ltd v McDonald and Evans**⁸⁶: 'It is often easy to recognize a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.'
- The **organisational test**, was evolved in the case of **Stevenson, Jordan and Harrison Ltd vs. McDonald**⁸⁷, Denning LJ 'Under a contract of service a man is employed as part of the business and his work is done as an integral part of the business, where as under a contract for services, his work although done for the business is not integrated into it but is only accessory to it'
- Under this test, skilled persons and professionals qualifies as employees although the employer has no control over the manner in which they discharge their duties. The major difference between this test and control test is that there is still an element

⁸⁵Stevens v Brodribb Sawmilling Co Pty Ltd (1986)

⁸⁶1952] 1 TLR 101

⁸⁷[1952] 1 TLR 101 at 111

of control, while under the control test the employer controls ‘how’ the work is done under the organisational test the employer controls the ‘when’ and ‘where’.

▪ **(d) Allocation of financial risk/the economic reality test/multiple test**

- Lord Wright suggested a complex test involving (i) control; (ii) ownership of the tools; (iii) chance of profit; (iv) risk of loss (*Montreal v Montreal Locomotive Works* [1947] 1 DLR 161). In a later case, Cooke J referred to these factors and said that the fundamental test was: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer is yes, it is a contract for services; if no, it is a contract of service.
- There is no exhaustive list of considerations relevant to determining this question, and no strict rules about the relative weight the various considerations should carry in a particular case. Factors which could be of importance were: (i) whether the person hires his own helpers; and (ii) what degree of responsibility for investment and management he has (*Market Investigations v Minister of Social Security* [1968] 3 All ER 732).
- These factors were considered to be significant in: **Ready Mixed Concrete v Minister of Pensions and NI⁸⁸**, where ‘owner-drivers’ who delivered concrete in vehicles purchased on HP from an associated company, painted in company colours and which could not be used for private purposes or other haulage business, were employed under a contract of carriage than of service. Ownership of the assets (the vehicle), the chance of profit and the risk of loss were the driver's. These factors were inconsistent with a master-servant relationship.

❖ **Lending an employee**

- If an employer lends an employee to another employer on a temporary basis, as a general rule it will be difficult for the first employer to shift responsibility to the temporary employer. See:
- In **Mersey Docks & Harbour Board v Coggins Ltd⁸⁹**, the Board was liable for the negligence of a crane driver hired, along with a crane, to Coggins. The contract provided that the driver was to be the servant of Coggins but the Board continued to pay his wage and had the power to dismiss him. Coggins had immediate control over what the driver

⁸⁸ [1968] 1 All ER 433

⁸⁹ [1946] 2 All ER 345

should do, but no power over how the crane should be operated. The HL held that the driver remained the servant of the Board.

❖ **Vicarious liability “in the course of employment”**

- For an employer to be held liable, the wrong must be committed “within the course of employment.” This criteria is a question of fact, and it is immaterial whether the wrong committed by the employee was authorised or not.
- An employer will only avoid liability in this situation if it can be shown that an employee acted “**on a frolic of his own**,” or in other words, if the employee acted in a way that was unconnected with his employment. Parke B famously stated in **Joel v Morison**⁹⁰, that the servant must be engaged on his master's business, not 'on a frolic of his own'.
- Recently, the courts have been willing to impose liability in far-reaching circumstances on the issue of whether the wrong was committed “in the course of employment.” Important in this context is the case of **Lister v. Hesley Hall Ltd**. This case establishes that an employer cannot avoid liability by showing that an employee engaged in an intentional and unauthorised wrongdoing.
- Thus, the important factor in establishing vicarious liability is the connection with the “course of employment.” However, it is important to note that an employer cannot avoid liability if an employee acts in a way that could be described as “incidental” to his employment and the duties to which he is entrusted with. Therefore, in establishing whether vicarious liability exists, the question to be asked is firstly, whether the act complained of was committed “in the course of employment” and secondly, whether the act is reasonably “incidental” to the employee's employment duties. If there is a connection, it is irrelevant whether the employee's act was unauthorized.
- In the wake of Lister, a more recent trend has been to impose liability upon an employer for violent acts committed by employees. In the Court of Appeal case of **Mattis v. Pollock** (t/a Flamingos Nightclub) a nightclub owner was held vicariously liable for the violent acts of an employed doorman. The Court of Appeal applied the rationale of Lister and held that a “broad” approach was required in assessing whether an individual's acts were sufficiently connected with the duties of his employment so as to justify imposing vicarious liability.

⁹⁰ [1834] 6 C&P 501 at 503

- An employer will usually be liable for (a) wrongful acts which are actually authorized by him, and for (b) acts which are wrongful ways of doing something authorized by the employer, even if the acts themselves were expressly forbidden by the employer⁹¹. Liability for criminal acts will also be considered.

- **Wrongful modes of doing authorized acts**

- **In the following cases it was held that the employer was vicariously liable for torts of the employee:**

- In *Limpus v London General Omnibus Co* (1862) 1 H&C 526 - bus drivers racing, despite a prohibition, caused a collision. *Bayley v Manchester, Sheffield and Lincolnshire Railway Co* (1873) LR 8 CP 148 - a porter, believing a passenger was on the wrong train, violently pulled him off, causing injury. *Century Insurance Co v Northern Ireland Transport Board* [1942] 1 All ER 491 - a petrol tanker driver, smoking a cigarette threw away a match, causing an explosion. *Rose v Plenty* [1976] 1 All ER 97 - a milkman, contrary to express instructions, employed a 13-year-old assistant, injured by the milkman's negligent driving. The act here was done for the employers' business.

- **In the following cases it was held that the employer was not vicariously liable:**

- In *Beard v London General Omnibus Co* [1900] 2 QB 530 - a bus conductor drove a bus injuring a pedestrian. *Twine v Bean's Express Ltd* [1946] 1 All ER 202 - a hitchhiker had been given a lift contrary to express instructions and was fatally injured. Lord Greene MR said that the servant was doing something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there. *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74 - workmen drove seven or eight miles for tea, immediately after finishing their lunch in a pub. The van overturned and a passenger was killed.

- **Criminal acts**

- An employer will not usually be liable for the criminal acts of employees. For example:
- In *Keppel Bus Co v Ahmad* [1974] 2 All ER 700 - a passenger who objected to a bus conductor's treatment of another passenger and then insulting language was assaulted by

⁹¹ Salmond & Heuston on the Law of Torts, 1996, p443

the conductor. The employer was held not liable by the Privy Council. Lord Kilbrandon said that insults to passengers are not part of the due performance of a conductor's duty.

- In *ST v N. Yorkshire CC* [1999] IRLR 98 - a deputy headmaster of a special school, responsible for caring for a handicapped teenager on a foreign holiday, sexually assaulted him. Butler-Sloss LJ said that this was not an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it was a negation of the duty of the council to look after children for whom it was responsible.
- However, if the employee performs their duties in a criminal manner, an employer may be liable. See:
- In *Morris v Martin Ltd* [1965] 2 All ER 725 - a fur coat sent to cleaners was stolen by the employee whose job it was to clean the coat. The cleaners were liable for the theft.
- In *Nahhas v Pier House Management* (1984) 270 EG 328 - a porter entrusted with keys by a tenant, entered her flat and stole jewellery. The employers were liable for negligently employing a 'professional thief' and breaching a duty to protect the plaintiff's flat.
- In *Vasey v Surrey Free Inns* [1996] PIQR P373 - the plaintiff was attacked by two doormen and a manager employed by the defendant after he had kicked a door, breaking glass. The CA held the defendants vicariously liable because the attack was a reaction to the damage to the door for the protection of the employer's property and was not a private quarrel unrelated to the employer's duties.

▪ **Vicarious Liability under a statutory duty**

- An employer can also be held vicariously liable for an employee's breach of a statutory duty. This duty differs to that of a common law duty in that the duty does not rise by operation of common law principles, but by statute. As such, the statute imposes a duty on the employee personally and makes no reference to the employer.
- An employer can be held liable for the breach of a statutory duty even where the statutory duty is owed by the employee personally and individually. This circumstance would potentially arise in the context of harassment within the workplace, where one employee has been harassed or bullied by another.
- However, emphasis will be placed on the intention of the legislature in creating the statute in deciding whether vicarious liability should be imposed.

❖ THE INDEMNITY PRINCIPLE

- There is a term implied at common law into contracts of employment that an employee will exercise all reasonable care and skill during the course of employment. An employee who is negligent is in breach of such a term and the employer who has been held vicariously liable for the tort may seek an indemnity from the employee to make good the loss.
- In *Lister v Romford Ice* [1957] 1 All ER 125. A father was knocked down by his son, who was employed by Romford Ice, while backing his lorry in a yard. The employers were vicariously liable for the son's negligence and their insurers met the father's claim. The insurers sued the son in the company's name, exercising their right of subrogation under the contract of insurance. By a majority, the House of Lords held that the son was liable to indemnify the employer and consequently the insurers.
- This case led to controversy about insurers forcing employers to sue employees, which would lead to poor industrial relations. Employers' liability insurers later entered into a 'gentleman's agreement' not to pursue such claims unless there was evidence of collusion or wilful misconduct (See further: Gardiner (1959) 22 MLR 552; Hepple & Matthews, *Tort: Cases and Materials*, 1991, p881).

❖ LIABILITY FOR INDEPENDENT CONTRACTORS

- In *Alcock v Wraith*⁹², Neill LJ stated: "where someone employs an independent contractor to do work on his behalf he is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work ..."
- **The main exceptions to the principle fall into the following categories:**
 - (a) Cases where the employer is under some statutory duty which he cannot delegate, (b) Cases involving the withdrawal of support from neighbouring land, (c) Cases involving the escape of fire. (d) Cases involving the escape of substances, such as explosives, which have been brought on to the land and which are likely to do damage if they escape; liability will attach under the rule in *Rylands v Fletcher* (1868) LR 3 HL 330. (e) Cases involving operations on the highway which may cause danger to persons using the highway. (f) Cases involving non-delegable duties of an employer for the safety of his employees. (g) Cases involving extra-hazardous acts."

⁹²[1991] 59 BLR 16,

- Neill LJ then examined whether there was a further exception which could be relied upon in cases of nuisance. He referred to *Matania v National Provincial Bank*⁹³, where the Court of Appeal was concerned with a claim for damages for nuisance caused by dust and noise during building operations; Slessor LJ concluded that the work did constitute a hazardous operation within the exception to the general rule. Neill LJ then stated that both the general rule and the exceptions apply whether the action is framed in negligence or nuisance. Furthermore, he was not aware of any different approach being adopted in an action for trespass.

❖ ENFORCEABILITY OF EMPLOYERS LIABILITY

- How is employers' liability enforced?. The injured employee can claim for compensation either under Common Law or under Employees' Compensation Statute. Both ways aims at compensating employees who get injured while in the course of employment. Normally compensation is given in monetary terms. The amount that is awarded is for the purpose of putting the injured employee as nearly as possible in the same position as he would have been had he not sustained injuries.
- In Tanzania the employers liability can be enforced using Common law principles; the provisions of Occupational Health and Safety Act, 2003 (Act No 5 of 2003); and The provisions of the Workers Compensations Act, 2008 (Act No 20 of 2008)
- The Occupational Health and Safety Act, 2003. The Occupational Health and Safety Act, 2003, provides for the safety, health, and welfare of persons to ensure that employers in Tanzania are providing employees with a safe working environment.
- Owners of factories and workplaces are required to register their buildings before use or occupation. Section 15 of the act provides that there shall be a register of factories and workplaces in which the Chief Inspector shall enter such Particulars in relation to every factory and workplace as he may consider necessary for the purpose of this Act.
- Section 16 (1) and (2) of the Act is to the effect that before any person occupies or uses as a factory or workplace any premises, which were not so occupied by

⁹³[1936] 2 All ER 633

him at the commencement of this Act, that person shall apply for the registration of premises.

❖ <u>WORKERS COMPASATION</u>

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- In Tanzania, this is governed by the provisions of the Workers' Compensation Act [Act No 20 of 2008]. Before that, it was regulated by the Workmen's Compensation Ordinance, CAP 263 of the revised laws of Tanganyika which was later referred to as Workers' Compensation Act [CAP 263 R.E 2002] after the Revised Laws 2002 came into force.
- Act No. 20 of 2008 provides for compensation to the employees who get injured through accidents or occupational diseases while in the course of employment. The compensation payable under the Act is not dependent on any negligence/fault but rather is in the form of an insurance of the work man against risks of accidents.
- The Act, thus is a **social security legislation** based on the United Kingdom Compensation Law of 1925 which conforms with I.L.O Workmen's Compensation for Accidents Convention No. 17 of 1925. The Act applies to Tanzania Mainland and covers all employers and employees including those in Public Service.
- Section 3 of the Act sets objectives of this law which include; Provide for adequate and equitable compensation for employees who suffer occupational injuries or contract occupational diseases arising out of, and in the course of their employment and in the case of death, for their dependants; Provide for the rehabilitation of employees who have suffered occupational injuries or contracted occupational diseases in order to assist in restoring their health, independence and participation in society;
- **'Workers' Compensation Act is a social security legislation** because is the Act containing provisions which used to protect Rights of workers out and in the course of employment as per *Section 3 of the of Evidence Act*⁹⁴, sets objectives of this law which include;
- **Provides for adequate and equitable compensation** for employees who suffer occupational injuries or contract occupational diseases arising out of, and in the course of

⁹⁴ [Act No 20 of 2008].

their employment and in the case of death, for their dependants; In the case of **James Patrick & Co. Proprietary Ltd. v Sharpe**⁹⁵, where In this case the husband of the respondent was employed by the appellant. As he was travelling between his place of residence and his place of employment he suffered an auricular fibrillation as a result he died. It was held that the injury arose out of and in the course of employment.

- **Provides for the rehabilitation of employees** who have suffered occupational injuries or contracted occupational diseases in order to assist in restoring their health, independence and participation in society; In **Ali Mahdi v Abdulla Mohammed**⁹⁶, the respondent was in a lorry of the appellant. Some sand was thrown up by a passing vehicle and entered his eye and caused him to lose it. The High Court of Tanganyika (as it was then) upheld the decision of the District Court that the accident arose out of and in the course of the respondent's employment.
- **Provides for a framework for the effective**, prompt and empathetic consideration, settlement and payment of compensation benefits to employees and their dependants; **Zuleikha binti Amour vs. Construction Engineers and Builders**⁹⁷, In this case, the deceased met an accident within the employment premises as he was going back after working hours. The widow of the deceased claimed several rights including compensation for the death of the deceased. issue was whether, the deceased met the accident while in the course of employment. The court held that the injury sustained by the deceased while going to or from work at the place of employment and residence is arising out of and in the course of employment.
- **Provides for the establishment, control and administration** of the WCF & the legal framework for contributions to and payments from the Fund, *Section 19 (1) of the Act*⁹⁸ provides that where an employee has an accident resulting in the employee's disablement or death, the employee or the dependants of the employee shall, subject to the provisions of this Act, be entitled to the compensation provided under this Act.

⁹⁵ [1954] 3 All E.R. 216 (Australia)

⁹⁶ [1961] E.A. 83.

⁹⁷ (1984) TLR 289

⁹⁸ [Act No 20 of 2008].

- **Funeral grants**, *Section 53(1) of the Act*⁹⁹, demands the Director-General to pay out of the fund an amount of compensation within the limits set out in item 9 of the Fourth Schedule, for the funeral costs of an employee who dies as a result of an injury earned by an accident.
- In *section 53 (2) of the Act*¹⁰⁰, the law is to the effect that, without prejudice to subsection (1) the Minister may make regulations prescribing the manner in which calculation of the amount of compensation to be paid shall be made.
- **Provides for compensation for occupational Diseases**, according to *section 22 (1)*¹⁰¹ where an employee contracts a disease set out in the Third Schedule to the Act, or any other disease, and the disease has arisen out of, and in the course of the employee's employment, the employee shall, subject to the provisions of the Act, be entitled to the compensation. Where an employee dies as a result of a disease referred to under subsection (1), the dependants of the employee shall, subject to the provisions of the Act, be entitled to the compensation.

▪ **RELEVANT CASES ON WORKERS COMPASATION**

- **Virani vs. Dharamshi**¹⁰², In this case, the deceased was an employee of the appellant. Part of the deceased's duty was to go to a particular godown to collect coffee beans. The deceased and another person who was not in the same employment had a quarrel as a result of which the deceased died.
- The court held in this case that, the accident arose out and in the course of employment if it results from an act which an employee is employed to do even if the employee is adopting a wrong method of doing the act or is doing it in the wrong manner.
- Thus, the quarrel was held to have resulted from an act done by the deceased for the purposes for and in connection with his employment.
- In **Ali Mahdi v Abdulla Mohammed**¹⁰³, In this case the respondent was in a lorry of the appellant. Some sand was thrown up by a passing vehicle and entered his eye and caused him to lose it. The High Court of Tanganyika (as it was then) upheld the decision of the

⁹⁹ [Act No 20 of 2008].

¹⁰⁰ [Act No 20 of 2008].

¹⁰¹ Ibid

¹⁰² [1967] EA 132

¹⁰³ [1961] E.A. 83

District Court that the accident arose out of and in the course of the respondent's employment.

- In the case of **Hill v Butterley Co. Ltd**¹⁰⁴, the plaintiff was an employee of the defendant. As she was crossing the premises of the defendant to get to the office so as to register her name before starting work she slipped on an icy slope and was injured. The Court of Appeal held that the accident "arose out of and in the course of employment".
- In another case of **Campbell v Proud's Engineering Co-Ltd**¹⁰⁵, a workman was an employee of the defendant and was going for his pay in another office of the defendant which was some distance away. On his way he jumped on the near side of a passing lorry that was going in the same direction. An accident happened and the workman died.
- The Court of Appeal held that the workman was going to the office for his pay and he was in the course of his employment. The jumping on the lorry instead of proceeding on foot did not make his journey of a different kind from what it would have been had he used a safer method. The question of compensation for the injured employees while in the course of their employment is a matter of right. It is taken to be part and parcel of the costs of a certain job.

❖ <u>OCCUPIER LIABILITY</u>

■

▪ **INTRODUCTION**

- Occupiers' liability it is the branch of law of tort which deals with the liability of the occupier's premises towards the visitors who came in their premises. It is the kind of tort which imposes duties upon the occupiers of the premises to take good care of their premises so as to protect the visitors.
- Occupiers' liability covers liability which may arise from the accident caused by the defective premises. It is an extension of the law of negligence which imposes duty or duties upon the individual or person. Occupiers' liability in Tanzania is governed by the **Occupiers' Liability Act [CAP 64 R.E. 2002]** and the principle of the common law.

¹⁰⁴[1948] 1 All E.R. 233

¹⁰⁵[1947] 2 All E.R. 97

- The liability of occupiers to visitors, whether lawful or not. The liability is based on fault and is considered to be a species of negligence, although it is now on a statutory footing both in relation to lawful visitors and to trespassers.

- **WHO IS AN OCCUPIER?**

- An occupier simply is the person who is in control of the premises. The leading case on this issue is **Wheat v E Lacon & Co Ltd**¹⁰⁶, where husband of the claimant fell down the back staircase of an inn where he was a lodger. The hand rail was short and also there was no light bulb in the fitting at the top of the stairs.
- The respondents owned the inn and employed a manager who lived on the premises and who had permission to take in lodgers. It was held that there was no breach of duty by anyone, but one of the central issues was who was the occupier of the premises, the respondents or the manager?.
- Lord Denning said that “...*An occupier is the person who has some degree of control associated with and arising from his presence in and the use of premises...*”
- So according to that case the main test whether a person is an occupier is whether such person has some degree of control associated with his presence and use of the premises.
- It doesn't necessary means that an occupier must be the owner of the premise. An occupier can be any other person apart from the owner provided that such person he is using the premises or is in control of the premises.
- So if the owner of the premises has dematized his premises to another person, that person which may be either a tenant, lessee will be the occupier of that premises.
- But if the owner is in possession of the premises or is using the premises he will be the occupier of that premises. Now the term premises for the purpose of occupiers' liability is not confined to immovable property only. It may involve other movable properties such as vessels, vehicles, ships, aircraft, and etcetera.
- Those persons were divided into two categories, **invitees** and **licensees**: and a higher duty was owed to invitees than to licensees; the duty of the occupier had become simply a duty to take reasonable care to see that the premises were reasonably safe for people coming lawfully on to them.

¹⁰⁶[1947] KB 598.

- wherever a person has a sufficient degree of control over premises that he ought to realize that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an 'occupier' and the person coming lawfully there is his 'visitor'; and the 'occupier' is under a duty to his Visitor' to use reasonable care.
- In order to be an 'occupier', it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control.
- Occupier's liability replaced the old common law distinction between invites and licensees and replaced it with general category of visitor. The liability of an occupier of land or premises to persons on the land for the condition of the premises and things done there.
- The occupier for this purpose is the person or persons exercising control over the premises. At common law the extent of an occupier's liability varied according to whether the person on the land entered under a contract as an invitee, as a licensee or as a trespasser, the common law rules have been replaced by statutes.
- The English statute distinguished between visitors and other person on land. The occupier's liability Act 1957 imposes on an occupier a common duty of care to all his visitors such as those who enter by his invitation or his permission, to see that they will be reasonably safe in using the premises for the purpose for which they were invited or permitted to be there.
- Under the occupier's liability Act 1984 an occupier only owes a duty to persons who enter lawfully but without the occupiers permission; If the occupier is aware or has reasonable ground to know if a danger on premise and that a person may be in the vicinity of danger and the risk is one against which he may be reasonably be expected to offer some protection.
- The duty is confined to taking such care as is reasonable in all the circumstances to see that the danger does not cause death or personal injury to the person concerned. The duty may be discharged by taking such steps as the reasonable to give warning of danger or to discourage person from incurring the risk.

- **Harris v. Birken Head**¹⁰⁷, the local authority had issued a notice of compulsory purchase order and notice to entry but had not taken possession. They were held to be occupiers.

- **DUTIES OF AN OCCUPIER**

- The occupier has the duty to make sure that the visitors will be reasonably safe in using the premises for the purpose for which there are invited or permitted to be there as provided under section 3 (2) of the Occupiers' Liability Act¹⁰⁸.
- Therefore this duty will be said to be breached if the visitors suffer some injuries arising from the defective condition of the premises. And if there is any danger or defect to the premises the occupier will be said to have discharged his duty if he has warned the visitor of the danger as per section 3s' Liability Act¹⁰⁹.
- And the occupier must be aware that the nature of the warning may differ depending on the age of the visitors. Therefore the warning which is sufficient to adult may not be sufficient to children simply because children are less careful than adult. Therefore the duty of the occupier towards the children is higher than that of the adult visitors as per section 3(a) of the Occupiers' Liability Act¹¹⁰.

- **WHO IS A VISITOR**

- A visitor is the person who has express or implied permission to enter into the premises. The term visitors it includes the group of persons who are under common were referred as invitees, Licencees and the Contractors or the person who has the contract with the occupier.

- **WHO IS THE VISITORS WITH IMPLIED PERMISSION**

- This is the question of facts depending on the nature of each case but generally it includes the person who has been authorized by the law to enter into the premises for their own purposes. For example it includes the policemen executing lawfully duties or Tanesco meter readers, the firemen attending the fire or the explosion, water meter reader etcetera.
- On the other side there is a trespasser, a trespasser is an opposite of visitors. A trespasser is the person who enters into the premises without lawfully justification or without legal

¹⁰⁷ [1976]

¹⁰⁸[Cap 64 R.E 2002]

¹⁰⁹Ibid

¹¹⁰[Cap 64 R.E 2002]

permission. As the general rule under common law the occupier has no duty towards the trespasser.

- The occupiers' duty towards a trespasser is only limited not to injure the trespasser intentionally or deliberately. Therefore for example if the occupier is aware of the beggar in his premises he can't shoot him or her or injure him in anyway simply because the beggar is the trespasser.
- Furthermore if the occupier is aware of any danger in his premises and there is a trespasser then the occupier has the duty to warn the trespasser of the danger. However a person may be a lawfully visitor but there are some circumstances which may change that person into a trespasser.
- In other words there are situations or circumstances which may change a status of a visitor and make him or her trespasser. This may happen if the occupier has put some limit in his invitation such as limits as to time, purpose or place of the **visitors therefore the visitors may become a trespasser in the following circumstances;**

1. A visitor may become a trespasser if he goes into a place where he was expressly or impliedly warned by the occupier not to go. If the visitor has been given such kind of jurisdiction not to go somewhere, if he or she goes there and end up with some injuries he can't claim damage.
2. A visitor may become a trespasser if he abuses or contravenes with the purpose of his or her invitation.
3. A visitor may become a trespasser if he exceeds the limits of his invitation for example about time or place.
4. A visitor may become a trespasser if the occupier no longer concerns to his presence that is if the visitor misbehaves at any time and refuses to leave when asked to do so by the occupier.
5. A visitor may become a trespasser if he uses improper or unauthorized entry in entering or exiting the premises.

- **DISTINCTIONS BETWEEN INVITEES AND LICENSEE**

- The common law has drawn a broad distinction between two kinds of persons who enter on land with the consent of the occupier: between a person who enters the land in pursuance of a common material financial-with the occupier and an entrant who does not share such

an interest with him. The former is known to the law as an invitee and the latter as a licensee; and the occupier has greater responsibilities in ensuring the safety of the invitee than in ensuring that of the licensee.

- The best-known example is perhaps that given by Denning L. J. in **Dunster v. Abbott**¹¹¹, "A cankasser who comes without your consent is a trespasser. Once he has your consent he is a licensee. Not until you do business with him is he an invitee".

- **CIRCUMSTANCE WHERE ONE CAN BE SUED AS AN OCCUPIER**

- Firstly, where a landlord let premises by demise to a tenant, he was regarded as parting with all control over them. He did not retain any degree of control, even though he had undertaken to repair the structure. In **Cavalier v Pope**¹¹², it was argued that the premises were under the control of the landlord because of his agreement to repair.
 - Secondly, where an owner let floors or flats in a building to tenants, but did not demise the common staircase or the roof or some other parts, he was regarded as having retained control of all parts not demised by him. Accordingly, he was held to be under a duty in respect of those retained parts to all persons coming lawfully on to the premises.
 - Thirdly, where an owner did not let premises to a tenant but only licensed a person to occupy them on terms which did not amount to a demise, the owner still having the right to do repairs, he was regarded as being sufficiently in control of the structure to impose on him a duty towards all persons coming lawfully on to the premises.

❖ **NERVOUS SHOCK**



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

¹¹¹[1954] 1 W.L.R. 58 at pp. 59-60:

¹¹²[1906] AC 428

- **Medical Definition:** In medicine, circulatory failure marked by a sudden fall of blood pressure and resulting in pallor, sweating, fast (but weak) pulse, and sometimes complete collapse. Its causes include disease, injury, and psychological trauma.
- Nervous Shock, being a relatively new area of tort, has gained much importance. It is used to describe a claim where the claimant might claim for financial compensation even though he/she has not suffered any apparent physical injury.
- As our Legal systems follow common law principles, especially in the absence of any codified branch of law, and also in the absence of any significant set of cases from Tanzania courts as judicial precedents, we need to look at the history, development and current status of this branch law of torts for a better understanding.
- For a claim of nervous shock, the claimant will have to demonstrate on the basis of medical evidence, that he has a recognizable psychiatric illness or disorder. The types of psychiatric illnesses that are likely to form the basis of claims include, post-traumatic stress disorder, depressive disorders, adjustment disorders and anxiety disorders.
- However, as seen in **Hinz v Berry**¹¹³, a person who suffers from extreme grief and sorrow, but which falls short of a recognised psychiatric illness is not able to recover damages, as one is expected to be able to deal with grief and sorrow.
- Nervous Shock cases may arise out of intentional acts of commission or omission, or unintentional or Negligent acts of commission or omission.
- In case of intentional acts it is not even necessary to prove malice. In the case of **Wilkinson v Downton**¹¹⁴, as a practical joke, Mr Downton told the plaintiff Mrs Wilkinson, that her husband has been seriously injured in an accident and was lying in a ditch with broken bones. The effect of Downton's statement was a violent shock to her nervous system resulting in weeks of suffering and incapacity. Wilkinson sued.
- The trial court found in her favour. Downton appealed on the grounds that damage was merely nervous shock out of a practical joke and there was no cause of action. The appeal court held that a party can recover for outrageous conduct that causes physical harm or mental distress.
- But it is the cases relating to unintentional or negligent acts that has given rise to an enormous body of judicial precedents that has seen a path of evolution with so many twists and turns of befuddling and inconsistent variations of rules and exceptions to the rules and so on. Added to this is the arguments of "flood gates" and 'public policy' that have also

¹¹³[1970] 2 QB 40

¹¹⁴[1897] 2 QB 57

played a role in this evolution of judicial precedents dealing with the subject of nervous shock.

- In the case of **Victorian Railway Commissioner v. Coultas**¹¹⁵, where a gatekeeper at a railway crossing invited a buggy in which a pregnant woman was sitting with her husband. As soon the buggy entered to crossing the train was approaching, there was no physical or actual collision but the escape was so narrow and the danger was so alarming that the lady fainted and suffered a nervous shock resulting in illness and miscarriage.
- Held by Privy Council: Damage arising from a mere sudden terror unaccompanied by any physical impact but resulting in a nervous shock cannot under such circumstances be considered a consequence which in ordinary course of things would flow from negligence of the gatekeeper. Damage was too remote to be recovered as there was no actual bodily impact.
- In **Pugh v London Brighton & Sought Coastory Ltd**¹¹⁶, a signalman noticing that something was wrong with one of the carriages of a speeding train waved a red flag to stop the train. But all the excitement and fright led to a nervous shock being suffered by the signal man, which incapacitated him. The court ruled that this is a case of an accident under the insurance law.
- The first major case involving a negligent act resulting in a nervous shock where the claimant found favour with the court is **Dulieu v White**¹¹⁷. The Claimant A. alleged that while she was sitting behind the bar of her husband's public house (she then being pregnant) B.'s servant negligently drove a pair-horse van belonging to B. into the public-house.
- **Bourhill v Young**¹¹⁸, In this case a motorcyclist was killed in a road accident for which he was responsible. A pregnant woman, who had got off a tram at scene of the accident (having heard the noise of an accident) claimed that when she reached the scene of the accident she saw blood on the road and as a result suffered shock which put her into premature labour resulting in the loss of the baby. She subsequently brought a claim in relation to nervous shock and the resulting loss/damage.
- **HELD:** House of Lords Court denied her claim because it was not reasonably foreseeable that someone not closely connected to the victim would suffer shock. There was insufficient proximity between the motorcyclist and the claimant. There was not a duty of care, owed

¹¹⁵[1888] 13 AC 222

¹¹⁶[1896] 2 QB 248

¹¹⁷[1901] 2 KB 669

¹¹⁸[1942] 2 All ER 396

by the motorcyclist to the claimant and she was not present at the scene of the accident (she had arrived after the accident had occurred).

- In **King v Phillips**¹¹⁹, The driver of a taxicab negligently backed the vehicle into a child (King) who was on a tricycle immediately behind him, slightly injuring the child. At the time of the accident the child's mother was in her house 70 or 80 yards away. While looking out of her window she heard a scream, which was identified as that of the child. She saw the tricycle under the cab, but could not see the child. She ran into the road, met the child and took him to the house. She suffered shock.
- **Held:**., awarded the child damages for injuries he sustained. But denied the claim of the mother for damages under nervous shock. McNair, J: '... the driver of taxicab could not reasonably have foreseen that to back the cab in the way in which he did would cause injury complained to the child's mother, and that therefore the driver owed no duty of care to her.
- In **McLaughlin v. O'Brien**¹²⁰, the proximity factor was further expanded and clarified. The details are: The claimant's husband and three of her children were involved in a serious road traffic accident in which their car was struck by a lorry due to the negligence of the defendant lorry driver. Unfortunately one of the children was killed on impact.
- An ambulance took the injured parties to hospital. Another of the claimant's sons was a passenger in a car behind the family. The driver took him home and told his mother of the incident and immediately drove her to the hospital. She saw her family suffering before they had been treated and cleaned up. As a result she suffered severe shock, organic depression and a personality change. She brought an action against the defendant for the psychiatric injury she suffered. The Court of Appeal held that no duty of care was owed. She appealed to the House of Lords.
- **HELD:** The appeal was allowed and the claimant was entitled to recover for the psychiatric injury received. The House of Lords extended the class of persons who would be considered proximate to the event to those who come within the immediate aftermath of the event.
- In **Alcock v Chief Constable, South Yorkshire Police**¹²¹, the emphasis was on the categorisation of 'victims'. This case arose from the disaster that occurred at Hillsborough football stadium in Sheffield in the FA cup semi-final match between Liverpool and Nottingham Forest in 1989. South Yorkshire Police had been responsible for crowd control

¹¹⁹[1953] 1 QB 429

¹²⁰[1982] 2 QB 40

¹²¹[1991] 4 All ER 907

at the football match and had been negligent in directing an excessively large number of spectators to one end of the stadium which resulted in the fatal crush in which 95 people were killed and over 400 were physically injured.

- The scenes were broadcast live on television and were also repeated on news broadcasts. Sixteen claims were brought against the defendant for nervous shock resulting in psychiatric injury. At trial ten of the claims were successful. The defendant appealed against the findings in nine and the unsuccessful claimants appealed.
- The Court of Appeal found for the defendants in all of the claims. Ten appeals were made to the House of Lords. These included claims made by brothers, sisters, parents, a grandparent and a fiancé. Two of the claimants had been at the ground but in a different area. Some had seen the events unfold on the television, some had heard about the events in other ways. Some had identified bodies at the makeshift mortuary.
- HELD: The appeals Dismissed. Lord Oliver set out the distinction between primary and secondary victims. A primary victim one involved immediately, or, immediately, as a participant and a secondary victim one who is no more than a passive and unwilling witness of injury to others. The claimants were all classed as secondary victims since they were not in the physical zone of danger. As Secondary victims, the claimant must have proximity in time and space to the injured party (witnessing the Immediate aftermath of the incident), close tie of love and affection to the injured party and suffer nervous shock as a result of this.

❖ <u>NEGLIGENT MISSTATEMENTS</u>



- So due to the development on the economical, social and cultural within the society, developed other negligence namely **Negligent Misstatement** was emerged, which is also leading to financial loss or pure economic loss. In the case of **Hedley Byrne v Heller & Partners Ltd**¹²² Where the house of lords inter alia stated that;
“If in the ordinary course of business or professional affairs, a person seeks information or advice from another who is not under a contractual or fiduciary obligation to give the information or advice in the circumstance in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept a legal duty to exercise such care as the circumstances

¹²² (1964) AC 464

require in making his reply and for a failure to exercise that an action for negligence will be if damage results.”

- The above rule was adopted in Tanzania in the case of **Francis Ngair v National Insurance Corporation (N.I.C)**¹²³. In which the Plaintiff was involved in the car accident with Mushi’s vehicle as a result he lost his right arm. The driver was subsequently convicted of various offences arising from the accident. Subsequently the plaintiff’s advocate telephoned the offices of the N.I.C to process compensation. He was told by the clerk in charge of the motor claims department of the N.I.C that the vehicle involved in the accident was at the material time insured as against third party risks with them(N.I.C).
- They were requested to fulfill the formalities in order to be compensated. They were also asked to send a copy of the police report which was done on the same day. After complying with all what was required, the NIC denied that the vehicle was insured with them on the material day and repudiated all liability. In fact the vehicle was insured with the British India Insurance Company but the plaintiff’s claim against them by then was time barred. So the plaintiff filed an action in tort against the N.I.C claiming damages for the negligent misstatement of their employee that the vehicle was insured with the N.I.C. Biron J, citing the case of Hedley Byrne v Heller & Partners Ltd decided the case in favour of the plaintiffs.

➤ **To establish the proceeding under this doctrine one could undergone the following rules;**

(a) That, the plaintiff must prove that the defendant possessed of a special skill.

- This means that the maker has to give advice while knowing that the receiver will rely on the same information to do some subsequent activities as was seen in the case of Francis Ngair v National Insurance Corporation (N.I.C) where the defendant knew that the advice they gave was to be followed to claim for compensation. Because the advice was given negligently the plaintiff was unable to claim from the true insurance company (British Insurance Company) since he was already time barred.

(b) That the plaintiff must reasonably rely on the defendant’s advice

- The plaintiff must prove that he relied on the advice. It must be foreseeable that the plaintiff will rely on the advice as was seen in Hedley Byrne case that the appellant relied on

¹²³ (1972) HCD 134

banker's advice to book time for advertisement for their clients which led sustaining financial loss of about 17000 pounds.

(c) That the plaintiff must have some knowledge of the type of transaction for which the advice is required.

- This limb emphasizes one crucial point which consolidates the proximity rule. The claimant is duty bound to show in clear terms that the giver of an advice knew the transaction for which an advice was given¹²⁴. In Francis Ngaire's case, Mwaikambo knew very well the next move which the plaintiffs were going to take. That is why the very person advised the plaintiffs to produce a police report and other documents¹²⁵.
- The Court in the case of *Donoghue v Stevenson* expanded the legal principles established to include all manufacturers. They also stated that for an action in negligence to be successful it must be shown that: There was a duty of care owed by the defendant, there was a breach of the duty owed, and Damage was suffered as a result of the breach. Each of the three aspects must be proved before a claim for negligence will be successful. The duty to take care must be owed to the consumer (the ultimate user), the defendant (manufacturer) must in some way fail to observe that duty, and damage must be suffered (which may be to the person or to the person's property).
- Even though there is established principles governed the doctrine of negligence, other aspects embodied within the doctrine is that of defenses which if the defendant will prove or establish will exonerate him or her from the liability.
- In the case of **Paul S. Asbert Itule v Theresia Andrea**.¹²⁶, The court stated that not every negligent act will result in liability in negligence.

¹²⁴ Binamungu C.M (2002) Law of Torts in Tanzania at pg 56-57

¹²⁵In Tanzania today, the law governing the stock exchange imposes a duty to the directors of listed companies to give correct information in the prospectus to be relied on by investors. This is provided under *Section 34 of the Capital Market and Securities (Amendments) Act no 10 of 2010*. And also *Section 38 of the Companies Act* provides that it is the duty of the directors not to make negligent misstatements.

¹²⁶[1980] TLR 98 (HC)

❖ TOPIC FOUR: THE LAW BETWEEN NEIGHBORS



- **At the end of TOPIC FOUR you should be in a position to understand the following salient areas of the Law of Tort:**

1. The tort of nuisance
2. The basic types of nuisance that is public & private nuisance
3. The fundamental principles relating to public & private nuisance
4. The doctrine of strict liability as laid down Ryland v Fletcher & its exceptions
5. Concept of absolute liability.

❖ TORT OF NUISANCE



❖ INTRODUCTION

- The word nuisance literally means annoyance or any source of inconvenience. In law, it signifies, according to Blackstone, "anything that worked hurt, inconvenience, or damage."
- At common law, nuisance is a condition on a property or some use of a property that interferes with a neighbouring owner's ability to enjoy their property.
- Nuisance is a common law of tort. It means that which causes offence, annoyance, trouble or injury. A nuisance can be either public (also "common") or private.
- Nuisance is one of the oldest cause of action known to the common law. Nuisance signifies that the "right of quiet enjoyment" is being disrupted to such a degree that a tort is being committed.
- Nuisance is the *branch of law of tort most closely concerned to environmental protection*¹²⁷. Thus concerns with noxious fumes, pollution by oil as in the case of Esso Petroleum Co. Ltd v. South Corp¹²⁸.

¹²⁷Rodgers .W.V.H. (2006) **Winfield and Jolowicz and on tort**, 7th Ed, sweet & Maxwell, London. p 639

¹²⁸[1956] A.C 218

- Nuisance as a tort means an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it¹²⁹. Acts interfering with comfort, health or safety are the example of it. The interference may be anyway, e.g., noise, vibration, heat, smoke, smell, fumes, water, gas, electricity, excavation or disease producing germs.
- According to Pollock "Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or in some cases, in exercise of common right."
- It is governed by the common law maxim which states *sic utere tuo ut alienum non laedas* translated as '*so use your own property as not to injure your neighbour*' or that the man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbor.
- A legal action in nuisance is one aimed at redressing harm arising from the use of a property (public or private), where such usage would substantially and reasonably amount to invasion of interest, annoyance, inconvenience or injury to an individual or the general public; whether or not the invasion is done innocently, negligently or intentionally.
- Three important qualifications must be made, however, to this broad generalization
- **First**, there are areas of nuisance such as obstruction of highways, or of the access thereto, which have no 'environmental' flavor.
- **Second**, the prevailing stance of nuisance liability is that of protection of private rights in the enjoyment of land, so that control of injurious activity for the benefit of the whole community is incidental.
- **Third**, the common law nuisance has been supplemented and to a large extent replaced by an array of statutory power designed to control environmental damage.
- In Tanzania one may refer the Environmental Management Act, 2004 and the Public Health Act, 2009 for principal legislations and also most of subsidiary legislations particularly those made at local government level aiming at prevention of environment.

❖ **NUISANCE VERSUS TRESPASS**

- Nuisance should be distinguished from trespass. Trespass is a direct physical interference with the plaintiff's possession of land through some material or tangible object.
- The points of distinction between Nuisance and Trespass are as follows:- If interference is direct, the wrong is trespass, if it is consequential, it amounts to nuisance. Planting a tree

¹²⁹Winfield on Tort, 7th ed. P. 193

on another's land is trespass. But when a person plants a tree over his own land and the root or branches project into the land of another person that is nuisance; to allow stones from a ruinous chimney to fall upon those premises is the wrong of nuisance¹³⁰.

- While trespass action protects against an invasion of one's right to exclusive possession of land, for example where a land owner drops a tree across her neighbors boundary line thereby liable for trespass, she may be liable for nuisance where however, her dog barks all night keeping the neighbour awake.

❖ **KINDS OF NUISANCE**

▪ **PUBLIC NUISANCE**

- Public nuisance is a crime. Public nuisance is interference with the right of public in general and is punishable as an offence. The provision of **Section 170 of the penal Code** is to the effect that "Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a "common nuisance", and is liable to imprisonment for one year".
- The classic definition of public nuisance was given in the case of **Attorney General v PYA Quarries**¹³¹, where in this case Quarrying operations were conducted in such a way that local residents were affected by and vibrations from explosions. The court defined public nuisance as '*one which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects*'. The defendant's activities were held to amount to a public nuisance.
- Obstructing a public way by digging a trench, or constructing structures on it are example of public nuisance. Although such obstruction may cause inconvenience to many persons but may be hundreds of action for a single act of public nuisance.
- To avoid multiplicity of suits, the law makes public nuisance only an offence punishable under criminal law. In **Dr. Ram Raj Singh v. Babulal**¹³², the defendant created a brick grinding machine adjoining the premises of plaintiff, who was a medical practitioner. The brick grinding machine generated dust, which polluted the atmosphere. The dust interred

¹³⁰ Salmond, Tort, 14th ed. P. 72

¹³¹[1957] 2 QB 169

¹³²A.I.R. 1982 All. 285, 289.

the consulting chamber of the plaintiff and caused physical inconvenience to him and patients, and their red coating on cloths, caused by the dust, could be apparently visible.

- It was held that special damages to the plaintiff had been proved and a permanent injunction was issued against the defendant restraining him from running his bricks grinding machine there.
- Civil right action is also available to the person who has suffered some special or particular damage, different from what is inflicted upon public as a whole. **Now the public nuisance, also becomes a private nuisance.**
- The expression “**special damage**” means damage caused to a party in contradiction to the public at large. For example, digging trench on a public highway may cause inconvenience to the public at large. No member of public, who is obstructed or has to take a diversion along with others, can sue under civil law. But if anyone of them suffer more damage than suffered by the public at large, e.g., is severely injured by falling into the trench, he can sue in tort.
- In order to sustain a civil action in respect of a public nuisance, proof of special and particular damage is essential. If the plaintiff cannot prove that he has suffered any special damage more damage than suffered by the other members of the public, he cannot claim any compensation for the same.

▪ **STATUTORY NUISANCE**

- The increasing concern of central government for public health and the environment has led to a mass of legislation concerned with noise, run down premises, clean air and accumulations.
- Although statutory nuisances are the most important in terms of the environment, they are not dealt with in any detail in a tort course as they are enforced by public bodies.
- From the claimant’s point of view, the most significant point about statutory nuisance is that enforcement is in the hands of the local authorities. This saves a person who is affected from the time and expense of having to bring a private action. The normal method of enforcement is for the local authority to serve a abatement order on the offender.

▪ **PRIVATE NUISANCE**

- Private nuisance is a civil wrong. Private nuisance is interference with the right of an individual. To constitute the tort of nuisance, the following essentials are required to be proved: 1. Unreasonable interference; 2. Interference with the use or enjoyment of land; 3. Damage.
- Private Nuisance is not a crime but a tort. Private nuisance is a tort which deals with disputes between adjacent landowners. It involves drawing a balance between the right of one person to use their land in whatever way they wish and the right of their neighbour not to be interfered with.
- It is a wrong which interferes with the enjoyment of some right to land, short of being a trespass, e.g. by noise, smoke etc. It is not a direct interference with land.
- Overhanging branches of a tree can be a nuisance. Obstructing the passage of light into one's house is a nuisance as was said in *Fleming and Hislop*¹¹ App. Case 66
- "What causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained although the evidence does not go to the length of proving that health is in danger".

▪ **CLAIMANTS IN PRIVATE NUISANCE**

- Private nuisance is historically concerned with the regulation of land use between neighbors. This is reflected in the rule that the claimant in an action for private nuisance has to have an interest in the land or exclusive possession of the land which is affected in order to be able to sue.
- This has been confirmed by the House of Lords in **Wharf Ltd Hunter v Canary**¹³³, where an action was denied to spouses and children of tenants of a property affected by dust and interference with television reception.
- The rule can be traced to the case of **Malone v Lasky**¹³⁴, Malone The wife of a tenant of premises was injured when a cistern was dislodged by vibrations caused by the defendant. The wife had no claim in private nuisance, as she had no proprietary or possessory interest in the land.
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¹³³[1997] 2 All ER 426

¹³⁴[1907] 2 KB 141

▪ **DEFENDANTS**

- The law concerning defendants in private nuisance actions is complex and will be divided into three categories of defendant namely; Creators Occupiers Landlords.
- **A) Creators**
- The creator of a nuisance may always be sued even though they are no longer in occupation of the land from which the nuisance originates.
- This rule must be read in the light of the House of Lords decision in *Cambridge Water Co Counties Leather plc v Eastern* [1994] 1 All ER 53. It is necessary that the defendant should have been able to foresee damage of the relevant type when the act alleged to be a nuisance occurred.
- The defendant (creator) will not be liable for continuing damage when they are unable to rectify the situation.
- **B) Occupiers**
- In most nuisance cases it will be the occupier of the land from which the nuisance originates who is sued. The occupier is liable for nuisances created by themselves, and by their servants (on the basis of vicarious liability), but not for nuisances created by an independent contractor, unless the occupier is under a non delegable duty or the contractor is working on the highway and creates a danger to highway users .
- In **Bower v Peate**¹³⁵, The parties owned adjoining houses. The defendant employed a contractor to work on his house. During the course of the work the support of the plaintiff's house was undermined. The defendant was held liable as he was under a non delegable duty.
- Historically, an occupier was not liable for nuisances created by trespassers or acts of nature. This was in line with the view that ownership of land was a source of rights rather than duties. Recent case law has changed this view, imposing duties of affirmative action on landowners for dangers emanating from their land.
- In **Sedleigh Denfield v O'Callaghan**¹³⁶, A trespasser installed piping in a ditch on the respondent's land. Three years later the pipe became blocked and the appellant's

¹³⁵[1876] 1 QBD 321

¹³⁶[1940] AC 880

land was flooded. One of the respondent's servants had cleaned out the ditch twice a year.

- As the respondents were presumed to know of the danger and had done nothing to abate it they were liable in nuisance. Liability in these circumstances would arise where the occupier, with knowledge of the existence of the nuisance, adopted it for his own purposes or continued it by failing to take steps to avoid it.
- In **Goldman v Hargrave**¹³⁷, A redgum tree on the appellant's land was struck by lightning and caught fire. The appellant had the tree cut down and left the fire to burn out. A strong wind got up and the fire spread and damaged the respondent's property.
- The Privy Council held that where an occupier becomes aware of the existence of a nuisance, he is under a duty to take positive action. The standard of care imposed on the occupier is subjective rather than the normal objective standard.
- In determining the occupier's liability, the court must take into account the cost of abatement and balance it against the occupier's resources. In this context resources means financial and physical resources. The appellant was held liable for failing to abate the nuisance.
- In **Leakey v National Trust for Places of Historic Interest or Natural Beauty**¹³⁸, The defendants occupied a hill which was known to crack and slip as a result of weathering. Debris fell on the plaintiffs' land and the plaintiffs asked the defendants to remove it. The defendants denied responsibility but were found liable in nuisance.
- The Court of Appeal held that the principle in Goldman applied in English law and extended to nuisances caused by the state of the land itself. The court also held that the action had been correctly brought in nuisance.
- **C) Landlords**
- The law on whether a landlord is liable for a nuisance is complex. The basic principle is that the landlord will not be liable as they have parted with control of the land. There are a number of exceptions to this principle.

¹³⁷[1967] 2 All ER 989

¹³⁸[1980] QB 485

- A nuisance existed at the time of the letting the landlord will be liable if they knew or ought to have known of the nuisance before letting. They will also be liable if they can be said to have authorized the nuisance.
- In **Harris v James**¹³⁹, A field was let by S to J for J to work it as a lime quarry and to set up lime kilns. The plaintiff complained of smoke from the kilns and nuisance caused by blasting in the quarrying. J was liable as occupier and commission of a nuisance.
- **Tetley v Chitty**¹⁴⁰, The defendant council allowed a go-cart club to use its land. An action in nuisance was brought by nearby residents on the ground of noise. The council's defence that it was not liable as it had neither created the nuisance nor permitted one to occur was rejected. The noise was an ordinary and necessary consequence of the go-carts and the defendant had therefore expressly or impliedly consented to the nuisance.
- In **Southwark London Borough Council v Mills**¹⁴¹, The landlords let flats in a communal block which had very poor soundproofing resulting in the noises of everyday living being audible through the walls.
- It was held by the House of Lords that the normal use of a residential flat cannot be a nuisance and as the tenants were not liable for nuisance the landlord could not be liable for authorising nuisance.
- If the landlord has taken a covenant in the lease from the tenant that the tenant will not cause a nuisance and the nuisance is not an inevitable consequence of the letting (as in *Tetley v Chitty v Chitty* not liable.), the landlord is not liable.

- **1. UNREASONABLE INTERFERENCE**

- Every interference is not a nuisance, but it may cause damage to the plaintiff's property or may cause personal discomfort to the plaintiff in the enjoyment of property. To constitute nuisance, the interference should be unreasonable. Every person must put up with some noise, some vibration, some smell, etc. so that members of the society can enjoy their own right.

¹³⁹[1876] 45 LJQB 545

¹⁴⁰ [1986] 1 All ER 653

¹⁴¹ [1999] 4 All ER 449

- If I have a house by the side of the road, I cannot bring an action for the inconvenience which is necessarily incidental to the traffic on the road. I cannot sue my neighbor if his listening to the radio interferes with my studies. So long as the interference is not unreasonable, no action can be brought.
- “A balance has to be maintained between the right of occupier to do what he likes with his own, and the right of his neighbor not to be interfered with.” If the interference is unreasonable, it is no defence to say that it was for the public good.
- So the persistent infliction of harm by a gasboard is not justified. “For the purpose of nuisance, it has to be seen as to “what is reasonable according to ordinary usages of mankind living in society, or more correctly in particular society.” An unreasonable activity cannot be excused on the ground that reasonable care had been taken to prevent it from becoming a nuisance.

▪ **Sensitive Plaintiff (sensitivity)**

- An act which is otherwise reasonable does not become unreasonable and actionable when the damage, even though substantial, is caused due to sensitiveness of the plaintiff or the use to which he puts his property.
- If certain kinds of traffic is no nuisance for a healthy man, it will not entitle a sick man to bring an action if he suffers thereby, even though the damage be substantial. If some noise which do not disturb or annoy an ordinary person but disturb only the plaintiff in his work or sleep due to his over sensitiveness, it is no nuisance against this plaintiff.
- If the damage is due more to the sensitivity of the claimant’s property than to the defendant’s conduct then no nuisance is committed.
- In **Robinson v Kilvert**¹⁴², The plaintiff occupied the ground floor of the defendant’s premises and used it to store brown paper. Heat created by the defendant’s manufacturing process damaged the paper.
- It was held that the damage was due more to the sensitivity of the paper than to the defendant’s activities and there was no nuisance.

▪ **Does Nuisance cannot state of affairs (Public utility)**

- Nuisance is generally a continuing wrong. A constant noise, smell or vibration is a nuisance and ordinary and isolated act of escape cannot be considered to be a nuisance. The wrongful

¹⁴²[1889] 41 ChD 88

escape is continuous, intermittent or isolated, it is actionable. An intermittent interference may be probably more annoying than a constant one. “An intermittent noise, particularly when it does not come at stated intervals is likely to be more disagreeable than if it were constant.”

- Can the defendant advance the argument that although their activity may be causing damage to the claimant, it is in the public interest that they be allowed to continue? The traditional view is that public interest is irrelevant to the question of private rights and will be ignored.

- **Malice**

- The act of defendant which is done with an evil motive, becomes an unreasonable interference, it is actionable. A person has right to make a reasonable use of his own property but if the use of his property causes substantial discomfort to others, it ceases to be reasonable. “If a man creates a nuisance, he cannot say that he is acting reasonably.
- In **Christie v. Davey**¹⁴³, the defendant, bring irritated by considerable amount of music lessons by the plaintiff, a music teacher, living in the adjoining house, maliciously cause discomfort to plaintiff by harming against the parting wall, beating of trays, whistling and shrieking. The court granted an injunction against the defendant.
- The court held that noise which were made in the defendant’s house were not of legitimate kind. No proprietor has an absolute right to create noise upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbors or of the public. If he violated that condition, he commits a legal wrong, and if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense.
- In **Hollywood Silver Fox Farm v. Emmett**¹⁴⁴, The plaintiff bred silver foxes. The defendant, after an argument, ordered guns to be fired on his own land but close to the plaintiff’s land. His intention was that the noise would prevent the foxes from breeding. An injunction was granted to restrain the defendant. What would otherwise have been a reasonable act was a nuisance because of his malice.

¹⁴³[1898] 1 Ch. 316

¹⁴⁴[1936] 2 KB 468

▪ **The reasonableness test**

- Where the interference causes sensible personal discomfort the court will apply a reasonableness test to determine whether it amounts to a nuisance.
- A number of factors may be taken into account, either in isolation or in conjunction to determine whether the defendant's conduct was reasonable.
- It is important to note the effect of **Hunter v Canary Wharf Ltd**¹⁴⁵, on this point. The House of Lords' stress on nuisance being a tort to land and not a separate tort of causing discomfort to people is a reference to the distinction between nuisances causing materials damage to the property and those causing sensible personal discomfort. Smells and noise would normally come into the latter category. One of the main thrusts in Hunter was a desire to prevent the distinction from becoming one of a distinction between property and personal damage.
- This means that in future cases the court will concentrate on the land itself rather than on the landowner, and the landowner must find a way of identifying how their land has been affected, whether this is in a reduction in its capital value or in its amenity.

▪ **2. INTERFERENCE WITH USE AND ENJOYMENT**

- Private nuisance is a balancing act between the defendant's right to use their land as they wish and the claimant's right to enjoy their land without interference. The claimant must establish that the defendant has caused a substantial interference with their use or enjoyment of their land. No account is taken of trivialities.
- **The interference may take a number of forms but some of the commonest are;**
- **Injury to Property.** Any unlawful interference with a person's use or enjoyment of land through some object which cause damage to the property is actionable as nuisance. It may be allowing the branches of a tree to overhang on the land of another person, or the escape of roots of the tree, water, gas, smoke or fumes, etc. on the neighbor's land or even by vibration.
- The right of every owner of land such land in its natural conditions, shall have support naturally rendered by the subjacent and adjacent soil of another person. A person has

¹⁴⁵[1997] 2 All ER 426

natural right to have his land supported by his neighbor's and therefore removal of support, lateral or from beneath is a nuisance. The natural right of support of neighbor's land is available only in respect of land without buildings.

- Therefore, such a right is not available in respect of building or other structure of land. Although the law does not recognize the right of support of building, yet if the damage to the building is consequential to the damage to natural right of support of land, an action for withdrawal of support can lie.
- **Injury to comfort or health**, Substantial interference with the comfort and the convenience in the using the premises is actionable as a nuisance. A mere trifling or fanciful inconvenience is not enough. The law does not take account of very trifling matters. There should be a serious inconvenience and interference with the comfort of the occupiers of the dwelling house according to notions prevalent among reasonable man and woman.
- The standard of comfort varies from time to time and place to place. Inconvenience and discomfort from the point of view of a particular plaintiff is not the test of nuisance but the test is how an average man residing in the same area would take it. The plaintiff may be over sensitive.
- Whether the interference amounts to a nuisance is a question for the court. Normally this will be determined by applying a reasonableness test, but where the interference causes material damage to the claimant's land, the defendant will be liable unless the claimant is oversensitive or one of the defenses to nuisance applies.
- In **St Helens Smelting Co v Tipping**¹⁴⁶, The plaintiff bought an estate near to the defendant's copper smelting works. Fumes from the works damaged the plaintiff's trees and crops. The court drew a distinction between nuisances causing material damage to the land and those which caused sensible personal discomfort. In the latter case the question of locality was relevant.
- As the plaintiff's land had suffered material damage, the fact that the locality was a manufacturing area was irrelevant and an injunction was granted. The problem with this decision is that it is difficult to determine what is meant by material damage.

¹⁴⁶[1865] 11 HL Cas 642

- Any substantial interference with residential land may lower its value, but unless the land itself is damaged the locality factor may defeat the claimant's action. (Emphasis supplied).
- In Tanzania the case of **Sandhu Construction Company Limited v. Peter E.M. Shayo**¹⁴⁷ is authoritative on the issue of interference, reasonableness and locality. In this case the respondent had sued the appellant in private nuisance and prayed for an injunction to restrain the appellant from continuing the nuisance and for general damages. The respondent had alleged that his enjoyment of his house situated at Elerai village in the Arusha Municipality was seriously interfered with by the excessive noise, vibrations and obnoxious dust emanating from a stone crusher operated by the appellant situated 30 metres from his house.
- The respondent himself had a maize mill operating within the compound of his house. The respondent was successful in the High Court and it is against that decision that the appellant is appealing.
- The Court of Appeal as per Mustafa JA (as he then was) held that: In considering the standard of comfort or convenience of living of the average man, the character of the neighborhood must be taken into account; an average man's standard of comfort and convenience involves the toleration of acts done by his neighbour in the course of ordinary and reasonable use of his property; a nuisance to be actionable must be such as to be a real interference with the comfort or convenience of living according to the standard of the average man; discomforts caused are not actionable if they fail to qualify as intolerable or unacceptable; the discomforts must cause suffering to the party complaining.

▪ **3. DAMAGE**

- Actual damage is required to be proved in an action for nuisance.¹⁸ In the case of public nuisance, the plaintiff can bring an action in tort only when he proves a special damage to him. In private nuisance, although damage is one of the essentials, the law will often presume it.

¹⁴⁷[1984] TLR 127 (CA)

▪ **NUISANCE ON HIGHWAY**

- Obstruction on highway or creating dangers on it or on its close proximity is a nuisance. Obstruction need not to be total. The obstruction must, however, be unreasonable. Thus to cause the foundation of queues without completely blocking the public passage is a nuisance.
- In **Ware v. Garston Haulage Co. Ltd**¹⁴⁸, the defendant left his lorry with an attached trailer by the side of highway. The trailer had no rear light in the night and the plaintiff on his motor cycle ran into the back of the trailer. In an action by the plaintiff against the defendant for nuisance. It was held that defendant was liable as his leaving the vehicle in the darkness on the highway. Leaving a vehicle a place for an unreasonable long time even during the day has been held to be nuisance.
- Creation of dangers on the highway by making excavations, projection of tree or lamps, leaving slippery or dangerous substance on the road also amount to nuisance. Doing an act in one's own premises, even though that offends the sentiments of the passer-by of a person is not a nuisance.

▪ **Projections**

- As regards projection on highway by object like overhanging branches of tree or a clock, etc. from the land or building adjoining the highway, no action for nuisance can be brought for such projection unless some damage is caused thereby. The mere fact that some object projects on the highway does not mean that is a nuisance. If every projection was to be considered to be nuisance, it would seem that, a fortiori every lamp so overhanging, every signboard, every clock every awning outside a shop, are in themselves illegal erection, not to mention the upper storey corbelled out over the roadway, which were common in every town of country.
- In **Noble v. Harrison**¹⁴⁹, the branch of a beach tree growing on the defendant's land hung on the highway to a height of about 30 feet above the ground. In fine weather, the branch of tree broke down and fell upon the plaintiff vehicle which was passing along the highway. For the damage to the vehicle plaintiff sued the defendant to make him liable for nuisance.

¹⁴⁸[1914] K.B. 30

¹⁴⁹[1926] 2 K.B. 332. At 337, per Rowatt, J.

- The right of the public in a highway was merely to pass so long that right was not interfered with, they could not complain of what was in the air above or on the earth beneath. If the occupier of the premises knows of the defects in the projection but he does not get the same removed, he would be liable. It is no answer to an action that he had employed an independent contractor to remove that defect but the same was not done properly.

❖ REMEDIES AVAILABLE FOR TORT OF NUISANCE

▪ INJUNCTION

- The injunction is the primary remedy in nuisance actions and its objective is to force the defendant to cease their activities. The injunction may be perpetual and terminate the activity or limit it to certain times.
- It is possible for the court to suspend the injunction and give the defendant the opportunity to eliminate the source of the complaint. Injunctions are equitable remedies and as such are not available as of right.
- The question of when the court should exercise its discretion to refuse an injunction was considered in the following case:
- In **Shelfer v City of London Electric Lighting Co¹⁵⁰**, Vibration and noise were caused by the defendant's activities. The defendant claimed that the plaintiff should be limited to damages as the award of an injunction would deprive many Londoners of electricity.
- The court held that the discretion not to award the injunction should be exercised only in exceptional circumstances: (a) where the injury to the plaintiff's legal right is small; and (b) is capable of being estimated in money terms; and (c) is one which can be adequately compensated by a small money payment; and (d) it would be oppressive to the defendant to grant an injunction.

▪ DAMAGES

- In public nuisance actions the claimant must prove special damage in order to succeed. Damage must usually be proved in a private nuisance action but may be presumed. It is normal for the claimant to seek damages for past losses and an injunction to prevent future losses. The remoteness of damage test in nuisance is the same as that in negligence: the defendant must have been able reasonably to

¹⁵⁰[1895] 1 Ch 287

foresee the kind of damage which occurred. (2 Wagon Mound No [1967] 1 AC 617.) Where the nuisance causes damage to the land, the measure of damages will usually be the depreciation in value of the land.

- Where the nuisance consists of interference with use and enjoyment, then assessment of damages presents problems. In **Bone v Seale**¹⁵¹, The defendant's pig farm was adjacent to the plaintiff's land. The plaintiff sought an injunction and damages in nuisance in respect of smells caused by pig manure and the boiling of pig swill.
- The court held that there was no damage to the plaintiff's property or his health and awarded damages of £1,000 based on the amount that would have been awarded in a personal injuries action for loss of sense of smell.

▪ **ABATEMENT**

- This remedy of abatement is a form of self help and consists of the claimant taking steps to stop the nuisance, for example, by cutting off the branches of overhanging trees or unblocking drains.
- Where the exercise of the remedy requires the claimant to enter another person's land, then notice must be given, otherwise the abator will become a trespasser. It is fair to say that the law does not usually favour this remedy and in most cases it is not advisable. (Delaware Mansions Ltd Council [2002] 1 AC 321.)

❖ **DEFENCES IN TORT OF NUISANCE**

- General defenses apply to most torts, there are some tort where only certain defenses are accepted and nuisance is one of them! Some of the defenses recognized by the courts as valid defenses and some other have been rejected. The following defenses are considered valid in nuisance cases:-

▪ **1. Statutory Authority**

- If the act said to be causing unreasonable interference, or it is related to, an unauthorized under a statute, there can be no claim of private nuisance. There is no liability for that under the tort.

▪ **2. Prescriptive Right**

- Law recognizes that if for a long period of time plaintiff has not objected to an act that potentially disturbing, then the plaintiff cannot, after such passage of time, turn around

¹⁵¹[1975] 1 All ER 787

and complain of the act. The period of time to acquire this right to continue with the activity is 20 years.

- For instance if you live next door to musician for 20 years, and he has been playing his drums every morning without complaint from you, then you are not entitled to complain about it in the 21st year. The musician has an prescriptive right to do the act that you claim to be a nuisance.
- In **Sturges v Bridgman**¹⁵², The defense of prescription failed, as the noise from the confectioner's activities only became a nuisance when the doctor had his extended consulting room built. Only from this time did the 20 years start to run.

- **3. Usefulness**

- Usefulness is simply the question of public utility as a defense, rather than a factor going towards reasonableness. The fact that the defendant's activity is a useful one is not a defense.

- **4. Nuisance due to many**

- Where the nuisance is caused by a number of persons, it is not a defense for the defendants to prove that their contribution alone would not have amounted to a nuisance.
- Coming to the nuisance is not a defense. The defendant cannot argue that the claimant was aware of the nuisance when they moved to the area. In **Sturges v Bridgman**¹⁵³, the confectioner argued that when the doctor built his extended consulting room he was aware of the noise and had therefore come to the nuisance. The court rejected this argument as this was not a recognised defense in nuisance.
- **Miller v Jackson**¹⁵⁴, Lord Denning argued that as the plaintiffs had bought a house next to a cricket field they could not be heard to complain about interference by cricket balls. This was rejected by the rest of the Court of Appeal so far as establishing a nuisance was concerned, but it was a factor in the decision of the majority not to grant an injunction.

¹⁵² [1879] 11 Ch D 852

¹⁵³ (1879) 11 Ch D 852

¹⁵⁴ [1977] QB 966

❖ THE CONCEPT OF STRICT LIABILITY



▪ INTRODUCTION: RATIONALE OF STRICT LIABILITY

- There are many activities which are so dangerous that they constitute constant danger to person and property to others. The law may deal with them in two ways. It may prohibit them altogether.
- It may allow them to be carried on for the sake of social utility but only in accordance with statutory provisions laying down safety measures and providing for sanctions for non-compliance through the doctrine of strict liability. The undertakers of the activities have to compensate for the damage caused irrespective of any carelessness on their part.
- The basis of liability is the foreseeable risk inherent in the very nature of the activities. In this aspect, the principle of strict liability resembles negligence which is also based on foreseeable harm. But the difference lies in that the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions and so if the defendant did all that which could be done for avoiding the harm, he cannot be held liable except possibly in those cases where he should have closed down the undertaking.
- Such a consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions.
- The rationale behind strict liability is that the activities coming within its fold are those entailing extraordinary risk to others, either in the seriousness or the frequency of the harm threatened.

▪ ORIGIN OF THE STRICT LIABILITY RULE

- The Strict Liability rule had its origins in nuisance but for most of the 20th century was probably regarded by the majority of lawyers as having developed into a distinct principle. Now it seems to have returned to what are regarded as its roots: it is a “sub species of nuisance”. But on balance it still merits some separate treatment.
- Liability under the rule is strict in the sense that it relieves the claimant of the burden of showing fault; however, it is far from absolute since there are a number

of wide ranging differences. The doctrine was established into the case of **Rylands v. Fletcher in 1868**, where house of lord under Blackburn J, laid down the rule recognizing ‘no fault liability’ which was recognized as strict liability. That is even if the defendant was not negligent or rather even if the defendant did not intentionally cause the harm or he was careful, he could still be made liable under the rule¹⁵⁵.

- In **Ryland vs. Fletcher**¹⁵⁶, the plaintiff was a lessee of a mine. The defendant owned a mill in the land adjacent to the land under which the mines were worked. The defendant employed competent person to construct a tank on his land for providing water to his mill.
- The plaintiff had worked his mine up to a spot where there disused and filled up passages of an old mine. During drilling the contractor did not observe the shaft and hence did not block them. When the reservoir was ready and was filled with water it burst through then shaft and flooded into the plaintiff’s mine in the adjoining land.
- The defendant was held liable even though he had not been negligent or knew the shaft although the contractor had been negligent.
- According to the rule, if person brings on his land and keeps there any dangerous thing such that a thing which is likely to do mischief if it escape, he will be prima facie answerable for the damage caused by its escape even though he had not be negligent in keeping it there. The liability arises only because he kept some dangerous things on his land and same had escaped there and cause damage. Therefore since the liability arises without any negligence on the part of defendant.
- Therefore, Strict Liability is automatic responsibility (without having to prove negligence) for damage due to possession and/or use of equipment, materials or possession which are inherently dangerous such as explosives, wild animals, poisonous snake, assault weapons.
- This is analogous to the doctrine of “**res ipsa loquitur**”¹⁵⁷ in which control, ownership and damages are sufficient to hold the owner liable even without proof of specific negligent acts or omissions¹⁵⁸.

¹⁵⁵ BANGIA,R.K (2002) *The Law Of Torts Including Motor Vehicle Act & Consumer Protection Laws*, Allahabad Law Agency Pg.320

¹⁵⁶ (1868) 19 LT 220

¹⁵⁷ Res Ipsa Loquitur is a Latin maxim which implies that thing speaks for itself. It is a principle often applied in the law of tort of negligence.

¹⁵⁸ <http://legal-dictionary.thefreedictionary.com/strict%2BLiability&q=strict+liability+>

▪ **REQUIREMENTS OF THE RULE**

- It was decided by Blackburn J, who delivered the judgment of the Court of Exchequer Chamber, and the House of Lords, that to succeed in this tort the claimant must show:
- That the defendant brought something onto his land;
- That the defendant made a "non-natural use" of his land (per Lord Cairns, LC);
- The thing was something likely to do mischief if it escaped;
- The thing did escape and cause damage.

▪ **DANGEROUS THINGS**

- According to this principle/ingredients in order for a defendant to be held liable arises when the thing collected is dangerous thing which is likely to do mischief if it escape as it was in **Ryland V. Fletcher**¹⁵⁹ also the thing must be brought on to the defendant's land that is it should be "accumulated" and such accumulation must be voluntary so that an occupier will not be liable for things naturally on his land.
- ***For example, A is an authorized hunter of wild animals and ones A in his activities collect a poisonous snake in the wild and brought it to his home for purpose of keeping it then such an act of possessing a dangerous thing can apply to this rule of strict liability because if such thing will escape then it can amount to cause damage to another's land or premises.***
- The rule uses the word *anything which is likely to do mischief it escapes* but the thing in this contest must not be considered only to those dangerous thing as water is not a dangerous thing *per se*¹⁶⁰ yet it was the thing in **Ryland vs. Fletcher** instead what it matters is whether that thing is likely to do damage on escape to others land as it was decided in **Read vs. Lyons**¹⁶¹.

▪ **ESCAPE**

- The rule laid down in the case **Ryland v. Fletcher**, apply when a thing from a defendant escape from the land in his control and occupation to a place which is outside of his control and occupation¹⁶².

¹⁵⁹Supra note 2

¹⁶⁰ Per se means 'by itself or in itself which is usually used when your are about the qualities of one thing considered on its own rather than in connection with other things.

¹⁶¹ (1946) 2 ALL ER 471

¹⁶² PANDEY J.N *The Law Of Torts with Consumer Protection Act and Motor Vehicle Act*, Central Law Publisher pg.371

- In **Read Vs. Lyons & Company**¹⁶³, it is an illustration where there was no escape hence the defendant was not held liable. In that case the plaintiff was an employee in the defendant shell, where they made high explosive shell for the government. The plaintiff was an inspector in the defendant factory as during inspection there was an explosion in the factory in which the plaintiff was injured. There was no proof of negligence on the party of defendant where the defendant not liable because there was no escape of any kind from the premises which could have caused damage to any person.
- Also in **Mukesh Textile Mills vs. A.R. Subramanyam Swami**¹⁶⁴, the defendant who was the owner of the sugar factory, collected large amount of molasses in a tank in his land in which the plaintiff had an agriculture land adjoining to the defendant factory, irrigated by water from a stream flowing from the middle of the plaintiff's mill.
- The insects had made holes on in the *bundhs* of the tank as a result of which large amount of molasses *escaped* from the tank and passed through the stream which flowed over the plaintiff's farm and damaged the sugarcane crops therein. The court held the defendant liable.
- **For example;** *no one will be liable if rain water flows from his land which is higher to the plaintiff's and does harm to it. Also if water flows from A's premise underground tunnels into B's mines whether by force of gravitation or percolation then A will not be liable on the rule of strict liability for the escape if the water was naturally on A's land and he did nothing to accumulate it there. Strict liability applies only to things artificially brought or kept upon the defendant's land But a person is liable even for the escape of things naturally on his ground if he artificially accumulates them there so that their escape does more mischief than it would have done had it not been accumulated. Therefore one can avoid liability for things naturally on his land only if he let things have their own way and does not interfere with them so if one accumulates rain water on his own land and does not allow it to find its own way one will be responsible if such accumulated water escapes and does damage to someone.*

¹⁶³ Supra note 7

¹⁶⁴[1913] AC 263

▪ **NON-NATURAL USE OF THE LAND.**

- The defendant is said to be only answerable if in bringing the thing therein for some special use bringing with it, it is said to be non- natural use of land contrary to ordinary use or for the general benefit of the community.
- *For example, installation of water pipes in houses and flats, electric wiring in a house, supply of gas in gas pipes in dwelling house are regarded to be of natural use contrary to the collection of water in huge quantity which is of non natural use as it was in Ryland vs. Fletcher.*
- In **Mukesh Textile Mills vs. A.R. Subramanyam Swami**¹⁶⁵, the defendant who was the owner of the sugar factory, collected large amount of molasses in a tank in his land in which the plaintiff had an agriculture land adjoining to the defendant factory which was irrigated by water from a stream, flowing from the middle of the plaintiff's mill.
- The insects had made holes on in the *bundhs* of the tank as a result of which large amount of molasses escaped from the tank and passed through the stream which flowed over the plaintiff's farm and damaged the sugarcane crops therein.
- The court held the defendant liable because he could reasonably have foreseen the resultant harm from his act as 8000 tons of molasses were accumulated in his land. Also it was held that accumulation of large quantity of molasses was *non natural* use of land.
- In **Noble v Harrison**¹⁶⁶, it has been held that trees on one's land are not non-natural use of land. There the branch of a non-poisonous tree growing on the defendant's land, which overhung on the highway, suddenly broke and fell on the plaintiff's vehicle passing along the highway. The branch had broken off due to some latent defect. It was held that the defendant could not be held liable under the rule in Rylands v Fletcher.
- Therefore, there must be an escape from a place where the defendant has kept or accumulated the thing to a place which is outside of his occupation or control¹⁶⁷.

¹⁶⁵AIR 1987 Kant 87

¹⁶⁶[1926] 2 KB 332

¹⁶⁷See Read vs. Lyons & Company (1946) 2 ALL ER 471.

▪ **DAMAGE**

- The damage suffered by the plaintiff should be a direct consequence of the thing that escaped. In Ryland's case, it is the large quantity of water that has caused the damage by flooding the mines of the plaintiff. In other words there has to be a causal link to the thing that escapes and the damages.
- In a later case the House of Lords has also added the factor of 'foreseeability'. Please refer to Cambridge water case (1994) 2AC 264. There is now a further requirement, according to the House of Lords, that harm of the relevant type must have been foreseeable.

▪ **EXCEPTION/DEFENSES TO THE RULE**

- The rule in Ryland v. Fletcher it has come up with different exceptions as analyzed and explained hereunder:-

▪ **NATURAL USE OF THE LAND**

- The rule of strict liability does not apply in the case where the things are present in person's land in natural form or arises in the land even though their dangerous, but this applies most in things artificially brought in the land. Even in case of things which are brought artificially the question will arise whether if that person kept these things for natural use?.
- In the case of **Neath Rural District Council v. Williams**¹⁶⁸ whereas in this case it was held that there is no liability for things which arises naturally the court said that, "the occupier is under no obligation to prevent the escape of such thing for common law of England has never imposed liabilities upon land owners for anything which happen to their land in the natural course of affairs if the land is used naturally".

▪ **ACT OF GOD**

- An act of God is an event which 'no human foresight can provide against, and of which human prudence is not bound to recognize the possibility'¹⁶⁹. In strict liability rule, if the escape has been unforeseen and because of natural forces without any human intervention then that person can apply the defense of Act of God. Therefore a defendant is not liable for any accident as to which he can show that it is due to the natural causes directly and exclusively without human intervention and that could not have been prevented by any

¹⁶⁸[1951]1 KB 115

¹⁶⁹ Tennent vs. Earl of Glasgow (1864) 2 M (HL) 22 at 26-27 per Lord Westbury

amount of foresight pains and care reasonably to be expected from him. For instance if there are existence of natural forces such as extra-ordinary rainfall and flood then in this situation the defendant can plea the defence of act of God if such escape of a thing was due to the act of God.

- As stated in the case of **Nicholas v. Marsland**¹⁷⁰, in this case the defendant possessed a number of artificial pools on his land which were formed by damming a natural stream which rose above the defendant's land and flowed through it and which was allowed to escape from a pool by successive weirs into its original course. A very violent storm said to be the most violent within the human memory broke down the embankments, the rush of water from the pool down the stream carried away certain bridges. In respect of damages of these bridges the action was brought to court and the defendant took the plea of *vis major/damnum fatale*. It was held that the defendant was not liable in as much as the water escaped by the Act of God.
- *For example; if Mr. X and Y are neighbors and in the premises of Mr. X there are several trees and once a strong wind come and drop one of the tree and such a tree drop to Mr. and cause damage then if Mr. will brought such matter to the court of law then Mr. X can plea the defence of Act of God.*
- However, the decision in **Nicholas vs. Marsland**¹⁷¹ was doubted by the House of Lords in **Greenock Corporation vs. Caledonian Railway**¹⁷². In that case the Corporation constructed a concrete paddling pool for children in the bed of a stream and obstructed the natural flow of the stream. Owing to a rainfall of extraordinary violence the stream overflowed at the pond and damaged the property of the plaintiffs. The court held that the extraordinary rainfall did not absolve the corporation from responsibility and that they were liable for damage.

¹⁷⁰ Nicholas v. Marsland (1875) LR 10 EX 255

¹⁷¹ Ibid.

¹⁷² [1917] AC 556

▪ **ACT OF A STRANGER/THIRD PARTY**

- The defendant will not be liable if a stranger was responsible for the escape of a thing if the escape of a thing is caused by third person without knowledge or authority of the defendant provided that the defendant had not been negligent and has not committed a breach of duty to take necessary precaution against the interference of any strangers in his premise.
- In **Richards v Lothian**¹⁷³ is an illustration to this as the defendant was not liable when an unknown person blocked a basin on his property and caused a flood, which damaged a flat. But the burden of proof is on the defendant to prove or show that the escape was a result of wrongful act of third person and there was no negligence on his part. The main aim of this test is whether on the facts of the case it could be thought that the occupier of the land had control on those circumstances as a result of which an act happened which could not be allowed to happen. If the answer is yes, then the owner of land would be liable.
- In **North Western Utilities vs. London Guarantee and Accident Company**¹⁷⁴, In this case the appellants were carrying on gas at higher pressure which was dangerous if it should escape, they owed a duty of care to the owner of the hotel to exercise reasonable care and skills that the owner should not be damaged that the local authority might at any time be conducting operations in the interests of members of public likely to be affected.
- The appellants were liable as they had full knowledge of the negligence of their servant and had full knowledge of negligence of their servants. Being so they could have exercised reasonable care and the accident could have been prevented.

▪ **MISTAKE OF THE PLAINTIFF**

- If the plaintiff, in spite of knowledge on the existence or knowledge about danger, does not take reasonable care he cannot bring an action for damages against the defendant as it was illustrated in **Ponting vs. Nixon**¹⁷⁵ where the plaintiff's horse had eaten certain poisonous leaves on the defendant premise causing death to it. It was held that the plaintiff was not

¹⁷³[1913] AC 263

¹⁷⁴[1936] AC 108,125.

¹⁷⁵[1894] 2 QB 281.

entitled any damages as the injury was caused because of the horse's trespass to the defendant premise and there was no escape of leaves from the defendant land.

- The defendant was not held liable on basis that three requirements must be fulfilled as it was stipulated in *Ryland vs. Fletcher* which includes dangerous thing brought by the defendant, that dangerous thing must escape and it must be for non-natural use of land. It cannot be denied that an act of growing poisonous leaves on one's premise is not a dangerous thing but we have observed that the plaintiff's horse intruded in the defendant land hence no liability because there was no escape. In fact, if the escape is the fault of the claimant there will be no liability. Alternatively, there may be contributory negligence on the part of the claimant.

- **STATUTORY AUTHORITY**

- A statute may require a person or body to carry out a particular activity. Liability under **Ryland vs. Fletcher** may be excluded upon the interpretation of the statute provided that there is no negligence on the part performing an act under statutory authority¹⁷⁶. In **Green vs. Chelsea Water Works Company**¹⁷⁷, the defendant company was not liable as the company was engaged in performing a statutory duty.

- **COMMON BENEFIT/CONSENT OF THE PLAINTIFF**

- If the source of the danger was maintained for the benefit of both the claimant and defendant, the defendant will not be liable for its escape as it is regarded to be the common benefit for all¹⁷⁸ provided that there has been no negligence on the part of the defendant.
- This defence is either related to the defence of consent or the same thing as it was decided in the case of **Carstairs vs. Taylor**¹⁷⁹. In this case the defendant and the plaintiff were living on the same flat where the defendant was on the first floor of the flat while the plaintiff on the ground floor. The water from the roof drained from the from the pipe into a tank where some rats were said to have made some holes in the tank and water leaked from it causing damage to the plaintiff's properties on the ground floor.

¹⁷⁶*North Western Utilities vs. London Guarantee and Accident Company* [1936] AC 108 the appellants were liable as they had full knowledge of the negligence of their servant and had full knowledge of negligence of their servants. Being so they could have exercised reasonable care and the accident could have been prevented.

¹⁷⁷ [1894] 70 L.T 547

¹⁷⁸ Winfield and Jolowicz on Tort, Fifteenth Edition pg 551 common benefit is explained as "*common benefit seems redundant (and indeed misleading) as an independent defence*".

¹⁷⁹ (1891) LR 60 Ex 217.

- The court held the defendant not liable simply because the defendant had no control on the rats and they were both living on the same flat with consent and both had the same common benefit.
- The consent of the plaintiff need not to be express one but implied one may constitute a full consent provided that there was no fraud or undue influence to dominate the will of the plaintiff. If the court got satisfied that the defendant frauded the plaintiff or used his position to dominate his will, then the defendant will be prima facie answerable for the damage caused. But in this case if the defendant had control of rats he would be liable despite the fact that it is for common benefit.
- It is also referred as *volenti non fit injuria* i.e. *what is consented to is not an injury* either expressly or impliedly.
- Therefore in strict liability rule is like no other rule because it held the defendants liable for a tort with no need to prove negligence on his part or fault, the plaintiff has to prove damage he sustained. At times people commit wrongs unknowingly and so the rule to the same extent helps to make people liable by quashing the excuse of ignorance of the law.

❖ TOPIC FIVE: DEFAMATION

▪ Definition

- A defamatory statement is one which injures the reputation of another by exposing him to hatred, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society.
- In the case of **Hamis v. Akilimali**¹⁸⁰, the term defamation was defined as communicating with the mind of another, matters which are untrue and likely in the natural cause of things substantively to disparage the reputation of third person (s).
- As per Lord Atkin in the case of **Sim v. Stretch Atkin**¹⁸¹, A defamatory statement is one which injures the reputation of the plaintiff by its tendency to him in the estimation of right-thinking of the society generally or to cause right thinking members of the society to shun or avoid him.
- The expression “**Right thinking members of society**” was clarified and considered in the case of **Byrne v. Dean**¹⁸², it was alleged that a lampoon was defamatory because it accused plaintiff of sneaking to the police about unlawful gambling in his club.
- It was thus held that the action of the club committee in allowing the lampoon to remain on the notice board did not constitute defamation, as members of the society would not be right thinking if they thought it defamatory if they thought it defamatory to say that a man had discharged his public duty to help suppress crime.
- The **test of defamation is objective**, i.e. would an ordinary right thinking member of society have thought the statement to be defamatory? A statement which disparages a man in his reputation in relation to his office, profession, calling, trade or business may be defamatory, e.g. the imputation of some quality which would be detrimental or the absence of some quality which is essential to the successful carrying on of his office, trade or profession, such as want of ability, incompetence and dishonest or fraudulent conduct.

¹⁸⁰[1971] HCD No. 111

¹⁸¹[1936] 2 All ER 1237,

¹⁸²[1937] 1 KB 818.

❖ PROOF OF DEFAMATION

- Subject to the differences between the two types of defamation, libel and slander (explained below), the claimant must prove: (1) **That** the statement was defamatory, (2) **That** it referred to him, (3) **That** it was published, i.e. communicated, to a third party.
- The onus will then shift to the defendant to prove any of the following three defenses: (1) truth (or justification), (2) fair comment on a matter of public interest, or (3) that it was made on a privileged occasion. In addition, some writers put forward the following as defenses in their own right: (4) unintentional defamation, and (5) consent.

❖ ESSENTIALS OF DEFAMATION

▪ (1) Words Must Be Defamatory

- The statement must be defamatory. According to Lord Atkin, the statement must tend to lower the claimant in the estimation of right-thinking members of society generally, and in particular cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem.
- Sometimes the words may not be defamatory on their plain meaning but may become so because of the manner in which they have been spoken. The manner of pronouncing the words and various other circumstances may explain the meaning of the words.

▪ Mere abuse

- Vulgar abuse is not defamatory. Mansfield CJ stated "For mere general abuse spoken no action lies". Winfield & Jolowicz (p-406) states that spoken words which are prima facie defamatory are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them.
- Thus, the use of vulgar words or vituperative language by a person in anger does not amount into defamation if it only hurts the plaintiff's pride but does not disparage his reputation.
- If, however, it is likely to result in ridicule and humiliation of the plaintiff, an action would lie. If the words are written, not spoken, they cannot be protected as a mere abuse, for the defendant had time for reflection before he wrote and his readers may not know circumstances which may have led him to write what he did. But it is quite possible for them to be not defamatory for some other reason.

- Statements which reflect on a person's moral character or professional competence clearly will be defamatory. What is defamatory in one age will not necessarily be so in another.

- **The following are examples of defamatory statements:**

- In **Cosmos v BBC** (1976): The BBC broadcast a programme giving details about holidays, and the dangers of choosing holidays from glossy brochures. When showing a film of a Cosmos holiday camp in Majorca, they used the music which accompanied a popular series entitled 'Escape from Colditz' about a notorious prisoner of war camp. Cosmos succeeded in obtaining damages from the BBC.
- In **Savalas v Associated Newspapers** (1976): Actor Telly Savalas, who played Kojak in the long running television series of the same name, was awarded £34,000 for being described as 'a big amiable beast of a man who cannot cope with superstardom'.
- In **Roach v Newsgroup Newspapers Ltd** (1992): It was held to be defamatory to describe the well known actor who played the part of Ken Barlow in Coronation Street as 'boring'.
- Finally in **Grappelli v Derek Block Holdings Ltd** (1981): There was no libel in this case, as the words used were likely to excite sympathy rather than disrespect. The musician Stephan Grappelli was described by the defendants as seriously ill and unlikely ever to tour again.

- **Innuendo**

- Sometimes a statement may not be defamatory on the face of it but contain an innuendo, which has a defamatory meaning. Such a statement may be actionable. The hidden meaning must be one that could be understood from the words themselves by people who knew the claimant (**Lewis v Daily Telegraph [1964] AC 234**) and must be specifically pleaded by the claimant¹⁸³.
- In **Cassidy v Daily Mirror (1929)**, the claimant was the wife of a man who had been pictured with a young woman at a race meeting and described as engaged to her. The newspaper reporter had been given that information by Mr Cassidy and had no reason to doubt his word, but the claimant succeeded in proving an innuendo because the implication was that she would be regarded as a mistress not a wife.

¹⁸³ Chimala Stores vs. Zambia Road Services Ltd (1970) HCD 232

▪ **(2) Reference to the Claimant**

- The statement must refer to the claimant, i.e., identify him or her, either directly or indirectly.
- The words (or articles) must contain something that to the mind of a reader with knowledge of the relevant circumstances containing defamatory imputations and pointing to the plaintiff as the person defamed.
- It is, however, not required that the defamatory statement must have been intended by the defendant to refer to the plaintiff. Liability for libel depends on the fact of defamation and the intention of the defendant is immaterial.
- **Hulton & Co. V. Jones**¹⁸⁴, The case related to the publication of a humorous article in the appellant's newspaper.
- The article was concerning a motor festival at Dieppe and contained certain imputations on the morals of Jones described as churchwarden at Peckham and was intended to be a purely fictions character.
- But there happened to be a barrister of this name who was neither a churchwarden nor has taken a part in the festival at Dieppe. He sued the newspaper proprietors for libel on the ground that his friends believed that the article referred to him.

▪ **Defamation of a class**

- If a class of people is defamed, there will only be an action available to individual members of that class if they are identifiable as individuals.
- "If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there was something to point to the particular individual" as was held in the case of **Willes J in Eastwood v Holmes**¹⁸⁵
- In **J'Anson v Stuart (1787)**, a newspaper referred to 'a swindler', describing the person meant in the words 'his diabolical character, like Polyphemus the man-eater, has but one eyed, and is well known to all persons acquainted with the name of a certain noble circumnavigator.' The claimant had only one eye, and his name was very similar to the name of a famous admiral; he was able to prove that the statement referred to him, even though his name was never mentioned.

¹⁸⁴[1910] AC 20

¹⁸⁵[1858] 1 F&F 347 at 349).

- If the defendant made a reference to a limited group of people, eg the tenants of a particular building, all will generally be able to sue. (Browne v DC Thomson (1912) SC 359.)
- This issue was considered by the House of Lords in Knupffer v London Express Newspaper Ltd [1944] AC 116.

▪ **Unintentional defamation**

- At common law it is irrelevant that the defendant did not intend to defame the claimant. In **Hulton & Co vs. Jones**¹⁸⁶, the court held that intention of the defendant is irrelevant in common law in defamation cases where the defendant is liable for a work of fiction which is reasonably understood to refer to the plaintiff, even if the author did not know of his existence.

▪ **(3) Publication**

- The statement must be published, i.e. communicated, to a person other than the claimant.
- Publication is a communication by the defendant of matters defamatory of the plaintiff to a third party.
- There must be a recipient of information other than the plaintiff. This is because defamation is an injury to one's reputation, and reputation is what other people think of a man, and not his own opinion of himself. The statement must be published to a person other than the claimant alone.
- It is not actionable in civil law merely to make a defamatory statement to the claimant alone out of earshot of a third person, nor to write a letter to the claimant containing defamatory material.
- If the claimant decides to show a potentially defamatory letter to someone else, there is a defense of **volenti** as the claimant, not the defendant, has published the statement.
- In **Hinderer v Cole (1977)**, the claimant was sent a letter by his brother in law which was addressed to 'Mr Stone house Hinderer'.
- It contained a vicious personal attack on his character, describing him as 'sick, mean, twisted, vicious, cheap, ugly, filthy, bitter, nasty, hateful, vulgar, loathsome, gnarled, warped, lazy and evil'. The defamatory words in the letter were shown by the claimant to other people, but the defendant had only sent them to him.

¹⁸⁶[1909] 2 KB 444

- There was therefore no publication by the defendant to a third party, and those words could not form the basis of a libel action.
- However, the claimant did obtain damages of £75 because the word 'Stonehouse' was held to be defamatory, as it implied that the claimant was like John Stonehouse, an MP who had recently disappeared by faking his death from drowning to escape paying his debts.
- If a clerk or typist is given a document containing a defamatory matter for preparing its copies and he returns the same to his employer, it is not publication.
- However, dictating a defamatory letter to a typist is probably slander (Salmond and Heuston on the Law of Torts, 1996, p154), but when the letter is published to a third party it is libel.
- However, in **Bryanston Finance v De Vries**¹⁸⁷, was held that where a letter was written to protect the interests of the business there was a common interest between the employer and employee, and so a letter dictated to a secretary in the normal course of business was protected by qualified privilege.
- In **Ahern vs. Maguire**, Chief Baron Brady said that, if a letter 'however slanderous, is received by the person to whom it is addressed, and does not go beyond him, there is no publication of it in law to support an action for libel'. But a wrongly addressed letter containing defamatory remarks would be actionable if opened by someone other than the subject of the remark.
- **Section 40 of the Newspapers Act**¹⁸⁸, (1) A person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed, to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person. (2) It is not necessary in a case of libel that the defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or

¹⁸⁷[1975] QB 703

¹⁸⁸[Cap 229 R.E 2002]

from any extrinsic circumstances or partly from the one and partly from the other means.

- In **Huth v Huth**¹⁸⁹, a man sent a letter to his wife which defamed her and their children. It was opened and read by the butler. An action was brought by the children (as a wife could not sue her husband at the time). The Court of Appeal dismissed the case saying that it was not the butler's job to open letters and he only did so out of curiosity. There cannot, therefore, be a publication to a third party where it is not natural and probable that that third party would hear the information.
- **Theaker v Richardson**¹⁹⁰, a husband opened a letter which defamed his wife. It was held that the defamation had been published to the husband as it's natural and probable that the husband would open it.

- **Communication between husband and wife**

- A statement made to one's own spouse will not be 'published' for the purposes of defamation (*Wennhak v Morgan* (1888) 20 QBD 635 at 639). Communication between husband and wife is protected as any other rule "might lead to disastrous results to social life".
- Communication of defamatory matter by the wife to the husband and vice versa is not publication. But publication of defamatory matter by a third person to a wife about her husband and vice versa will be publication.

- **Repetition**

- Every time a defamatory matter is repeated, it is deemed to be a fresh publication and gives a cause of action. In case of repetition the writer, publisher, editor, etc. are all held liable. Even the person who disseminates it such as a newsagent or newspaper vendor may be held liable. But the courts adopt a lenient attitude about such persons. Such persons can avoid their liability by establishing that they did not know or could not have known by reasonable diligence that they were circulating a matter which was defamatory to some one.

¹⁸⁹[1915] 3 KB 32 26

¹⁹⁰[1962] 1 WLR 151.

▪ **Distributors**

- The defense sometimes known as 'innocent dissemination' is designed to protect booksellers and distributors of materials which may contain libelous statements.
- A person has a defense if he shows that he was not the author, editor or commercial publisher of the statement; he took reasonable care in relation to its publication; and he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement. A person shall not be considered the author, editor or publisher of a statement if he is only the printer, producer, distributor, or seller of printed material containing the statement, or the broadcaster of a live programme.
- An internet service provider was held not to be the publisher, within the meaning of s1, of defamatory statements posted on a newsgroup. However, on the facts the claimant had notified the defendants that the posting was defamatory and requested that they remove it, but they had refused to do so.

▪ **Consent**

- Consent of the claimant to the publication of a statement, by showing other people defamatory material which the defendant meant for the claimant only, will create a situation in which technically there has been no publication defamatory letter sent by the defendant to the claimant was shown by the claimant himself to third parties¹⁹¹.

▪ **Examples of publication**

- **The following situations that will amount to publication:**
- **Words written on a postcard or open message;**
- **Defamatory statements placed in an envelope and addressed to the wrong person (Hebditch v MacIlwaine (1894));**
- **Speaking in a loud voice about the claimant so that people nearby can overhear (White v JF Stone (Lighting and Radio Ltd) (1939));**

¹⁹¹For further information see: Chapman v. Lord Ellesmere [1932] 2 KB

- **Sending a letter to the claimant in circumstances when it is likely to be opened by a third party** (a secretary/clerk opened a letter) (Pullman v Hill (1891) Theaker v Richardson (1962) — a husband opened a letter addressed to his wife);
- Allowing unauthorized defamatory statements to remain on one's premises (In Byrne v Deane (1937)).
- In Cunningham v Essex County Council (2000), it was held that the casual onward transmission of a draft letter in preparation for a reference, alleging criminal proceedings against the claimant, could not attract a defense of qualified privilege.
- This was an actionable publication for the purposes of a libel claim;
- **Making a statement which carries the natural consequence of being repeated by someone else** (Slipper v BBC (1991)).
- In this unusual decision, the defendant was liable not only for the original statement in a television broadcast, but for later newspaper reviews which repeated the 'sting' of the statement;
- **Making the statement to the claimant's spouse;**
- **A publication on the internet** (2000) Godfrey v Demon Internet Ltd)
 - **The following situations will not amount to publication:**
- **Placing defamatory material in an unsealed letter** (Huth v Huth (1915);
- **Making defamatory statements which are later repeated by someone else** (Ward v Weeks (1930).
- This usually breaks the chain of causation and the original maker of the statement will not be liable for repetitions, though there have been exceptions to this (see Slipper v BBC (1991);
- **Making the statement to one's own spouse** (Wennhak v Morgan (1888);
- There is some doubt as to whether communications in interdepartmental memos sent or circulated within an organisation would be 'published'.
- Opinion on this was divided in Mills Ltd Riddick v Thames Board (1977). In any case, in such situations, there could well be a defense of qualified privilege.

❖ FORMS OF DEFAMATION

- Defamatory statements are usually in written or spoken words (and include material on the internet) but pictures, photographs, gestures and other acts can also be defamatory.
- A company can bring defamation proceedings as well as individuals but cannot claim damages for distress or hurt feelings in the same way as an individual. A company will be defamed where the statement damages its business or reputation.
- Liability for defamation is divided into the two categories of **libel and slander**.
- **LIBEL**, consists of a defamatory statement or representation in permanent form. If a defamatory meaning is conveyed by spoken words or gestures it is **SLANDER**.
- Examples of libel, as distinguished from slander, are a picture, statue, waxwork, effigy, or any writing, print, mark or sign exposed to view.
- According to the above examples, it can be concluded that libel is addressed to the eye, slander to the ear. (i.e. permanent and temporary or transient nature).
- **LIBEL** the defamation is in a permanent form it is actionable per se, i.e. without proof of damage it may be a crime
- **SLANDER** the defamation is in non permanent form (i.e. it is transient) it is actionable only on proof of special damage, i.e. an actual pecuniary loss which the plaintiff can identify and value and it cannot be a crime.

❖ DISTINCTION BETWEEN LIBEL AND SLANDER

- The basic differences between the torts of libel and slander are as follows:
- (1) **Libel is a defamatory statement in permanent form**, for example, **Writing, wax images** (Monson v Tussaud's Ltd [1894] 1 QB 671), **films** as was the case in **Yousoupoff v Metro Goldwyn Pictures Ltd**¹⁹², In this case it was held that a film which suggested as a matter of Historical fact that the plaintiff at one time had been raped was libelous.
- Some examples of libel are: **Monson v Tussaud's Ltd (1894)**, where the placing of a wax image of the claimant in the chamber of horrors at Madam Tussaud's waxwork exhibition amounted to libel;

¹⁹²[1934] 50 TLR 581

- **Radio and television broadcasts;** as was the case in **Olowo vs. Attorney General of Uganda**¹⁹³, where a song was sung in a vernacular and the defendant admitted the words defamatory to the plaintiff, found that broadcast words were of the permanent nature and broadcast of the recording was a libel. The defamatory meaning could be understood by those who understood the language and who were acquainted with the plaintiff and know of the circumstances.
- **public performances of plays**
- **Section 38 of the News Papers Act**¹⁹⁴, defines Libel as: Any person who, by print, writing, printing, effigy or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, shall be guilty of the offence termed "libel".
- **Slander is a defamatory statement in a transient form.**
- **2) Libel is actionable per se (without proof of special damage which is calculable as a specific sum of money), slander is not.**
- To succeed in an action for slander, damage must be proved except in four instances, which are as follows:
 - **(a)** Where there is an allegation that the claimant has committed an imprisonable offence. The offence must be one which carries a sentence of imprisonment at first instance, rather than one which merely carries a possible prison sentence or a fine.
 - In **Romani s/o Modesti and two others vs. Amiri s/o Kitego**¹⁹⁵ and **K.Hassani v. Chali Kithuku**¹⁹⁶, the two cases involved allegations of witchcraft made orally. The courts in both cases were of the opinion that imputation of witchcraft was an offence punishable under the Witchcraft Act. Such allegations therefore constitute defamation and may be actionable without proof of any damage on the part of the person alleged to practice witchcrafts.
 - **(b)** Where there is an imputation that the claimant is suffering from a socially undesirable disease such as venereal disease, leprosy, plague and, arguably,

¹⁹³[1972] EA 311

¹⁹⁴[Cap 229 R.E 2002]

¹⁹⁵[1969] HCD 22

¹⁹⁶[1985] TLR 212

HIV/AIDS. There has been a suggestion that the list of diseases in this category is now fixed.

- **(c)** Where there is an imputation that a woman has committed adultery or otherwise behaved in an 'unchaste' fashion (Slander of Women Act 1891). It has been held that an allegation of lesbianism is included in the term 'unchastity' (Kerr v Kennedy (1942)).
- **(d)** Where there is an imputation that the claimant is unfit to carry on his trade, profession or calling.
- The statement must disparage the claimant in the way which he or she exercises his or her profession or job.
- In **Hopwood v Muirson** (1945), it was held that an allegation that a headmaster had committed adultery was not actionable per se, but it would have been had the adultery been alleged with a pupil or a teacher at his school.
- This common law position has been altered by section 2 of the Defamation Act 1952 which merely requires that the claimant could possibly have been injured in relation to his or her trade or calling by the statement.
- **(3) Libel may be prosecuted as a crime as well as a tort, whereas slander is only a tort.**

❖ DEFENCES

▪ (1) Truth (Or Justification)

- Only false statements are actionable, so if the statement made about the claimant is true, there can be no action for defamation. The burden of proof is on the defendant to prove that the statement made is true, rather than on the claimant to prove that it was false.
- Although this is the principle which underpins the defense of justification, the defense is by no means as simple as might be expected, for three main reasons. If the defendant takes only this plea and the plea fails, punitive or exemplary damages will be awarded against him. But if the plea succeeds no action will lie even if the publication was made with malicious or improper motive. What is required to be proved is not literal but substantial truth.

▪ **(2) Fair Comment On A Matter Of Public Interest**

- The defense of fair comment is frequently relied upon by the press, as it is designed to protect statements of opinion on matters of public concern.
- Lord Esher, in **Merivale v Carson**¹⁹⁷, stated that the test was:
- "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticized?"
- The defense only applies to comments made on matters of public interest, e.g. comments on works of literature, music, art, plays, radio and television; and also the activities of public figures.
- A publication made 'maliciously' (spitefully, or with ill-will or recklessness as to whether it was true or false) will destroy the defense of fair comment.
- Where there are imputations partly based on fact and partly expressions of opinion, the defense of fair comment will not fail merely because 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.

▪ **(3) Innocent dissemination**

- The defense of innocent dissemination is designed to protect booksellers and distributors of materials which may contain libelous statements.
- This defense was explained in **Vizetelly v Mudie's Select Library** (1900), in which publishers had requested the defendants, a circulating library, to return certain books which were likely to contain libels.
- They did not do so and were liable for defamation. It was held that the defense could apply to libraries, booksellers and other 'mechanical' publishers of libels, provided that: the publication is innocent, in the sense that they did not know that it contained a libel; and there were no circumstances which ought to have made them aware that the publication could have contained a libel; and there was no negligence on their part in not knowing of the libel.

▪ **(4) PRIVILEGE**

- The general rule is that a man who defames another does so on his own peril. A privileged statement is an exception to this rule.

¹⁹⁷ [1887] 20 QBD 275

- It is said that it is the occasion in which the statement is made is privileged and not the statement itself.
- There are occasions in which freedom of expression of views, without fear of an action for defamation, is considered more important than the protection of the reputation of a person(s).
- Thus no action lies for a defamatory statement made at a privileged occasion.

- **(a) Absolute**

- There are certain occasions on which the law regards freedom of speech as essential, and provides a defense of absolute privilege which can never be defeated, no matter how false or malicious the statements may be. The following communications are 'absolutely privileged' and protected from defamation proceedings:
 - Statements made in either House of Parliament.
 - Parliamentary papers of an official nature, i.e., papers, reports and proceedings which Parliament orders to be published. Extracts from parliamentary papers are covered by qualified privilege.
 - Statements made in the course of judicial proceedings or quasi-judicial proceedings.
 - Communications between lawyers and their clients.
 - Statements made by officers of state to one another in the course of their official duty (*Chatterton v Secretary of State for India* [1895] 2 QB 189).
- Absolute Privilege as per **section 42 of the News Papers Act¹⁹⁸**, is a statement which is of such a nature that no action will lie for, however false and defamatory it may be and even if it is made maliciously (with improper motive).

- **(b) Qualified**

- Qualified privilege operates only to protect statements which are made without malice (i.e., spitefully, or with ill-will or recklessness as to whether it was true or false).
- The judge must decide whether the situation is covered by qualified privilege. If so the jury must then decide whether the defendant acted in good faith or whether there was malice.
- The following communications will be protected by 'qualified privilege':

¹⁹⁸[Cap 229 R.E 2002]

- Statements made in pursuance of a legal, moral or social duty, but only if the party making the statement had an interest in communicating it and the recipient had an interest in receiving it.
- Statements made in protection of an interest, eg public interests or the defendant's own interests in property, business or reputation.
- Fair and accurate reports of parliamentary proceedings.
- Fair and accurate reports of public judicial proceedings, e.g., when the report is not published contemporaneously with the proceedings.
- Qualified Privilege: **read ss. 43-45 of the Newspapers Act**
- In **A.S Maskini vs. Joe Rodrique & others¹⁹⁹**, it was held that qualified privilege attaches to communications where the informant has a legal, moral or social duty to communicate the information and the recipient has a similar duty to receive it (In other words there must a reciprocity of interest.

▪ **(5) APOLOGY**

- As a general rule, making of an apology or an offer thereof is no defense to an action for libel but it may mitigate damages. But, as an exceptional case, it is available in case of public newspaper or other periodical publication.
- Even in such case, the defense can succeed if there is no malice or gross negligence and the defense is published at an earliest opportunity inserted in the newspaper or periodical as the case may be.

*****END*****

“Wabillahi Taufiq Walhidayah Wassalamualaikum Warahmatullahi Wabarakatuh.”

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¹⁹⁹ [1975] LRT 65