NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

Note the cases which are referred to in connection with each of these 'indicators' of the standard of care expected of a reasonable prudent person in the defendant's position. You should note also that these factors are not elements of whether the standard of care has been reached, but are guide which may or may not apply in a situation to determine the standard of care.

Causation of Loss and Damages

The law must have some means by which the right to recover damages flowing from a negligent act, is limited. It does this in two ways: by imposing the requirement of **causation** and **remoteness.** Suppose that an executive is driving to the airport to catch a plane to lodge a tender for a lucrative government contract. On the way to the airport, he is involved in a collision with another driver and his car is extensively damaged. Assume it was the other driver's fault. The executive misses his plane, fails to lodge the tender in time and does not win the contract. As a result, his company becomes insolvent and many employees lose their job. Should the employees be able to sue the other driver for their loss of wages? Most people would say, 'that is not fair on the driver to impose that burden'. But how does the law draw the line? This is where the tests for causation and remoteness come in. We consider the issue of remoteness in a moment but first let us look at causation.

As Turner points out – the basic test of causation is the '**but for**' test. In other words, 'but for' the negligence in question the loss would not have been sustained. This test allows the facts to be tested to see if the negligence really causes the loss. Put another way, the court must be satisfied that there is a causal between the negligence and the loss. Suppose in the situation above it can be established that the executive would not have missed the plane anyway because he left the office too late, that the tender would not have won the government contract even if it was lodged in time or that the company would have become insolvent because of the recession, whether or not it obtained the contract in question. In each of these cases a claim by the employees or the company itself would not survive the 'but-for' test. There is no causal link between the negligence of the other driver and the loss or wage. So one way to test for causation is to see if there are any intervening factors operating between the negligence and the loss. In the above example, the lateness of the executive in leaving to catch the plan, the fact that the tender would not have been successful in any event, the economic recession are all intervening events that break the chain of causation.

Turner provides an example of where the plaintiff failed to satisfy the causation requirement, namely, *Cummings v Sir Williams Arrol & Co Ltd [1962] 1 ALL ER 623.*

In the situation described above most observers would say that the employees who lost their jobs should not recover but how does the law draw the line? The causation requirement provides one limit but there is another. The damage suffered by the plaintiff must be of the kind or type which **was reasonably foreseeable** by the defendant. Fairly obviously it would not have been reasonably foreseeable for the negligent motorist who ran into the executive (in the example above) that by doing so he would throw employees out of work and be liable to compensate them for their loss of income.

While a similar test is used to determine remoteness as to determine the duty of care, reasonable foreseeability, the emphasis in applying the test to the remoteness question is on whether the **damage** is foreseeable and also whether it is of the **kind** or **type** of damage. The general test of remoteness is laid down in the *Wagon Mound case)Overseas Tankshoip (UK) Ltd v Morts Dock & Engineering Co Ltd.)* [1961] AC 388. The case provides a good illustration of how the test is applied.

SELF ASSESSMENT EXERCISE 2

1a. What are the four elements of the tort of Negligence?

b. What are the tests used in respect of each element to see if it is present?

3.1.2 Professional Negligence

One important branch of the law of negligence concerns the liability of professionals such a accountants, lawyers, investment advisors and the like for advice given to clients and others. While the general principles of negligence still apply, the courts in this area have developed some specific rules to handle particular activities and professions.

Before looking at the relevant aspects of negligence, it should be noted that in many cases professionals will be liable to their clients in **contract.** The liability from contract will frequently overlap with that of tort because the contract will have an express or implied term that the professional will exercise reasonable care and skill in return for the fee charged. What we are primarily concerned about here is the liability of the professional to **third parties**, that is those who are not in a contractual relationship with the person alleged to be negligent.

3.2 Liability to Third Parties

In this course, we focus on the ability of the professional for providing negligent advice or information (known as negligent mis-statement). However, it will soon be seen that this is not the only source of liability to third parties. An example of where a professional was held liable to a their party through their actions rather than words is *Re Hill & Associated v. Van Erp (1997) 142 ALR 687*. A Solicitor drew a will for a client and under the will property was bequeathed to a Mrs. Van Erp. Unfortunately the solicitor arranged for Mrs. Van Erp's husband to witness the will. Under the law, any gift by will to a person or spouse of a person who witnesses a will is void. Mrs. Van Erp sued the solicitor in negligence. As Mrs. Van Erp and the interest intended for her were clearly identified in the will, the majority of the Court felt that there was sufficient proximity to find a duty of care by the solicitor to Mrs. Van Erp.

3.3 Negligent Mis-Statement

In the past, it was possible for a plaintiff to recover financial loss but it had to be associated with some form of physical injury or damage. So the plaintiff in *Donoghue v Stevenson,* for example, could recover lost wages if she had to take time off from work but only because it was a by-product of her physical illness. Another relevant limitation to negligent claims was that the defendant was not liable for negligent words alone but only for negligent acts. The reluctance to allow a claim for negligent words alone stemmed from the perception that it would result in too wide a range of claims and for excessive amounts. Over time, however, pressure increased on the courts to recognize that, 'pure' financial loss (i.e. loss not associated with some other injury) was just as real as other forms of loss and that it was appropriate for plaintiff in these cases to be compensated.

The first case to allow a claim for pure financial loss was *Hedley Byrne v Heller Partners* in 1964. The following **elements** for negligent misstatement were developed:

1. If a person gives information or advice to another;
2. On serious matter;
3. In circumstances where the speaker realizes, or ought to realize;
4. That he or she is being trusted to give the best of their information or advice;
5. As a basis for action by the other party;
6. And it is reasonable for the other party to rely on that advice.

Then the speaker comes under a duty of care.

Notice that these six elements only go to form the duty of care. The other elements of negligence (breach, causation and remoteness of damage) still have to be satisfied separately. While these six elements are quite specific in their operation they are still broadly concerned with the relationship between the parties and whether there is the required closeness to impose the duty of care.

There are many more cases on negligent misstatement and, as you might expect, a number of subtle variations and exceptions for different applications of the basic duty. These matters are beyond the scope of this course.

3.4 Liability of Auditors

As mentioned above, from the time that the Courts has first sanctioned negligent misstatement actions, there have been concerns that liability could spread too widely. Auditors are a particularly vulnerable group. Public companies must have their accounts audited and the results of these audits become known to the general business community. Could an auditor be liable to a person who buys shares in the company on the strength of the audit where the auditing was performed negligently and did not reveal grave financial difficulties?

For some years the law in this area was quite unclear but was finally settled in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords* (1997) 71 ALJR448.

The appellant, Esanda, had lent money to various companies in the Excel Finance Group. Peat Marwick Hungerfords (PMH) were the auditors of the Excel group and Esanda alleged that PMH had been negligent in carrying our their duties, that Esanda had entered into the transactions in reliance on the audited accounts and as a result of the negligence had suffered economic loss when Excel went into receivership. In claiming that PMH had owed it a duty of care, Esanda pleaded in essence that the loss was foreseeable by reason of Esanda's reliance on the audited accounts of Excel. No evidence was led to show that PMH was aware Esanda would be relying on the company accounts. Thus Esanda had done no more than plead reasonable foreseeability and had failed to allege the existence of a relationship of proximity.

The Appellate Court held that mere foreseeability was insufficient to establish the existence of a duty of care founding a claim for negligence misstatement. The appellant also should have pleaded that there existed a relationship of proximity between it and PMH.
The Court concluded that there were no circumstances which took the case out of the general rule that a person is not liable for negligent

statements unless she/he intended to induce another to rely upon such statements, or in the absence of such intention, she/he knew that the statement would be communicated to the other; either as an individual or as a member of an identifiable class, in connection with a particular transaction or transactions of a particular kind and that the other would very likely rely on it for the purpose of deciding whether to enter into the transaction/s.

SELF ASSESSMENT EXERCISE 3

1. What is the purpose of an award of damages in the tort?
b. Explain the legal principles for determining the extents of damages claimable in an action in the tort of negligence

3.5 Disclaimers

Exclusion clauses or disclaimers are clauses which seek to exclude or excuse a person from liability which night otherwise attach to them.

For present purposes you should note that there is real doubt as to whether a disclaimer can exclude a duty of care. This is because the duty is imposed by the Court as distinct from a contractual disclaimer which is based on enforcement of a contractual term. (As we shall see later even contractual disclaimers are often ineffective). What does seem to be clear is that where the defendant is the only source of information or advice, then a disclaimer will not be enforced. After Shaddock's case many local authorities inserted disclaimer clauses when giving information concerning properties within the local authority area but this has been held to be ineffective *Mid Density-Developments Pty Ltd V Rockdale Municipal Council* (1993) 116 ALR 460.

3.6 Defences to Actions in Negligence

- **Contributory Negligence**

If the executive in our situation outlined earlier was partly at fault then the damages that could be recovered from the other driver for either the repairs to his car, or any personal injuries would be reduced to the extent of that fault. Contributory negligence used to be a complete defence but now under legislative provisions such as the *Law Reform (Miscellaneous Provisions) Act* there is an **apportionment** of liability and hence an apportionment of damage. It is commonly pleaded as a defence in traffic cases because of the strong likelihood that both drivers are at fault. The quantum of damages claimed is reduced by the percentage, which the plaintiff is found to have contributed to those damages.

- **Voluntary Assumption of Risk**

Known also by its latin maxim *volenti non fit injuria,* the principle here is that a person cannot complain of a risk if they have consented to it. A footballer would not be able to sue a fellow footballer for injuries received in a game, assuming the rules were being complied with at the time.

To establish the defence, the plaintiff must have

(a) fully appreciated the risk, and
(b) accepted it willingly.

This can lead to some interesting situations where a passenger sues an intoxicated driver of a motor car for injuries received. On the face of it, the defendant driver would have a defence of *volenti* but not so if the plaintiff was sufficiently intoxicated so that he or she could not appreciate the risk!

4.0 CONCLUSION

The case of *Donoghue v Stenenson* is very instructive. Read it out again and again. Note the dictum of Lard Atkin. Negligence must fail where duty-situation is absent. It is not a duty in the air. It is owned to somebody. Loss may be physical or economic the degree of care which a duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled. Note the important case of *Hedley Bryne & Co Ltd v. Heller & Partners Ltd (1964)*. Damage must not be too remote: the *Wagon Mound* case (1961). Test applied is objective. Defences to negligence include contributory negligence, voluntary assumption of risk (*volente non-fit injuria*)

5.0 SUMMARY

Perhaps at this point you need not be too concerned with the detail. In the context of negligence you should be aware of the role of tort law in compensating the plaintiff but also the need to ensure that the law is fair on the defendant. Against this background much of the development of negligence has been on finding ways of defining the limits to the right of recovery by the plaintiff. One way that this is achieved in negligence is the imposition of the objective test of the 'reasonable person'**.**

At this stage, you may need to go back over your work and more closely at the content of the area in question. Here you need to know the **four elements** of negligence and the different roles played by each of those

elements. With the first element, the duty of care is concerned to establish whether there was sufficient **closeness** between the plaintiff and the defendant. The second, the breach of that duty focuses on the **standard of care** expected and the final two elements on the limitations to be placed on the **damages** that can be recovered.

Hand in hand with the elements are the legal tests for each element. These are important as the elements themselves for without them the elements are meaningless. Here, notice how the notion of reasonableness appears in the tests for the first, second and fourth elements although the tests are designed to achieve different aims.

6.0 TUTOR-MARKED ASSIGNMENT

Chidi was shopping at her local supermarket on Saturday morning when she supped on some wet substance that had been split on the floor. She fractured her pelvis. Three weeks later still recovering in hospital, she fell down a flight of stairs and fractured her other leg.

a. Does the Supermarket owe Chidi a duty of care?
b. Has there been a breach of duty of care?
c. Can Chidi claim damages from the supermarket in respect of:

i. injury one
ii. injury two

7.0 REFERENCES/FURTHER READINGS

Fleming J. (1992). *The Law of Torts*. 8th Ed. Sydney: The Law Book Co. Ltd.

Gardin D. (1991). *Outline of Torts*. Sydney: Butterworths.

Gillies P. *Business Law.* 5th Edn. Sydney: Federation Press.

Holmes D. (1984). *Butterworths' Student Companions – Torts*. Sydney: Butterworth.

Street H. (1976). *The Law of Torts*. 6th Edn. London: Butterworth.

UNIT 4 SPECIFIC TORTS: DEFAMATION, CONVERSION AND DETINNE, NUISANCE, VICARIOUS LIABILITY

CONTENTS

1.0 INTRODUCTION

In this last unit on law of torts, we shall briefly learn about few more specific torts like defamation, conversion and detinne and nuisance and conclude with vicarious liability. Defamation is a statement which is calculated to injure the reputation of another, by exposing him/her to hatred, contempt or ridicule. Action for conversion and detinne arise when one title to chattel is challenged on where the chattel is detained respectively. The term "nuisance" is elastic. It is a state of affairs that interferes with ones use of enjoyment of property. Lastly we will touch the issue of vicarious liability: let the superior make answer"; He who does a thing through another does it himself: that is to say: 'look to the man higher up'.

2.0 OBJECTIVES

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

- describe the basis of defamation action and the common defences
- describe the elements of conversion and detinne and nuisance
- describe the concept of vicarious liability and apply it to a given fact situation.

3.0 MAIN CONTENT

3.1 Defamation

This is an important but very complex area of the law. To cover some of the main principles the following extracts have been chosen from Gillies (1993, pp 96-8):

The tort of defamation is concerned with publications (the concept includes spoken words, written words, cartoons and the like) which tend to injure the plaintiff's reputation. The word 'publication' is a standard one in this part of the law, but it is not synonymous with publication through the media – a relevant publication takes place with the communication of the complained of statement to one or more persons (though publication to the plaintiff alone is not a relevant publication).

(In other words, if you write a letter to someone in which you defame him/her then there is no tort committed – assuming the letter does not fall into the hands of any other persons).

Defamation law is largely a product of the common law, it is also to be found in the Criminal Code and Penal Code.

As with other areas of tort law, policy plays an important role. The law attempts to strike a balance between protecting a person's character and reputation from attack and allowing free speech. However, most commentators agree the scales are tipped against free speech.

3.1.1 Elements

A defamatory statement is broadly defined by the law – it is one which tends to lower a person in the estimation of others. In a classic phrase, it is frequently an imputation which tends to bring the plaintiff into 'hatred, contempt or ridicule', although it need not be this extreme. Defamations can be direct or implied – indeed, provided that the reasonable recipient of such a statement can infer that it is directed at the plaintiff, it is unnecessary that the latter actually be named in it.

The law distinguishes slanders - essentially spoken defamations, and libels – essentially written ones. The division is not clear cut, however – by virtue of decisional and statute law, certain defamations not in writing are classed at libels. For example, defamatory radio and television broadcasts are libels as are defamatory motion films. At law, actual damage must be shown, whereas libel does not require this – an inferred injury to reputation, albeit an intangible one, is presumed.
For practical purposes the distinction between libel and slander have either been abolished or are now irrelevant.

The definition of defamation is broad, and the reports reveal that quite mild strictures have been litigated. Accordingly, the defences bear the brunt of limiting liability for defamation.

3.1.2 Defences

The basic defence is that of justification or truth. The defendant must prove that the statement was true. This is an absolute defence. In certain jurisdictions, this is not enough. The statement also must be in the public benefit, as well be on a matter of public interest (or be published under qualified privilege).

a) Qualified Privilege

This is a broad and potential important defence. At common law, it is a defence where the statement was made by a person having the interest or duty, legal, social or moral, to make it to the recipient, and the latter has a like duty or interest in receiving it. An example would be a conversation between the managers in a company, relating to a personnel matter. The duty or interest must be reciprocal – a limitation. It is arguable that the privilege is not lost because the information is false, provided the defendant acts in the reasonable belief that the information is true. (Malice will defeat the privilege).

For some years it has been supposed that a media company and its audience did not have such a common interest to attract the privilege, on the basis that the recipient's interest had to be a fairly immediate one, such as might be apparent if the communication was relevant to the making of a decision by him or her. However, the times may be changing – it was accepted that such a community of interest could exist between media and audience.

b) Fair Comment

This defence is directed to expressions of opinion only. Having said that, it is often too difficult to tell where fact ends and opinion begins. For the defence to apply, the comment must be 'fair' (meaning honest, rather than reasonable); it must have been based on facts which are true; and it must be on a matter of public interest, such as matters of government, or a work of art or an artistic performance made available to the public, Malice (the concept is vague, but it includes spite) will defeat the defence.

c) Absolute Privilege

Another important defence is absolute privilege which covers statements made in parliament or the courts. Also the publishing reports or statement that are themselves subject to qualified privilege can attract a similar defence.

d) Constitution or Theophanous Defence

The most recent defence developed by the courts is known as the constitutional or Theophanous defence. It is based on the implied freedom of potential discussion assumed to be present in the Constitution. It restricts the ability of politicians and other public figures to sue for defamation but there are a number of limitations to the defence.

Finally, it should be noted that damages are not only available against the maker of the statement but also the publisher. In some cases the publisher may have a defence if the statement is published in good faith for public information.

3.2 Conversion and Detinne

Detinne is the **detention** of the goods having received a demand for their return. Contrast **conversion** where the goods may not have been retained (e.g. they could have been sold or destroyed in which case a demand for their return is not relevant.

3.3 Nuisance

Here the most important type of nuisance; for our purposes is private nuisance. The basic elements of this action are:

(a) Substantial and unreasonable interference with
(b) The enjoyment or use of land by
(c) A person who has a right to occupation or possession of land.

So private nuisance cases usually involve neighbourhood disputes.

3.3.1 Let Us Take Those Elements in Turn:

(a) **Substantial and unreasonable interference** is most easily proven by material damage such as killing crops by pesticide spray, breaking windows with golf balls or dust damage to stock. Regard is had for what a plaintiff should be reasonably expected to bear in the circumstances. The examples given above are quite clear cut but if for instance the activity is noise then it is more difficult to judge. It would be difficult for a neighbour to sue in