DEFENCES TO TORTIOUS LIABILITY
UNDER NIGERIAN LAW

BY

RUFAI MUFTAU

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DECLARATION

I hereby declare that this work is the result of my personal efforts, and that apart from other people's works which have been acknowledged, this thesis is to the best of my knowledge has never been presented either in part or in full for a degree or higher degree award elsewhere.

RUFAI MUFTAU

CERTIFICATION

This research work has been duly supervised and approved as having satisfied the requirements for the award of Masters of Law of the Ahmadu Bello University Zaria, and it is approved for its contributions to knowledge and literary presentation.

Mallam Tawfiq Ladan
Chairman, Supervisory Committee
Date 14/5/98

Mallam Saleh Mohammed
Member, Supervisory Committee
Date 12/5/98

Mallam Nuhu Jamo
Head, Department of Private Law
Faculty of Law,
Ahmadu Bello University, Zaria.
Date 12/5/98

Professor J. Olayemi
Dean, Postgraduate School
Ahmadu Bello University, Zaria.
Date 16/2/99

DEDICATION

This thesis is dedicated to:

My parents, through whom I was brought into the world.

> ------My Lord: bestow on them thy mercy even as thy mercy even as they cherished me in childhood------1

And to: my beloved and virtuous wife:

> ----For them (virtuous women) has God prepared forigiveness and great reward---2

And lastly to the entire members of Rufai's family.

> -------Our Lord---------- --.
> And give us (the grace) to lead the righreous.3

1. Quran 17:24
2. Ibid 33:35
3. Ibid 25:74

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On a final note, I wish to state that I am solely responsible for all the errors that may have been made in this research work.

ABSTRACT

The choice of this topic is apt and timely, in view of the functions and roles which the topic plays in the modern day Nigeria.

In any given society, Nigeria inclusive, laws are often made to regulate certain conducts and behavioural attitudes of the people. Each individual has to conduct himself within certain a standard of behaviour.

An individual has certain rights which others must respect, and vice versa. But where these rights are infringed upon, an aggrieved party seek" redress in a competent law court. And the essence of this is to ensure peace and harmonious relationship in the society.

However, a person who has been sued on an alleged wrong may have legal defence(s) in law so as to escape from tortious liability. such defence(s) may be invoked as a partial or tota1 negation from tortious liability.

On this premise, it is the aim of this research work to analyse and examine certain situations under which these defences can be invoked in a law court with a view to escape from tortious liability.

This research work is comprised of six chapters, namely;

Chapter one consists of introduction and forms of tortious liability.

Chapter two will analyse and examine situations where the plaintiff's conduct and action at the relevant time, which has caused the alleged tort in question. The aim of this is to see whether they can be used as a defence in law or not.

Chapter three pertains to necessity as a defence. Under this chapter, the wrong is neither caused by the plaintiff nor the defendant. Rather, it is caused by events which are beyond the control of both the plaintiff and the defendant.

Chapter four will merely discuss certain defences which have been used and invoked as likely defences to a tort of defamation.

Chapter five will discuss eome other defences which can be successfully raised in any tortious actions.

Chapter six, which is the last chapter of this work will be the concluding part of the whole thesis; making observations and suggestions for future reforms of the law.

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ABBREVIATIONS

1.	AC	Appeal Cases
2.	ALL ER	All England Reports
3.	ALL NLR	All Nigeria Law Reports
4.	App. Cas	Appeal Case.
5.	CCHCJ	Selected Judgements of the High Court of Lagos State
6.	CLR	Commonwealth Law Reports
7	Co. Rep.	Coke's Reports
8	DLR	Dominion Law Reports
9.	E&B	Ellis and Blackburn's Reports
10	ECSLR	East Central State Law Reprts
11	ENLR	Eastern Nigerian LawReports
12	ER	English Reports
13	Ex. D	Exchequer Division
14	FSC	Federal Supreme Court
15	GLR	Ghana Law Reforms
16	HL	House of Lords
17	KB	King's Bench
18	LJQB	Law Journal Queen's Bench Reprts
19	LLR	Law Reports of the High Court of Lagos
20	LT	Law Times Reports
21	NILR	Nigeria Insurance Law Reprts

CHAPTER 1

1.0 GENERAL DEFENCES TO TORTIOUS LIABILITY UNDER NIGERIAN LAW.

1.1 INTRODUCTION.

Tort is derived from a latin word; tortus, meaning; "twisted" or "crooked". But, later on, the word found its way into the English language, and thence used as a synonym for a wrongful act.

Similarly, it has also been used as:

> an act which causes harm to a determinate person, whether intentionally or not, being the breach of a duty arising out of a personal relation or contract, and which is either contrary to law or an omission of a specific legal duty, or a violation of an absolute right.[1]

Furthermore, it can also be described as:

> A civil wrong for which the remedy is a common law action for which unliquidated damages, and which is not exclusively the breach of a trust or other merely equitable obligation.[2]

In general terms, therefore, tort includes all injuries, yet with exclusion of any breach, arising out of contractual relationshsips. But, it must be pointed out that this definition is inadequate in view of the fact that other remedies are also available. Such remedies

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1. B. ROGER: Osborn's Concise Law Dictionary (7th ed) at p. 325.

2. (Supra) at p. 1

include self help, equitable injunction etc.

A tortious act is a wrong in nature, and thus a corollary of which the tortfeasor is subject to liability. But before liability is imposed, the duty of burden of proof is on the plaintiff; the existence of an actionable wrong, and also that damage resulted from the act of the tortfeasor.

Historically, a tortious action is premised on revenge and deterence. However, this had since been changed in the modern time. Therefore, tortious actions now exist, primarily, to compensate the victim by compelling the tortfeasor to pay for the injury caused to an innocent person. And in the words of Sir Percy Winfield,[2b] a 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.

In view of this therefore, tortious duties exist because the law reckon with them; yet they are not based upon any agreement or consent of the person subjected to those duties. And by way of an illustration, Mr. A is under a duty not to assault Mr. B because the law says so, but not because A and B have agreed amongst themselves.

It is truism that tortious actions are aimed at preventing people from hurting one another. This includes property, physical person, reputation, etc. And interwoven

2b. ROGERS, W.V.H.: Winfield & Jolowicz on Tort, (Sweet & Maxwell), (London), (1979).

with this statement is a basic tenent of this branch of the law which asserts as:

> "Alterum non laedere", to hurt nobody by word or deed".

Against this background, the general rule of law emanating from the aforementioned principle is that if there is a right, then it must be followed by a remedy whenever such right is breached. Yet, it must at once be pointed out that this general principle of law is with some exceptions. For example, in some certain situations, though, a tort has been committed, yet, the victim will have no remedy in law. The reason for this proviso may be partly because of the fact that the wrong complained of is too trivial. Similarly, at times, in an attempt to balance the respective rights and interests of the parties, the Court finds out that fairplay and justice demands that the interests of the tortfeasor prevail over that of the victim.

Furthermore, a justification for the exception may also be due to the fact that the wrong complained of was caused when the tortfeasor was exercising his own rights. For example, as it is the case in a loss caused to traders because of competition in trade etc.

However, and of more fundamental are in certain circumstances are where though a wrong has been committed, yet the tortfeasor has valid and genuine defence(s) in law to exhonerate his blame worthy.

Against this background, it is the main focus of this research work to put into sharp focus, and highlight some of the aforementioned defences.

1.2 FORMS OF TORTIOUS LIABILITY.

It is a general principle of law that a wrong (whether civil or criminal) against an innocent person must have been caused on a formation of a mental element on the mind of the tortfeasor or accused. This is because subject to few isolated cases,[3] lack of a requisite mental element before, or at the time of commission ofthe wrong may not necessarily lead to liability.

In view of this, the primary aim of this introductory chapter is to examine and put into sharp focus some of these mental elements. The mental elements include:-

1.3 FAULT PRINCIPLE.

This is a phrase which is used to denote the fact that the tortfeasor was at fault of a wrong/injury caused to the victim. In other words, the wrong being complained of must have been caused by, or attributed to the acts of the defendant. Thus, it is usual to draw inference from the defendant's wrongful intention or from his begligent act.

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3. See Rules in Rylands Vs Fletcher (1868) LR3 HL 330

The use of the principle is to the effect that a tortfeasor should be held liable for his careless misconduct as opposed to a strict liability wrong. It is therefore common to pay emphasize on the conduct of the tortfeasor; his failure to take a reasonable care anu precautions to avoid the act which caused the wrong complained of. On this point, Lord Macmillan observed as follows:-

> The emphasis is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent.[4]

By operation of the principle, the plaintiff need not establish "mens rea" as it is the case in criminal trials. In the alternative, what the law is required of the plaintiff is to show that the tortfeasor's action was blame-worthy.

Historically, fault principle is used in two ways, namely:-

i. A test as a basis of knowing liability so that the defendant pays for a wrong caused to the plaintiff because of the defendant's act i.e. A person who causes a wrong or injury because of his fault should be asked to compensate his victim.

ii. On the corollary, a person who causes a wrong to another person without a fault on his part should not be asked to compensate his victim. And in this context, the general principle of law is

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4. Read Vs J. Lyons & Co. Ltd (1946) 2 ALL ER 47

No liability without fault.

Meanwhile, it must also be pointed out that the rule of a tortious liability on the basis of the defendants' fault also applies to situations where both the parties are guilty of fault; and in this regard, the modern law of contributory negligence applies. Therefore, in the case of Olayinka vs Lakin,[5] the defendant was shown to have been guilty of negligent driving. It was however shown that the deceased was guilty of contributory negligence by moving into the road without first ensuring that it is safe to do so. In apportioning liability, the court remarked as follows:-

> The defendant was largely responsible for the incident-----I consider that the apportionment should be in the ratio 30% to the deceased and 70% to the defendant.

Meanwhile, even if fault has been directly linked to conduct of a particular person, the law under which remedy would be sought for may not be that of a tort-based law. And if this is the case, thens such remedy would be pursued under other laws.

For example, if the wrong is a criminal type, the victim may be compensated under criminal injuries Compensation Board (1964). And under this arrangement, courts have been empowered to award compensation to accident victim for personal injury, or to victims who received injury as a result of crime of violence,[6] or, accidental

5. (1972) 4 CCHCJ 100 at p. 106

6. See Criminal Injuries Compensation Board as consolidated in 1969, Para. 5.

injury that is received when a suspected offender was being arrested[7] e.t.c

In R vs CICB exparte ince,[8] a policeman who was at the scene of a break-in was killed because of a collusion of an on-coming vehicle. It was held that his widow ought to be compensated, although it was found out that the Police was guilty of contributory negligence. Therefore, this case is now a floodgate for policemen, if on duty to receive compensation on any injruy which is caused to them during their work.

Again, in R vs CICB, exparte Scholfield,[9] on suspicion, a policeman went to where he thought thieves were hiding, but he found no one. On his way coming back, he injured himself. The court held that his "injuries were directly attributable to the attempted arrest of a suspected offender". On this basis, the policeman was awarded compensation under the scheme.

In the same vein, compensation will also be available in situation where an old women had a heart attack because of the fact that she witnessed an armed raid at her place of work.[10] But, there is no award in a situation where a woman suffered depression because she was told that her daughter had been sexually assaulted.[11]

7. See R vs CICB ex parte dowes (1977) 3 ALL E.R. 854
8. (1973) 3 ALL ER 808
9. (1971) 2 ALL E.R. 1011
10. Criminal Injuries Compensation Board as consolidated in 1969; 8th Report, Paragraph 7.
11. Ibid. See Page 11

As a contrast also, in R vs CICB Exparye Clowes[12] a policeman was injured by a gas explosion during an investigation of a gas leak. The cause was because of a suicide done by the occupier by breaking off the end of the gas pipe. Here, no compensation was awarded because "the deceased had neither intentionally, nor recklessly caused, the policeman's injuries-------"[13]

Inclusive in the scheme is a situation where a victim sustained injuries because of crime of violence.[14] Or motoring offences in a situation where a vehicle was deliberately used as a weapon i.e. if such vehicle is used to run someone down.[15] Or, accidental injury that is sustained when a suspected offender was being arrested.[16]

However, it must be pointed out that if the victim is guilty of contributory negligence, the scheme under paragraph 17 allows the Board to consider the conduct of the victim before and after the offence so as to know if he can get full award or any award at all. For example, victim of sexual offence will be deemed to be at fault if she runs risk for her own safety, by accepting lift from a stranger late at night.[17] Or, in a fight between offender and victim

12. (1977) 3 ALL E.R. 854

13. See Atiyah, P.S.: Accidents, Compensation and the Law 2nd & 3rd Editions, (Weidenfeld and Nicholson), (London).

14. (Supra) at p. 10.

15. See Atiyah, P.S. (Supra) at p. 343.

16. See R vs CICB ex parte Lawton (1972) 3 ALL ER 582

17. Criminal Injuries Compensation Scheme (1969) as amended: Paragraph 17 (contributory Negligence).

and the victim was injured. In this case, if the person who wants compensation is the agressor, then he will not be entitled to compensation. In the case of Murphy vs Culhane,[18] it was observed that if a person initiates a serious assault, and he received more than what he bargained for, then he will be met by a pleas of volenti non fit injuria, illegality or contributory negligence.

However, a trivial assault met by a severe one may entitle the victime to full damages at common law.[19]

It should be noted that there is difference between contributory negligence under tort law and what obtained under the scheme. In tort, the law is that negligence which is "casually irrelevant" is to be ignored. Therefore, a plaintiff who carelessly sits on a dangerous wall will get full damages if he is negligently injured by a stray bullet from a careless hunter.[20] But, under the scheme, a conduct subsequent to criminal assault is irrelevant. This is why criminal record or immorality of the claimant is often disregarded unless it is in a way linked with the crime which caused the injury.[21] Therefore, immoral act is not in itself a reason for reducing an award, unless it was provocative or reprehensive.

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18. (1977) Q.B. 94

19. Lane Vs Holloway (1968) 1QB 379

20. See Jones Vs Livox Quarries Ltd (1952) 2 QB 608

21. See Criminal Injuries Compensation Scheme, 8th Report, Paragraph 10.

Arguing for an award of compensation on criminal injuries by the scheme, it was observed:

> Morally justified as in some measure solving the nation's consience at its inability to preserve law and order.22

Inspite of this however, the scheme has been faulted. For example, it was observed that though victims of criminal wrongs have tort claims against their assailants, yet, in practice, this is of no significant value .[23]

Fundamentally, the aim of seeking legal redress in a court of law is to restore the victim to his former position by way of "compensation" yet, one recognises the fact that compensation may be available for the victim under two or more systems. And where this is the case, two suggestions have been propounded.[24] First, the victim may be paid by one system alone,or by two or more systems so that recovery/refund of money paid is made from other system (s) , based on an agreed proportions. Infact, this is often noticed under insurance scheme under the doctrine of subrogation. And primarily, the aim of this rule is to avoid double compensation, although this is with some exceptions.[25]

22. See A Pearson Report, Vol. 1, Paragraphs 1588, 1591

23. See Criminal Injuries Compensation Scheme, 7th Report Paragraph 17.

24. See ATIYAH, P.S. (Supra) at page 443

25. See ATIYAH, P.S. (Supra) at page 445

In another development, remedy can also be sought for under personal insurance scheme, especially if it involves loss of property via a criminal act which is covered by a private insurance scheme. In this regard, the primary aim is to replace something with a "measurable financial value." And if there is a coverage under two or more schemes the victim (insured) cannot claim more than one idemnity. For example, in Gale vs Motor Union Insurance Co. Ltd.[26] property under an insurance cover was destroyed. It was held that the insured cannot recover both in tort, and under the insurance scheme. And that if after collecting money from his insurance company, but later on sues the defendant, then the money he collected will be on behalf of the company.

The doctrine of subrogation operates to the effect that if two persons are legally under a liability to compensate a third party on a loss, and between these two persons, one is under a primary liability, and the second is secondarily liable, the latter is entitled, if he pays the loss, to be subrogated to the claims of the third party against the person primary liable.[27] Therefore, if a servant's negligent act caused his employer to be held liable to a third party and the employer was insured under an insurance scheme; primary liability will be on the servant,

In the same vein also, if A's Insured houses was destroyed by fire because of B's negligence, then A can claim

26. (1928) 1KB 359

27. See ATIYAH, P.S. (supra) at page 450.

from his insurance company. However, the company can later on recover the money by suing B. But, if A and B are insured, then each can make a claim against his own company for the damage and then each insurer is subrogated to the claim of its insured. Even though, in practice, insurance companies prefer knock for knock agreement to subrogation.

At this juncture, it must be pointed out that reasons used to justify the use of fault principle as foundation of liability in tort are premised on the followings:

a) That the principle has a great dominance and impact on the entire law of torts. Example of this can be seen in most major developments that took place in the present compensation scheme. Such include compulsory third party insurance scheme for benefit of road traffic victims,[28] law Reform Act (1934)[29] which allows proceedings against an estate of a deceased negligent person, compulsory insurance on employers for liability to their employees,[30] contributory negligent Act

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28. See S. 3, Chp. 233. Motor Vehicles Third Party Insurance Act. (1990) Laws of the Federation.

29. S. 3, Fatal Accidents Law (cap 43) The Laws of Northern Nigerian (1963).

30. See S. 40, Chp. 470, Workmen's Compensation Act (1990) laws of the federation.

(1945)[30] which extends liability for fault e.t.c.

In view of this, writers like Sir John Salmond has observed that the whole law of torts as a set of moral principles which is to be based upon a concept of fault i.e. that liability should be upon fault, but nothing else. On this ground, the whole idea of liability upon fault alone had made the New York Court of Appeal to declare as unconstitutional a workmen's compensation Act. This is because it made an employer to make compensation to workmen injured without any fault on his part.

b. Another argument is rested on the fact that liability in a tortious action must be with a prove of wrong in ention or culpable negligence on the defendant. In this regard, Salmond[31] observed as follows:-

> Pecuniary compensation is not itself the ultimate object of a sufficient justific tion of legal liability. It is simply the instrument by which the law fulfills its purpose of pencal coercion. When one man does harm to another without any intent to do so and without any negli ence, there is in general no reason why why he should be compelled to make compensation the loss is merely shifted from the shoulders of one man to those of another, but it remains equally heavy. Reason demands that a loss shall lie where it falls, unless some good purpose is to be served by changing its incidence, and in general the only purpose so served is that punishment for wrongful intent or negligence-------

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30. See Part III, Contributory Negligence, Civil Libaility (Miscellaneous Provision) Act of 1961, Law of Federation of Nigeria.

31. HEUSTON, R.F.U.: Salmond on the law of torts, 16th (ed.) London, Sweet & Maxwell (1973).

Meanwhile, in the recent time a Canadian author has sum up this point in the following words:

> One value at the heart of tort law is the notion of individual responsibility something that is central to western civilization. 33

However, inspite of the arguments examined above, there are certain instances when the principle becomes very irrelevant. Infact, in tort, generally, fault has never been and even presently, it is not an essential element for tortious liability. This is because:

> -----It is contrary to the whole law of trespass, to much of the law of nuisance, to the law of defamation, and to the responsibility of principals for their agents. 34

Against this background, one may be liable, even though no fault has been attributed to his conduct. For example, under the law of property and law of restitution, an owner of a stolen goods, can recover his property back, or, he collects compensation in lieu, even from a bonafide buyer for value. Therefore, Mr. A. who in good faith buys an article from a thief will surrender the goods or compensate the owner. Again, Mr. A who has been over paid by mistake will be asked to restore the money. In this example, there is no need for a prove of fault. This is because the defendant's liability is not based on fault, but if it is, then, such "fault" is so-called or notional. This can be seen where a third party who is actually not at fault is vicariously

33. See Linden, Canadian Tort Law (1978) at p. 13

34. See Polock; "A Plea for Historical Interpretation".

liable for the tort committed by the actual trotfeasor. In this regard, fault of a third party is really irrelevant. For example, this can best be seen in a collective liability. In this context, responsibility is sought to be imposed on a large group of people e.g. company, governmental parastatals etc. for the r tort committed by their servants. In the case of Camarthensire Country Council Vs Lewis[35] a child under the control of the defendants, moved outside the premises of a nursery school towards a busy road. A coming vehicle, in order to avoid the child, crashed into a tree. The child's teacher was held liable in negligent. But the House of Lords freed the teacher, and in it stead, the defendants were held liable. The court observed that the defendants should not have allowed an unlocked gate at the end of a lane near a nursery school bordering a busy road. But the questions that remained unanswered are: Who is at fault? Is it every councillor who ought to have proposed a resolution at a meeting of council for the appointment of someone whose duty it was to prevent such accident? The Clerk, or head-teacher of the school?.

Moreover, if the offence being complained of is a subject m tter of an insurance claim, the real tort-feasor may not necessarily pay the compensation. In it stead, it is the insurance company that will pay for the claims involved.

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35. (1955) AC 549

At this juncture, it is important to observe that there are also other instances when the rule of fault principle does not apply. These instances have often been regarded as exceptions to the use of fault principle. These exceptions are three and they can be briefly examined as follows:-

1.3.1 Rules in Rylands vs Fletcher.[36]

Subject to some exceptions, the law propounded under this rule is to the effect that a defdendant who for his own benefit brings on his land, collects and keeps therein anything likely to cause mischief if it escapes is presumed to keep such thing at his own risk. In other words, he will be held liable and answerable for all the wrongs which are direct and the natural consequences if such thing escapes.

However, it must at once be added that the defendants liability is not based upon any fault, negligence, or, because the defendant intended the result. Rather, it is based upon the fact that the defendants' activity was frought with exceptional risks, and because of this risk it is only fair and just that the defendant should be held liable for the attendant results of what he brought into the land.

The requirement of the rules include the followings:-

36. (Supra) at p.6

i. An escape from the defendant's land to the plaintiff's land.

ii. The defendant must be in control of the land.

iii. The defendant must use it for a non-natural purpose.

iv. The thing brought and kept must likely do mischief if it escapes.

Meanwhile, though, the rule is a common law one, yet, it has now been used as part of the Nigerian law. Therefore, in the case of Edhemowe vs Shell Bp Nig. Ltd.,[37] the defendant during the course of its operation dug a waste pit to store oil. The pit filled up, and then escaped into the plaintiff's land. This cause damage to the plaintiff's fish pond and his fish. The court held that the accumulation of oil in a waste pit is a non natural use, and the defendant was held liable accordingly.This was because the defendant had "breached their absolute and strict duty to prevent escape".

Again, the same rule was also applied in the case of Chief Otuku and others vs Shell BP.[38] In the case, crude oil escaped from the defendant's land to the plaintiff's land. This destroyed the plaintiff's well and juju shrine. The plaintiff sued, and the defendant was held liable under the rule for the escape and the consequent damage

37. Suit Not UHC 12/70 (Unreported Ugheli High Court. 29/2/1971.

38. Suit No BHC/83 (unreported) Brori High Court 15/1/1985

on the ground that oil is a dangerous substance.

Similarly, the rule was also relied upon in the case of Umudje vs Shell B.P. Petroleum Devt. Co. of Nigeria Ltd.[39] Here, the platinff's complaint arose out of oil exploration of the defendant i.e. that the defendants blocked and diverted a natural stream thereby interfering with the plaintiff's fishing rights; that the oil waste accumulated by the defendant has lost control, escaped to plaintiff's land and caused destruction to it. As per the first complaint the court held that the defendants were not liable because the blockage had not caused flooding of plaintiff's land, but a mere starvation of water and fish. Thus, there is no escape of water from the defendant's land to the plaintiff's land. On the second issue, the defendant was held liable because there was evidence of crude oil waste which was accumulated in a pit on land under their control and this has escaped to the plaintiff's land and this had polluted the plaintiff's ponds and killed the fish.

1.3.2 Vicarious Liability

As another exception to a fault principle, a third party can also be held liable under the doctrine of vicarious liability for a tortious wrong that is committed by another person, even though, this third party has not been found guilty of any fault. This exception can be

39. (1975) 11 S.C. 155

seen between a principal and agent, employer and employee e.t.c. In W.N. Iko vs John Holt and sons Ltd and D.S. Tunna,[40] the car of the second respondent collided and damage the appelant's vehicle. The driver was employed to drive the second respondent's car. The case was dismissed by court of first instance, but on appeal, it was held that the master is liable for the tortious act of his servant. Thus, appeal against the first respondent was allowed.

Similarly, the rule was also relied upon in the case of Obafemi Akingbade vs Sgt Omonede and 1 ors,[41] the plaintiff/Appelant sued vicariously for the gun shot that was caused by the first respondent. At the court of first instance, the second respondent was held not vicariously liable because "the police service commission has not been shown to employ any person for deliberate shooting of innocent citizens. The first defendant------was merely on a frolic of his own--------". But, on appeal, it was observed that a master is responsible for the tortious act of a servant committed within the scope of his employment; it matters not that the tort is wilful, or, not beneficial to the employer. That the first respondent was only doing what he was employed to do when he shot the appelant. Thus, the second respondent was held

40. (1957) FSC 50

41. (993) 2 NILR Page 1

vicariously liable for a wrongful act of the first respondent. Salami J.C.A. observed:

> ------the rational is that if there is any responsibility to be fixed, it has to be borne by the party who placed a scoundrel in a position to harass an innocent citizen------42

The appeal succeeds and the first and second respondents were jointly and severally liable.

1.3.3 Where prove of Intention is required

As another exception to fault principle, liability will not follow in some certain situations unless and until a requisite intention tending to show the guilt of the defendant is shown on evidence. Therefore, in an action for battery, the act complained of must be done intentionally. This is because a mere negligence or recklessness of the defendant will not suffice.

Similarly, before a defendant can be held liable for an offence of false imprisonment an act positive to be intentional from the defendant must be shown on evidence. But if the defendant acted bona fide and had reasonable grounds to believe that the plaintiff should be imprisoned, then, liability will not follow.

Moreover, in a case of trespass to chattels, an intention or negligence must be proved before liability follows, but an intereference with the goods which is

42. (1993) 2 NILR at p.2

rather a mere accident is not enough. Therefore, if A, during the course of carrying out excavation on a land which is in the posession of B, struck and caused destruction to an underground cable of the plaintiff, A will not be held liable. But, it must be added that accidental tresspass differs from a trespass done out of mistake. If an interference is intentional, it will not be a defence that the defendant would not have commit the trespass, if the wrong had been done out of mistake as to the existence of his right. For example, if A interferes with B's property thinking that it is his (A), then, he will be held liable in trespass. This is because the act was intentional. And this will be immaterial that he did not know that the act was trespass. This example differs from the first case above in that the act was unintentional.

Furthermore, in a case or conversion, a prove of the defendant's intention is essential. For example, the defendant's intention must be to deal with the plaintiff's goods by exercising dominion over them on his own behalf or on behalf of someone, other than the plaintiff. In this regard, it will be immaterial that he did not intend to challenge the plaintiff's ownership over the property. It will therefore not be a defence that the defendant acted in good faith or that he is mistaking as to the plaintiff's rights in the property. Thus, in the words of cleansing, B;

> The liability----is founded upon what has been regarded as a salutory rule for the protection of property, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.[43]

It must however be pointed out that an interference resulting from a mere careless conduct is not conversion. Therefore, an attendant of a car who negligently allowed a thief to drive the plaintiff's car away is not liable in conversion.[44]

Meanwhile, of recent, there has been a proposal for a partial or a complete abolition of the fault principle as a basis for tortious liability. Many reasons have been canvassed for this, some of which include the following:

A first reason is that the compensation bears no relationship to the degree of fault. For example, one cardinal rule under a fault principle is that once it is shown that the defendant is at fault, then the plaintiff will be compensated. But this law under the fault principle has been faulted on the ground that regard is not taken on whether or not the result of the act compalined of is catastroph or not.

Moreover, results of a negligent act differ from the alleged fault that gave rise to it. For example, a negligent act of two different persons will necessarily

43. Fowler Vs Hollins (1872) L.R. 7 QB 616 at 639.

44. See Ashby vs Telhurst (1937) 2 K.B. 242.

produce different results; while it may be a mere result in situation A, it may be a serious result in situation B. Therefore, it has been shown that on every road accident cases, there are 122 near misses.[45] Also, a US' study showed that under normal driving situations in Washington D.C, even "good" drivers committed an average of 9 driving errors of different drivers in every 5 minutes.[46]

Therefore, whether a negligent act of a defendant will result into an accident or a near miss will be a matter of pure chance. This is because it has little to do with the defendant's culpability.

Similarly, as between the plaintiff and the defendant, there is doubt about the justice of the principle. By way of an illustration, the defendants' liability can be limited by denying liability on the ground that the result is unforseeable co.sequence. But, if liability is imposed, however extreme the results, and however the enegligent then it will be unfair on the part of the defendant.

Secondly, attention is often not paid to conduct of the plaintiff, This can be seen in situation where no one can be found for blame worthy of the plaintiff's injury. In this regard, the plaintiff will have nothing as compensation under the principle, regard not considered, for example in an accident case where the plaintiff drove with a slight

45. AUSTIN, Accident Black Spot,(Harmmondsworth)(1966) at p. 33.

46. Driver Behaviour and Accident Involvement: Implications for Tort Liability pp. 176-180 Automobile Insurance & Compensation Study, US Govt. Pronter (WASHINGTON)(1970).

degree pf care and attention; or if the injury occured in an atte pt to rescue a person in great difficulty, even though at the risk of his own life. e.t.c

Therefore, it is my view that other criterion should be put into cosn consideration for the purpose of apportioning liability instead of seeking for fault, which actually is not really there.

Inspite of this however, it must be quickly pointed out that the plaintiff's conduct is as a matter of law taken care of under the rule of contributory negligence with a view to aportioning blameworthy between the parties.

Thirdly, one cardinal rule of the principle is its premise on moral rules. Yet, this rule has been faulted on the ground that a defendant may be negligent without being morally culpable, and vice versa.

Again, the moral rule is often also not followed in some certain situations. For example, liability of an insurance company for the fault of an insured person, which caused an injury to the person of a third party. Here, this is inspite of the fact that the insurance company has nothing to do with the alleged wrong. Or, where liability of a servant on account of a fault that causes injury to his master under the doctrine of vicarious liability.

With these arguments at the background, I will prefer a mid stream approach in the proposal for a partial or a

complete abolition of the fault principle. This is because while it may be seen as easy for a complete abolition in some situations, it will be practically impossible in some other situations. The reason for this stand is not far fetched. For example, in an employer/ employee relationship, such proposal may be possible, and it has been used with success in jurisdictions like Germany, Britain, USA, etc. Here, if a worker is due for a compensation on an injury sustained on the job, the employer will pay such worker without the need to sue and prove fault from either side. The essence of this approach is to avoid the delay in litigation. And by this approach, such worker is reimbursed for medical costs, lost of wages, etc.

Yet, it must be noted that this approach is only limited to accidents on the job caused, or "arising out of and in the course of employment".

Finally, however,these few instances aside, where one may argue for a non adoption of fault, there are many areas where its adoption is of essence. This is because to yield to a proposal for a total abolition will defeat the basic principle of tortious liability which is:

"No liability without fault". This is because once this cardinal rule is abolished, then on what ground and justification will r tortious liability be premised? And once this question is answered in the negative, then it will be a mere academic exercise to argue for its total abolition.

1.4 INTENTION

Apart from fault principle as a foundation for tortious liability, intention is also another form of tortious liability. Infact, intention as a form of tortious liability is so important that in most tortious wrongs, it must be shown on evidence that the defendants act was either intentional or negligent. For example, an act is intentional if "it is done with full advertence to its consequences and a desire to produce them".

To start with, an intention is used to mean a will, purpose or a design to do a particular act. Again, it signifies knowledge of a tortfeasor that a result of an act is bound to happen especially if the result of the act is desired, but if it is not desired, then, such event is forseen to be certained.

Intention is used to describe a state of mind of the tortfeasor who realises that there is a risk that the consequences will result from his act, even though the result is neither certain nor desired. This is because the law is that liability follows out of a wrong intended. Although, a person may be held liable in law for consequences which he not only desired, but to which he did not even advert. In this case, a presumption may be made on the defendant's intention by looking at what the defendant said or did at all the relevant time.

On this premise, the general principle of law is

that "a party must be considered to intend that which is the necessary or natural consequence of that which he does."[47] And this assertion is best illustrated as follows:-

> If I fire a gun at your dog wishint merely to scare it, and infact some of the pellets hit it, it does not lie in my mouth to say that I intended only to scare it and not to hit it. And it would be equally idle for me, at any rate in the law of tort, to say that, I never wished to hit you, if infact some of the shot glanced off the ground and wounded you who were standing near your dog.[48]

At this juncture, it must be noted that a prove of intention is very difficult. Intention is a mental state and so it is often inferred from the conduct of the tortfeasor. This problem arises out of a common knowledge that:

> the Devil himself knoweth not the thought of man.[49]

And commenting on the nature of this problem, Bowen, L.J. observed as follows:-

> the state of a man's mind is as much as a fact as the state of his digestion.[50]

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47. See R vs Harvey (1823) 2 B & C 257 at 264

48. See ROGERS, W.V. H: Winfield & Jolowicz on Tort (9th ed) London, (Street & Maxwell), (1979) at p. 24.

49. Year Book Pasch. 17 Ewd. 4, Fol. 2, Pl. 3 per Brian, C.J:

50. See Edginton Vs. Fitzmaurice (1885) 29 Ch.D.

It is truism that a prove of intention is required for the purpose of a tortious liability. For example, in a wrong of a conspiracy, an intention to injure the degendant must be proved. This is equally the same in an offence of fraud.

However, the problem of prove of intention in tortious acts is not as much as it is seen in criminal trials. For example, if A strikes at B and an injury results, the issue of whether A intends the harm will be of little paramount provided a reasonable man would have forseen that A's act would occassion an injury to B.

Similarly, in a criminal trial, it is a must that intention comprehend all the consequences of the act. In tortious acts, however, this will not distinct initial interference with the victim from the consequences of the interference will be made. Therefore, if A strikes at B with the intention that a slight harm willresult, but a greater harm results, yet, A will be held liable for the greater harm. And incidentally, this is anagōIous with doctrine of "take your victim as you find him" as propound under the law of negligence.

1.5 NEGLIGENCE

Under the law of torts, the word negligence is used to connote two meanings, namely:-

a. A considerable factor which is used to determine the liability of a tortfeasor on an account of an alleged wrong caused to the plaintiff.

b. An independent tort which is used to mean an infliction of a damage to the plaintiff, a damage which is caused because of a breach of a duty of care owed by the defendant to the plaintiff.

However, it is in the first sense that this present discussion relates, or all about. Therefore, negligence is an act which is done without paying any heed to the consequences of the act. In this regard, it is usual and common to describe the defendants' conduct which causes the wrong as been careless.

The word negligence as used here is a form of mental element of the tortfeasor. Thus, it must be proved for the purpose of apportioning liability to the defendant. This special feature, primarily, makes it to be distinctly different from a tort of negligence as a separate tort; the meaning which the second definition above connotes.

Negligence as a form of mental element is used in contra distinction with intention. Although, most often than not, tortious acts like assault, nuisance, defamation e.t.c. may be committed without the necessary intention. On this basis, liability is premised on his non-challant attitude or his inadvertence as to the ultimate result of his conduct.

A distinguishing factor between negligence and intention is where there is a full advertence to both the conduct and its consequences, yet, there is no desire for the consequences. A practical illustration of total inadvertence is in a situation where a signal man falls asleep and thereby causes a railway collision.

On the other hand, an example of advertence to an act and the consequences without a desire for the consequence can be seen in the case of Vaughan vs Menlove.[51] In this case, the defendant was warned that the haystock is likely to overheat and to take fire which might spread to the land of his neighbour. Yet, he did not heed to this advice. Therefore, he was held liable for the destruction caused when the stack caught fire.

At times, negligence is often used to mean a standard of behaviour to include instances where a person has been careless because he did not behave as a prudent man would have behaved, either because of his inadvertence or otherwise. And it is in view of this that Alderson, B. in the case of Blyth vs Birmingham Water Works co.[52] remarked as follows:

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

51. (1836) 3 Bing N.C. 468

52. (1850) 11 Exch 781 at 784

The sense and meaning which this definition connotes is to the effect that a negligent or a careless act, without the existence of a duty of care to the victim will not lead to a tortious liability. It is therefore not surprising that *Lord Esher remarked:*

> A man may be as negligent as he pleases towards the whole world unless he owes them a duty. 53

In NEPA vs Akpata[54], the plaintiff/respondent sued the defendants for damages for negligence arising from their installation of high tension electric transmission wires over and above the properties of the plaintiff. The trial court decided in favour of the plaintiff/respondent. On appeal, the court observed amongst other things that before a liability holds, there must be a sufficient relationship of proximity between the parties to such extent that in the reasonable contemplation of the defendant's carelessness, it is likely that damage is caused to the plaintiff. And in this regard, a prima facie duty of care arises. If this is true, then liability will follow.

At times, it does happen that the consequences of the defendants' careless act is far reaching. Here, the usual concept of the remoteness of damage will apply; a doctrine which is used as a law and standard test to set a limit to extent of the defendant's liability for the consequences of his negligence.

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53. Le Lievre vs Gould (1893) 1 Q B 49 at 497

54. (1991) 2 NWLR 536

Therefore, a basic principle of the law above is that a defendant is liable only for those consequences of his negligent act which are not too remote. And it will be immaterial that on the application of the "but-for" test, the defendant caused the act complained of.

By extention, it is no dispute that the defendant caused the alleged wrong, yet the law will still not hold him liable for all the direct consequences of his act. This is because a person is only liable for such consequence as a reasonable man would forsee as the natural and probable consequence of the act. Therefore, consequence which are not forseable are taken as "too remote".[55]

In Oversea Tankship (U.K.) Ltd Vs Morts Doct & Engineering Co. Ltd (The Wagon Mound, No. 1)[56], it was observed that consequences will be too remote if a reasonable man would not have foreseen them. In this case, the defendants negligently discharged oil from their ship to where the plaintiffs were carrying out welding works. This act caused fire and damage a lot of things. It was held that since the defendants neither knew nor ought to have known that the oil can catch fire if poured inside water, then, they cannot be reasonably said to have foreseen that their act would have damaged the plaintiff's wharf. The damage being too remote

55. UMERAH, B.C.; Medical Practice in Nigeria, Longman, Nigeria (1989), Page 127.

56. (1961) Ac 388

and so cannot be held liable. But, he was however held liable for fouling of the ship ways because it was a foreseable result of the discharge of the oil.

Meanwhile, one cardianl principle of law is that he who asserts must prove such allegation.[57] Therefore, the burden of proof of a negligent conduct of the tortfeasor lies on the plaintiff. In this regard, a careless conduct must be inferred from:

a. the facts proved and which have an indirect link to the tortfeasor's state of mind,

b. the tortfeasor's conduct which fell short of measure set by law, and which is normally that of a reasonable man, and,

c. the manner in which a reasonable man would have behaved is determined with reference to the consequences that such a man would have foreseen.

Lastly, in this context, an acceptable definition of a reasonable man, in a summary, form is;

> ------ easonable is not the unduly timorous man who perceives danger where one does not exist; he is not even the non-challent who disregards the most obvious dangers. He is not a paragn of circumspection r ther he is a man who is presumed to be free from over apprehension and from over confidence----------58

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57. Okubulo vs Oyabgola (1990) e NWLR pg. 147 at 723.

58. IKEJUONYE, A.B.C.: Professional Negligence: Medical Profession, A paper presented at the Anambra State Law Conference, held on 10th & 12th December, (1986).

1.6 MOTIVE AND MALICE

1.6.1 MOTIVE:- The word motive is used to mean something which prompts a person to do an act, or, a failure not to do that act. It is therefore common to use the word as a synonym to a reason for doing the act complained of.

Similarly, it is also used interchangeably with malice. In this context, an evil intention for doing the act may be inferred from the overall surrounding circumstances of the case.

However, it must be observed that subject to rules in criminal trials, a motive for doing an act (tortious acts) is irrelevant for the purpose of finding out blameworthy for tortious liability. This is because an invasion of one's civil right may be followed by a tortious liability. It is therefore immaterial whether such motive is good or bad. This is because the law is simply that it only cares about what the tortfeasor has done, but not to make inquiry as to why the defendant has done the act compalined of. And the justification of this attitude of the law is to avoid the danger of allowing courts to determine liability of a defendant on the basis of making inferrence into their own opinions and prejudices as to the propriety of motive of the tortfeasor. Another reason may also have been the need to avoid the difficulty of ascertaining what motive is.

By way of an illustration, therefore, if an act is unlawful, then the fact that the tortfeasor has a good motive for doing the act will not be a good defence to escape tortious liability. Conversely, if the act is lawful, the fact that the motive of doing the act is bad will not make him tobe culpable for doing the act.

This illustration can be amplified in the following judicial decisions. For example, in Allen vs Flood,[59] the respondents were employed to do some repairs on a ship. The appelants objected to the respondents doing the work on grounds of some certain trade practices. The respondents were accordingly refused the job. It was shown on evidence that the interference was done to punish the respondents on account of what they have done in the past; an evidence ofbad motive. The respondents sued, and the jury held the appelant liable on ground of malice. But, reversing this decision, the Appeal Court, held that the appelants had violated no legal rights of the respondents. This is because they have done no unlawful means in procuring the respondents'-dismissal Also, that the action was not actionable however malicious or bad his motive might be. The appelant was accordingly held entitled to judgement. The case of Wilkinson Vs Downton[60] is also another authority. Here, the defendant by way of joke made a false statement on the state of health

59. (1898) Ac 587

60. (1897) 2 Q B 57

of the plaintiff's husband. The defendant meant this to be true and so the plaintiff suffered an injury. The court in holding for the plaintiff remarked:

> -----The defendant, has, as I assume for the moment willfully done an act calculated to cause physical harm to the plaintiff--- that is to say, to infringe her legal right to personal safety, and has infact thereby caused physical harm to her----------. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

Nevertheless, a prove of motive is relevent in some certain situations. For example, the law is that a defendant may escape liability if he can satisfy the court that the alleged wrong was done in a bonafide exercise of his legal rights. In this case, no amount of personal hatred or bad motive operating in his mind that will make the lawful act to be unlawful. But, if a privileged act, in the exercise of a legal right, done malafide in the abuse of it so as to injure the plaintiff under a false pretence of using the privilege, such privilege will be lost at once. Accordingly, a civil action will be maintainable against him. Here, liability is not because it is malicious use of the privilege, but because the privilege was not used at all, the act being unconnected with it as if it had no existence.

Therefore, in the case of Bradford Corporation vs Pickles[61] the tortfeasor was held liable. In this case, the defendant was annoyed of the refusal of the corporation to buy his land. In an attempt to retaliate, he sank a shaft on his land. In holding him liable, Lord Macnaghten observed as follows:-

> It is the act, not the motive for the act that must be regarded. If the act, apart from motive, gives rice merely to damage without legal injury, the motive however reprehensible it may be will not supply that element.

Similarly, in the case of Keeble vs K Hickernigill,[62] this law was also used. Here, the defendant with the aim of injuring the plaintiff in the use of his duck decoy, wilfully fired off guns upon his own adjoining land and made noises so as to frighten the plaintiff's ducks from his decoy. This act was held to be tortious because it was intentionally done with a sinister motive which is within the legal definition of motive. Although, the defendant has a privilege to shoot upon his own land, and if in the bonafide use of it, and he made the same noises on the same spot and with same results in shooting his own game, he will be acting within his right to use it as pleased for his own legitimate purpose. But, because he was not doing this; he only use the land for aim of injuring his neighbour in his trade, he cannot justify himself under the right he would have made.

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61. (1895) Ac 587

62. 11 East 574, M

This law also extends to words spoken, or a libellious publication. For example, A gives a bonafide character of a servant to an intending employer. In doing this, he is privileged to say what he honestly knows to be true, though, in doing this, wrong may have been caused to the servant. But, if under a mere protection of giving honest statement, he knowingly abuses it and out of spite to the servant, he knowingly and falsely gives a bad character, he will he held liable.

1.6.2 MALICE

This is used to mean an ill will or an evil motive. In the case of Dickson vs Earl of Wilton,[63] Lord Campbell observed:

> any indirect motive, other than a sense of duty is what the law calls malice.

Similarly, inTurnbill vs Bird,[64]

Earl C.J. describes it as:-

> malice means any corrupt motive, any wrong motive, or any departure from duty.

Again, in Brown vs Dunn,[65] Lord Herschell

describes it as:

> malice means making use of the occasion for some indirect purpose.

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63. (1859) 1 F & F 419 at 427

64. (1861) 2 F & F 508 at p. 524

65. (1893) 6 R.67 at 72

However, in the ordinary usage of English language, the word is used to mean two things namely:-

1. Intentional wrong doing without a cause. And under this heading, it is used to mean ill will, or a wrongful act which is done intentionally without a just cause. Therefore, it is of essence to plead, in a tort of defamation generally to describe that the publication was done "falsely and maliciously".

2. Improper motive: An improper motive as used in this context has been used as synonym to malice. Therefore, the law is that malice or impropert motive is relevant for the purpose of tortious liability in some certain tortious l actions. In other words, this sub heading is an exception to the rule propounded in the case of Allen vs Flood[66] Therefore, before liability follows, the plaintiff must prove an existence of malice or improper motive. These instances include the following:

i. Malicious prosecution:

In a tort of malicious prosecution, a prove of malice is very important before a proper tortious liability could follow. In this context, malicious prosecution is an instance where the defendant's proceeding was not motivated by a desire to secure

66. (Supra)

the end of justice, but acted upon out of spite and hatred of the plaintiff.

However, it must also be known that an action will not succeed if the defendant can prove that the facts which he acted upon was reasonable and probable cause for initiating the proceeding. For example, in the case of S.J. Ogie and 2 ors vs E. Uke & 1 or,[67] the plaintiff was to be installed as Ovie on a named date. But, before this, date, the defendant caused a summon to be served on the plaintiff so as to prevent the installation. On issuance of the said summon, the defendant was convicted, but this conviction was later on set aside on appeal. The plaintiff thereafter sued on malicious prosectution. Here,the court held that the defendants acted out of spite in prosecuting the plaintiff and that their true motive was not to secure the ends of justice; rather to avenge their disappointment on the plaintiff who had won the Chieftaincy of their clan. Infact, Onyeama A.G.J. observed as follows:-

> On the evidence, I am satisfied that the defendants, in prosecuting the plaintiff, acted out of spite. The Okpara people were clearly piqued at loosing the chieftaincy and were determined to prevent by all possible means the plaintiff being crowned Ovie of Agbon. The timing of the first summons, the constant meetings at which the plaintiffs' coronation was discussed by Okpara people and the persistence in the prosection by appealing point to this determination.

67. (1957) WRNLR 46

Similarly in S.O. Eriavbe vs Jokote and 2 ors,[68] the plaintiff was released of an allegation of having stolen money. The basis of his release was that there was no lack of evidence to substantiate this. Yet, a proceeding was initiated before the magistrate court. But, he was also discharged and acquitted. The plaintiff now sued for malicious prosecution. This was proved and the defendants were accordingly convicted as charged. The court observed as follows: As there was want of reasonable care on the part of the defendant to check the true facts before prosecution, there was also a want of reasonable and probable cause for the prosecution. This was shown on evidence that prosecution was not to punish the plaintiff for a crime, but as a means for the defendants to obtain and control the government grant.

Lastly, this law was also followed in the case of Payin and Azele vs Alinah & Aghili.[69] Here, the plaintiff was sued for stealing coconuts from the plantation, but he was however acquitted of this offence. The plaintiff then sued for malicious prosecution. Foster Sulton, in giving judgement said:

> As Park J. said in Mitchell in vs Jenkins "the term malice in this sort of action is not to be considered in the sense of spite or hatred against an individual but of malus animus, and as denoting that the party is actuated by improper and indirect motives", Atkin L.J. in Meering vs Graham White Aviation Co, "honest believe seems to me to be the

68. (1959) WRNLR 63

69. (1953) 14 WACA 267

> substantial thing that has always to be decided" and such believe "must be not merely belief by the prosecutor in the guilt of the person, but it must be a belief that the prosecutor will be able to advice such evidence before a jury or the court has would justify the court in convincing the accused.

Therefore, using this test to the case at hand, it was held that the fact that the defendants had no honest believe in the guilt of the plaintiffs constituted malice in fact. But, as a contrast to this case, it was held in the case of Obi v. Chukwuma[70] that if the defendant was merely doing his duty and was not actuated by any spite, ill will or other uteror motives towards the plaintiff then action for malicious prosecution will not lie.

Similarly, in some certain situations, a mere presence of malice will not lead to hability, if it can be shown that no damage was caused. Therefore, if, in the case of Allen vs Flood,[71] and inspite of malicious intervention of Allen, and if the defendants defied his threats, but he did not yield to them, then the plaintiff will have no course of action. This is because they would not have been injured.

Furthermore, no cause of action will lie against a Sheriff for a false return to a writ of execution if the plaintiff has not suffered actual damage as a resulf of the false return.

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70. (1964) 2 ALL NLR 69

71. (Supra)

ii. Defamatory statements:-

As a general rule of law, an evidence of malice defeats the defence of fair comment. It is therefore common to ask the question on whether the comment was made so as to hurt the plaintiff or enlighten the public. If the answer is yes, then, it is malice. In thie regard, malice has been defined to mean "any corrupt motive or wrong motive", or, "making use of the occasion for some indirect purpose".

Example of malice is a personal hostility at the trial or an evidence of previous dealings which indicates a desire for revenge. In Ebuwa vs United Africa Co. Ltd[72] the plaintiff was accused of unfair and improper conduct in the management of the plaintiff's bulk oil plant. Malice was shown through the following facts: One of the defendants who were in competition with the plaintiffs in the buying of oil had tried to exceed his bulk allocation, but the plaintiffs had failed to persuade the departments to introduce a system of allocation, given the defendants preferential treatment.

Again, in African Newspapers vs Coker,[73] it was shown that the defendants' continuous campaign for investigation into acts of corruption by the plaintiff; this is inspite of the existed report already made and which had freed the plaintiff. The trial court remarked:

71b. Turnbill vs Bird (supra)

71c. Brown vs Dunn (supra)

72. (1955) 14 WACA 56, at p. 60

73. (1973) INMLR 386

> Such persistent campaign would inferentially be evidence of malice sufficient to destroy the defence of fair comment.

Against this background, privilege (whether absolute or conditional) is a good defence against publication of defamatory statements. Yet, this defence is with qualification; the defendant must act with honest, an act which the law recognises. It must not be done because of a desire to injure the plaintiff. Thus, if an intention to injure is proved, then the defence will be lost. In Allen vs Flood,[74] this law was put as follows:-

> ------To commit an act which is within his legal right does not in itself afford a cause of action but that the person who procures his action is guilty of a legal wrong, if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed------75

Therefore, a defendant may be acting within his legal right if he exercises this right under a defence of privilege against the defamatory publication in question, but he will lose this protection of the law if it was done out of bad intention.

By extension, this right may also be lost if the publication is made far beyond what it ought reasonably to have reached. For example, if instead of publishing the statement to only A&B, but the publication was extended

74. (Supra) at p. 57

75. Allen vs Flood (1898) Ac. p. 95

to reach C & D. In this case, an exemplary damages may be awarded to forestall future occurence. The rational of this may be due to the fact that a wicked or spiteful conduct of a tortfeasor may have increased the extent of the nature of the wrong.

iii NUISANCE

Essentially, a prove of malice is also required before a conviction on nuisance can lie. Therefore, if the defendants activity is done with the sole aim of causing annoyance or a discomfort to the plaintiff, then this will be an important factor to take into consideration on whether or not his conduct was reasonable. In this context, malice is used to mean an evil motive. Therefore, if out of an evil motive, A fires a gun on his land close to boundary of the plaintiff's land so that the plaintifff's foxes miscarry, A will be held liable in nuisance for damage caused to the foxes; this is because harmful conduct cannot be unreasonable if it was done out of malice.[76]

Similarly, a retaliation made because of noise caused by a plaintiff's music lessons in an adjoining house will attract a tortious liability. This ismore so if the defendant persistently whistled, shouted and beat trays against party wall. In this situation, the defendants conduct will be deemed actionable in nuisance, and so can be restrained by an injunction. This is because the

76. See Hollywood Silver Fox Farm Ltd vs Emmet (1936) 1 All ER 825

defendants purpose was malicious, but that of the plaintiff was reasonable and so will not be maintained in law.[77]

1.7 BREACH OF STATUTORY DUTY.

Sometimes, public authorities and institutions are created by law for the purpose of performing certain activities in the society. While doing these statutory activities, rights of the citizenry are bound to be adversely affected. Thus may have been caused due to the negligent nature of how the activity was carried out by those representing the authority. The enabling law which creates the authority usually makes provisions on how the activities are to be carried out, the extent of the rights (if any) of any person who may have been affected by its activities etc. Therefore, if there is any breach of statutory duty, and to know whether liability follows or not, a resort should always be made to such enabling laws. This is because it is the content of the enabling law that prescribes whether a breach can amount to liability or not. For example, a breach per se without negligent may not lead to liability; meaning that a breach has to be followed by negligent before one can get a remedy. Thus, if negligent cannot be attributed, liability will not follow. Or, a breach per se will lead to liability. And this tallies with the old common law rules.

77. See Bomford vs Turley (1861-73) ALLER Rep. 706

By way of an illustration, the old common law rule in this context is to the effect that if a body is authorised by statute to do some activities, it is not to be presumed that the body is immuned from a duty of care. This is because such body is not permitted to commit negligence while performing its duties. Rather, a duty of care is expected from it.

However, if it is in the former situation thereby barring actions in ng negligence or on any other tort, then the right which the plaintiff has under the common law rule would have been denied. In this regard, the defendant is then said to be protected from an action in negligence or any other tort.[78] Thus, in NEPA v Akpata[79] the plaintiff/respondent sued the defendants for negligence because of loss arising from erection of an high tension electric transmission wires over and above the plaintiff's property. The trial court found the defendant negligent. But on appeal, it was held that the defendant was not negligent; the defendant having failed to proof negligence. Although, it must be pointed out that it seems to be that even if the plaintiff had proved the defendant's negligence liability will still not have followed. And this view can be seen in the observation of Ejuwunmi, J.C.A. as:

> It seems to me therefore that the learned trial judge ought to have considered that the overhead transmission lines were constructed upon and by virtue of the said statutes.

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78. See the journal of Nigerian law, Vool 1, No. 2 July 1992, page 78.

79. (1991) 2 NWLR 536

Meanwhile, it should be noted that liability for breach is strict under the law propounded in Rylands vs Fletcher.[79b] This rule, though a foreign authority, yet the attendant hazards of the discovery of oil in Nigeria in the 60s had made the rule to be relevant in the modern day Nigeria. The defendant's lialibity is strict here irrespective of an absence of negligence from the defendant In Umudje vs Shell BP,[80] the plaintiff action was rested on an interference made to the plaintiff's fishing rights and its attendant damage that was caused to the said fishing rights because of the activities of the defendant. The Supreme Court observed:

> It is now generally accepted that a person who diverts a natural stream or causes the same to become blocked and in this way diverts its natural course does so at his peril and is liable for any damage caused by the failure of his works to contain the diverted streams, although, there was no negligence on his part.

Statutory duty can also be seen in employer/ employee relationship, especially if the latter is a creation of statute. Thus, in Federal Superphosphate Fertilizer Co. Ltd. vs Abraham Otaru,[81] the plaintiff on duty sustained an injury when a glass container with an acid content fell, and splashed. At the time of the accident,

79b. (Supra)

80. (Supra) at p. 28

81. (1993) 2 NILR pp 70-73

the plaintiff only wore a Khaki overqll and a protective helmet. There was no water in the immediate surrounding to neutralize the acid. This caused a severe burns on the plaintiff. He then sued in negligence for damage. The plaintiff got judgement, but the defendant appealed. The Appeal Court held:

a. At common law, an employer owes a duty of care to an employee to ensure proper supervision and provide a safe system of work, but this had been breached by the appelant i.e. a common law duty and a statutory duty which was owed to the respondents.

b. There is a breach of section 3 of the factories Act, 1958 which provides that an employer is to ensure supervision of an employee while using a machine or process likely to cause bodily injury; this duty was also breached for lack of adequate instruction and supervision. Thus, judgement affirmed.[82]

Moreover, in Obakoro vs Forex Co Inc,[83] the plaintiff while working on duty sustained some injuries. The plaintiff sued and rested his case on the fact that the hand gloves given tc him were not good. It was shown that there was an earlier complaints of this, but this did not

82. See SS 40-44 and 45-50) Chp. 112-141, Factories Act (1990) Laws of the Federation.

83. (1973) 3 NILR 91

yield any positive results. The defendant was accordingly held liable for failure to supply safety equipments as required by law.

Meanwhile, if an activity of a statutory body is likely to cause nuisance, then such power must be granted expressly or by a necessary implication. If not, such conduct will be deemed to mean operating outside its duty, and thus, a breach of this will amount to a liability. In Lagos City Council vs Olutimehin,[84] the plaintiff sued in nuisance because of emission of offensive smells and vapours from the defendants right soil which was sited close to the plaintiff's Church and school. The defendant pleaded section 140 (5) of the law which provides;

> It shall be the duty of the Council within the town to-----provide for the removal of night soil and disposal of sewage from all premises and houses in the town.

This defence was however rejected and so judgement was given to the plaintiff. In giving its judgement, the court observed:

> -----We would agree that the imposition of a duty on a statutory corporation normally implies the carrying out of things incidental to that duty. We think, however, that in so far as the carrying out is likely to interefere with the ordinary rights of private citizens, it must be strictly construed
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84. (1969) 1 ALL NLR 403

It is also strict under liability to keep animals. For example, liability for trespass done by cattle, and also for dangerous animals. In Daryani vs Njoku[85], the defendant was attacked and bitten by the plaintiff's dog. It was shown on evidence that a day before this incident, the same dog had made similar attack. This was reported to the plaintiff's wife with view to notifying the plaintiff. An argument made by counsel to the plaintiff that this was not/a proper notice to the plaintiff was rejected. The defendant was convicted accordingly.

Lastly, in the management Enterprises Ltd and 1 or vs Jonathan Otusanya,[86] part of the plaintiff's claim was that the defendant had breached a statutory duty to insure as provided by section 3 (1) Motor Vehicles (Third Party Insurance) Act. The Plaintiff's claim was dismissed because negligence was not proved againstthe second appelant. This was however reversed by court of Appeal. But, on further appeal, the Supreme Court held that a mere breach of section 3(1) without negligence may make the defendant liable to prosection. Yet, there will not be a right to damages without a proof of negligence. But that it was not shown here whether the defendant had committed a breach to ensure safety. Thus, judgement of court of Appeal set aside.

85. (1965) 2 ALL NLR 53

86. (1993) 1 NILR page 106

That of trial high court restored.[87]

1.8 CONCLUSION

In conclusion, the main aim of this chapter is to make an attempt in examining the various forms of tortious liability, namely; fault principle, intention, negligence, motive and malice, and lastly a breach of statutory duty.

The aforementioned forms of tortious liability are predicated on a simple fact that subject to few isolated cases, absence of mental element(s) operating on the mind of a tortfeasor may not lead to a tortious liability.

For example, using a fault principle as an illustration before a tortfeasor can be held liable for an alleged tortious act, it is a requirement of the law that the victim must be able to show that the tortfeasor's action was blame worthy. In other words, a fact must exist that the tortfeasor's fault is attributable to the injury in question. On this issue, Lord Macmillan has this to say

> The emphasis is on the conduct of the person whose act has occasioned the injury and the question is whether it can be characterized as negligent.[88]

But, on arguing on the otherside is this general principle of law which states:

No liability without fault.

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87. (1993) 1 NILR page 107

88. (supra) at p. 7

However, it must be pointed out that the general rule of fault as a basis of tortious liability is subject to some exceptions. For example, it is possible that liability may follow even if no fault is attributable to conduct of the defendant, thereby rendering the principle to be very irrelevant. Thus, it was observed as follows:

> ----It is contrary to the whole law of trespass, to much of the law of nuisance, to the law of defamation and to the responsibility of principals for their agents. 89a

As an illustration, therefore, under the law of property and law of restitution, an owner of a stolen goods can recover his goods back, or, he may receive compensation in lieu, even from a bonafide buyer for value. Thus, Mr. Y who in good faith buys a vehicle from a thief will surrender the vehicle or compensate the owner. Similarly, Mr Z who has been over paid by mistake will be asked to restore the money. And under this example, there is no need for a proof of fault. This is because the defendant's liability is not based on his culpability or his blame worthy.

Similarly, in some practical instances, the defendant's liability is not based on fault, but, if it is then, such "fault" is notional or so called. And this can be seen in situations where a third party who is actually not at fault is vicariously liable for the tort committed by the actual tortfeasor. In this case, fault of a third party is really

89a (supra) at p. 23 of this work.

irrelevant. Example of this can be seen in collective liability, where responsibility is sought to be imposed on large group of people e.g. company, government parastatals for the tort committed by their servants.

Meanwhile, as per issue of intention as a form of tortious liability, it is a trite law that the plaintiff must be able to show on evidence that the defendant's act was either intentional if "it is done with full advertence to its consequences and a desire to produce them".[89b]

It is therefore common to observe that, a party must be considered to intend that which is the necessary or natural consequences of that which he desires.

Infact, the above point is best illustrated as follows:

> If I fire a gun at your dog wishing merely to scare it, and in fact some of the pellets hit it, it does not lie in my mouth to say that I intended only to scare itand not to hit it. And it would be equally idle for me, at any rate in the law of tort, to say that I never wished to hit you, if in fact some of the shot glanced off the ground and wounded you who were standing near your dog[90]

Similarly, under negligence as a form of tortious liability, the law is more particularly about the conduct of the defendant which causes the wrong or injury as an act of carelessness on the part of the defendant. In this context, Alderson, B. [91] summarised the position of the law as follows:

89b. See page 26 of this work.
90. (Supra) at p. 44
91. (Supra) at p. 49

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

However, this is subject to the fact that a careless conduct without the existence of a duty of cate will not necessarily lead to liability. In this regard, the observation of Lord Esher is more illucidating on the point. He said:

> A man may be as negligent as he pleases towards the whole world unless he owes them a duty. 92

Moreover, the law on negligence as a form of mental element is also subject to the concept of remoteness of damage. Here, the rule is to set a limit to the extent of the defendant's liability for the consequences of his negligence. In other words, the defendant is only liable for those consequences of his negligent act which are not too remote. And it will be immaterial that on the application of the "but for" test rule, the defendant caused the act complained of.

As regards issues of motive, and malice, the law is that as far as motive is concerned, motive of doing an act is irrelevant for the purpose of apportioning blameworthy. The law is not really concerned about whether the motive of doing such act is good or bad. Rather, what the law is concerned about is the act complained of, but not to make inquiry as to why the defendant did the act. Therefore, if the act is unlawful, it will not be a defence that the defendant has a good motive for doing such act. Conversely, if the act is lawful, the fact that the motive of doing the act is bad will not make him culpable for the act.

92 See LeLeivre v Gould (supra)

On the other hand, a proof of lamice as used and needed before liability follows in some tortious acts. For example, in a tort of malicious prosecution, the plaintiff must show that the proceeding was motivated out of spite and hatred of the plaintiff. Similarly, in a defamatory statement, an evidence of malice will defeat the defence of fair comment. Again, in a defence of privilege communication, the defendant must act with honest, or must not act out of a desire to injure the plaintiff. So, if an intention to injure is proved, then the defence will be lost.

Finally, under a breach of statu ory duty as a form of mental element, the primary concern of the law is to find out if the act complined of had been negligently done by those who represent the authority, and then perhaps examine the law which created the authority for the purpose of apportioning liability. This is because at times, a breach per se wit out negligent may not lead to liability.

However, a breach under the rule of Rylans vs Fletcher[93] is strict. The defendant's absence of negligent is immaterial. By extention, liability may also be strict in a breach caused in an employer/employee relationship, especially if the latter is a creation of statute. Again, liabil ty may also be strict under liability to keep animals

93. (Supra).

On a final note, few comments, especially as regards the weaknessesinherent under the aforementioned laws have been intentionally avoided. The purpose of this act is to raise them at the concluding chapter, and thereafter offer some possible suggestions on them.

CHAPTER II

2.0 CONDUCT OF PLAINTIFF AS A DEFENCE

2.1 INTRODUCTION

As the heading of this fhapter shows above, the primary aim of this part of the research work is to examine certain acts and conduct of the victim (plaintiff) vis-a-vis the wrong caused to the defendant. This approach is not far fetched and it is with a view to correctly ascertain whether the plaintifff has directly or inidrectly caused the wrong in question. And by this approach also, the extent of blameworthy and liability (if any) of the tortfeasor will be adequately examined.

In this regard, the main concern of the law is to examine, if any, role(s) played by the plaintiff on the alleged injury been caused to him as a result of the defendant's fault. This is because it is to the advantage of the defendant, and importantly, the law leans in his favour if he can show to the court that the plaintiff's conduct as regards the wrong done to him is questionable at the material time. Therefore, once the defendant is able to do this, he may in law raise legal defence(s) which then serve as total or partial negation of the plaintiff's course of action. Such available defence(s) under this chapter can now be examined under the following headings:

2.2 CONTRIBUTORY NEGLIGENCE

This defence is used to mean that the plaintiff's guilty of negligent through the way he conducted himself by not avoiding or mitigating the injury caused to himself from the negligent act of the defendant, even though the plaintiff has the means and opportunity to avoid the wrong in question.

In other words, the operation of the defence is to the effect that the injury caused to the plaintiff is partly the result of the plaintiff's fault, and partly the result of the defendant's fault.

In the case of Jones vs Livox Quarries Ltd,[1] Lord Denning put the law as follows:-

> A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurting himself; and in his reckonings he must take into account the possibility of other being careless.

From the above statement, the law is that the plaintiff owes himself a duty to take proper care of himself. But, if he fails to do this, then he is to be blamed because he will be deemed to be the author of his own injury.

The defence is rooted upon two legal maxims, namely: Volenti non fit injuria, and in jure non remota causa sed próxima spectatur. By way of an illustration of these maxims, A who periliously cor ses a busy main road without looking out sides before doing so, knows the risk he is inviting because he is only inviting an

1. (1952) 2 Q B 608, 615

injury and so should not blame anybody on the injury caused to himself. In Shelton vs L & W Railway Co,[2] while the plaintiff was crossing a railway line, a servant of the railway company who was in charge of the crossing shouted a warning to him. But, because he is deaf, the plaintiff did not hear the warning and so sustained injury. The plaintiff was accordingly held liable for contributory negligence.

2.3 COMMON LAW RULE

Originally, the defence of contributory negligence is rooted under the old common law rule. Under this law, there was no provision for apportion of a loss in favour of a plaintiff. Therefore, if a plaintiff is found guilty of contributory negligence, then the defendant can raise this as a valid and a complete defence so as to free himself completely from the loss caused to the plaintiff. In Butterfield vs Forrester,[3] the defendant wrongfully put up a pole across part of a highway so as to repair his house. The plaintiff who was riding violently did not observe it. He rode against it and was injured. If he had been careful he would have observed the pole at a distance of 100 yards. On this ground, the plaintiff's claim failed. And in giving judgement for the defendant, the court observed:

> If he had used ordinary care he must have been the obstruction; so that the accident appeared to happen entirely from his own fault.

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2. (1876) 36 LJCP 249

3. (1809) 11 East 60

Still in the same case,Lord Ellenborough had this to say:-

> One person being in default will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff.

However, the operation of the above common law rule had occasioned an untold hardhsip unto the plaintiffs. Thus, the need for drastic measure(s) to mitigate or prevent the hardship which the above mentioned law had caused. For example, it is therefore not surprising that the doctrine of last opportunity test or last clear test was evolved. The test is to the effect that a defendant cannot rely on the plaintiff's negligence as a defence if the defendant's negligence was later in time than that of the plaintiff's. The justification of the test is premised upon the fact that the defendant should have used this chance of last opportunity and reasonable care to avoid the injury. On this ground therefore, the plaintiff will have a remedy if he can show that the defendant had a last clear chance to avoid the injury. In Davies vs Mann,[4] the plaintiff negligently tied his donkey on a narrow lane. The defendant, negligently driving his wagon at a faster rate ran over the donkey. The plaintiff was held entitled to remedy, (his negligent apart) because the accident may have been avoided by the use of ordinary care so as to avoid a mischief. And that it will be immterial that the ass was wrongly tied there.

4. (1842) 10 M & W 546, 549

However, it seems that the aforementioned doctrine has been jettisioned, for the consideration of other factors. In the Bywell Castle,[5] because of the defendant's negligence, a coach while descending a slope became so unmanageable that the plaintiff, afraid that the coach would over run, jumped off and so sustained injury. It was held for the plaintiff that he can recover.

Similarly, in Swaddling vs Cooper,[6] the appelant while diriving along a major road, appraached a point, when a cyclist came into the main road from the side road, without warning. This caused a collision, and the cyclist died. Appelant's attempt to apply the brake failed as there was no time for him to do so. But, action against the appelant failed. The court relied on the question raised:

> Whose negligence was it that substantially caused the accident?

However, on appeal, the court of Appeal ordered a new trial. Although, this was reversed on further appeal by the House of Lords, and the original judgement of the trial court restored. Delivering the judgement of the House of Lords, Viscount Hailsham[7] pointed out that:

> If it is established from his own evidence or by evidence adduced on behalf of the defendant, that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own negligence in failing to

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5. (1816) 1 Starkce 493

6. (1931) Ac. 1

7 Swaddling vs Cooper (supra) at pp 8 and 9

> to take reasonable care, if although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover. There is failure to avoid the collision by taking some extra ordinary precaution does not in itself constitute negligence The plaintiff has not right of complaint if in the agony of the collision the defendant's fail to take some step which might have prevented a collision unless that step is one which a reasonable careful man would fairly be expected to take in the circumstances.

But, it can now be categorically said that the doctrine under discussion has now been put to rest. In Mungo Appah & Anor vs Costain (WA) Ltd and Anor, 8 the Appelants/plaintiffs sued the defendant/respondent for loss caused as a result of collision of two vehicles at Lagos/Ibadan road. The accident occured on a T-junction where a side road entered into the other side of the raod without warning and without ascertaining whether there was any on-coming vehicle from the opposite direction. The trial court found for the defendant on the ground that the plaintiff was the only person who could have avoided the accident and as he had failed to do this, his claim will fail on the basis of "last opportunity test". But,

8. (1976) 6 UILR 508-509

The Act has now abolished the old common law rule which had before now caused serious hardship to the plaintiff. In it stead, it apportions liability between the parties in situation where the plaintiff is found guilty of contributory negligence. For example, section 1 (1) of the Act stipulates that though the plaintiff is proved guilty of contributory negligence, yet the defendant will not be absolved from liability. Rather, he is only entitled to have the damage payable by him reduced in proportion to the extent to which the plaintiff's negligence contributed to the injury.[9]

It is a mandatory provision of the law, and which the court must comply with. Thus, the court cannot refuse a reduction of award, provided it is just and a equitable to do so.

Meanwhile, the Nigerian version of this above English law can be seen as detailed below.[10] For example, section 17, contributory Negligence Kaduna State, Torts Edict, No. 8 of 1990 stipulates:

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9. See section 11 (1), part III, contributory Negligence Civil Liability (Miscellaneous Provision) Act of 1961, Law of Federation of Nigeria.

10. S. 8, Torts Law, cap 122 (Laws of Western Nigeria) S.3, Torts Law, cap 125 (Laws of Eastern Nigeria) Tortfeasors and Contributory Negligence Law 1957 (North) etc.

However, in the case of General Cleaning Contractors Ltd Vs Christmas,[12] the plaintiff sued on a negligence system of work, for injury caused to him while working for the defendant. There was no evidence to establish negligence on the defendant for failure to fix hooks for the safety belts, or cause the work to be done by means of ladders. But it was shown that there was negligence in their obligation to devise a reasonably safe system of work against obvious danger. This is because there were no instructions to ensure that the windows were tested before cleaning. Or, apparatus such as wedges to prevent the windows from becoming closed. In giving judgement against the defendants, the court held that by leaving it to the initiative of individual workmen to take precautions against a common danger, the employers have failed to discharge their duty. Accordingly, the appeal was dismissed.

The law on a pleading of Contributory Negligence aside, it is a trife law that he who asserts must proof. Therefore, the burden of proof of the defence is on the defendant. This is done by way of showing on evidence that the plaintiff has partly contributed to the injury in question. For example, in Nigeria Bottling Company vs Ngonadi,[13] the plaintiff sued the defendant on a refirgerator bought from the defendant on negligence. Both the

12. (1953) Ac 180

13. (1985) 1 NWLR pt. 4. 739

trial court and court of Appeal found for the plaintiff, Hence, a further appeal to the Supreme Court. Here, the argument of the defendant was that the lower courts have not considered the defence. In its reply, the Supreme Court observed that it is one thing to plead the defence, but it is another thing to establish the defence by credible evidence. But, as there was no iota of evidence to establish contributory negligence, the trial judge was right to have observed as:

> The defendant suggested various ways in which the tank of a fridge could be involved in an explosion. I must say out right that the evidence was credible. 14

Accordingly the appeal failed.

Similarly, in UBA vs Achoru,[15] the plaintiff sued on injury caused to her because of a swerve made to her right side so as to avoid the second appelant's vehicle, and so collided with a mango tree. Judgement was given to the plaintiff, but reversed on appeal. On further appeal, the Supremem Court observed that onus of proof is one one who alleges the defence to lead evidence, and give particulars of the negligence. And that Court of first in tance was right to have said that failure of the appelant to give evidence in proof of negligence means that a case of contributory negligence had not been established.

14. (supra) at p. 748, Rule 2

15. (1990) 6 NWLR pt. 156. 254

At this juncture, it isa fact that before the court rely on the defence, it must find out the causative potency of the act or omission of all the parties. In other words, there must be a direct nexus between the negligence and the damage, or, contributory Negligence must be a cause of the loss. Thus, the use of "but for" test with a view to finding out a cause of the wrong. Infact, the common expression is that the act must be a "real causa causans", but not a mere "cause sine qua non". For example, a person who drives without a licence cannot be barred from recvoery if the act of driving is not a proximate cause of the accident.

On this case, Lord Bead observed:

> -----But the claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts in causing the damage, apart from his blame worthiness. 16

In the case of Hawkins vs Ian Ross (castings) Ltd.[17] the plaintiff and two others worked in one bay in the defendant's foundry to prepare moulds for costings. Some moulding boxes and piles of sand were kept in the bay. It was admitted at trial by the defendants that the boxes should have been stored elsewhere. One day, the plaintiff was moulding, and there was no space for this, but the plaintiff did not talk. Rather, the plaintiff proceeded backwards down pouring aisle with S walking

16. (1952) 2 Q B 608 at 620

17. (1970) 1 ALL ER 180

forward. The plaintiff felt his ankle touch the handle of the last moulding box, and shouted to S to stop, but S continued to walk forwards. The plaintiff lost his balance and fell over the mould. The molten metal split and some of it went on his foot. He sued the defendants, and alleged vicarious liability, and a breach of satatutory duty. It was held among other things that the accident was wholly caused bya breach of statutory duty imposed on the defendants by regulation 6 (2) (a)[a] of the iron and steel foundries regulation 1953. That, alternatively, if there were contributory negligence on the plaintiff's part, it was not just and equitable, applying section 1 of the Act to reduce the damages having regard to the plaintiff's share in the responsibility for the damage.

In Richardson vs Stephenson Clarke Ltd,[18] the plaintiff a staff of the defendant's company was employed to do certain specific duties,and amongst others, to move two large pieces of equipment, a conveyor and a shelter, from one end t of the quary to the others to be put on bird a vessel, part of whose equipment they were. But this duty was assigned to the driver of the defendant. While the driver was moving the conveyor under the directions of the plaintiff, one or more of the shakles broke and the conveyor fell on the plaintiff , causing him serious injuries. The plaintiff sued for damages on account of failure to carry out

18. (1969)1 WLR 1695

the employer's common law duty of care to provide safe plant and equipment. The court held, although, selection of safe equipment for this work was the responsibility of the defendant, yet the defendant had done its common law duty by making available safe and adequate equipment and so can't be held negligent in leaving the selection of the equipment to the plaintiff because he was a competent and experienced man; sole cause of accident was plaintiff's failure to select safe equipment and so the defendant is not liable. In the words of Nield, J, "should my view on this aspect of the matter be regarded as wrong and it were proper to hold that there was some breach of the defendant's duty, then one would have to consider the question of contributory Negligence. I have considered it and I would without hesitation say that this is a case in which 100% of the blame attaches to the plaintiff himself."[19] So, there must be judgement for the defendants.

In an attempt to find a potency cause of an accident, a question once arose on whether failure to wear a seat belt can still negate a defence of contributory negligence or not. This question arose in Froom Vs Butcher[20]. Here, the plaintiff, while driving suffered a head and chest injuries as a result of head on collision between his car and that of the defendant. The defendant was negligent, but argued that if the plaintiff had wore a belt, he would not have sustained the injury; thus an act of contributory negligent

19. (1969) 1WLR at 1700 Para E-F

20. (1976) QB 286

on the part of the plaintiff. The trial court held that in the absence of statutory compulsion to wear seat belt, the plaintiff was not negligent, but if he had been guilty of contributory negligence, the damages would have been reduced by 20%. The defendant appealed, and here, the court held that to know if the plaintiff is guilty of contributory negligence or not, the issue is not what cause the accident, but the course of damage. That since the plaintiff's injury was caused because to failure of wear belt, he is guilty of contributory negligence. So, a reduction will be by 20%. The court went on further:-

> -----In most accidents on the road the bad driving which causes the accident, also causes the ensuring damage. But in seat belt cases, the cause of the damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt. If the plaintiff was to be blamed in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage and his damages fall to be reduced to such extent as the court thinks just and equitable. 21

The above decision is premised on;

> -----Everyone is free to wear it or not, as he pleases------Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. If he does it, it is his own fault; and he has only himself to thank for the consequences. 22

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21. Per Lord Denning in Foam Vs Butcher (Supra) at p. 292 Paragraph G-H.

22. Foam vs Butcher (supra) page 293; paragraph H.

Therefore, appeal allowed in favour of the defendant.

As an extension, the law in the above case will also cover a motor-cyclist who has not wear a crash helmet, but knocked down by a negligent driver, while driving.[23] This is on the rationale that he is careless in not wearing a crash helmet, and so this omission has contributed to his damage. And it will not be a defence on his part to say that his act had not caused the accident.

However, the above cases are subject to exceptions, namely:

> -----A man who is unduly fat or a woman who is pregnant may rightly be excused because, if there is an accident, the strap across the abdomen may do more harm than good.---------24

Against this background, when all the issues above have been fully raised and considered by the court, apportion will then follo accordingly. And this will be based on the extent of each individual's blameworthiness and responsibility to the injury. Thus, the court has been empowered to;

> ----deal broadly with the problem of apportionment, and in considering what is just and equitable, must have regard to the above worthiness of each party. But, the claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts. 25

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23. O' Connell vs Jackson (1972) 1QB 270

24. Foam Vs Butcher (supra) p. 295, paragraph G.

25. Per Lord Bead in Jones vs Livox Quarries Ltd (Supra)

For exam e, in the case of Olayinka vs Lakin,[26] the plaintiff sued on the death of the deceased as a result of the defendant's negligent driving. The deceased was found to h ve been contributorily gegligent in moving into the road without first ensuring that it is safe to do so. In apportioning liability, the court observed.

> the defendant was largley responsible for the incident-----I consider that the apportionment should bein the ratio 30% to the deceased and 70% to the defendant. 27

At times, loss is often caused by a combination of series of acts caused by two or more people. The combination of acts iin question may be attributed to more than one plaintiff and/or more than one defendant. Where this is the case, each will be liable to the extent of their respective acts which caused the injury. But for a valid understanding of this point, few examples can be cited as follows:-

a. if there is a joint commission of the alleged tort, as can be seen in situation where Mr. A. instigates Mr. B. to do the wrong.
b. if the acts of the tortfeasors are several and concurrent, as can be seen where the plaintiff's each driving different cars negligently knocked down a pedestrian at the same time, or,

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26. (1972) 4 CCHCJ 100
27. (supra) at p. 106

c. If the acts of the defendants are several, but not concurrent, as can be seen in instance where a driver runs down his victim, and a second driver runs over the same victim, and hence dies.

In all the above examples, the victim has two options to pursue his claim, namely;

i. He can sue all the tortfeasors to recover his loss, or,

ii. He can sue some, and abandon the rest. But, if he cannot get all his remedy, he can fall back on the other ones.

Yet, those sued also have a right to sue the other ones in a separate action either jointly or severally, once they are also responsible for the loss caused to the victim.

In Miraflores (owners) and others (Abadesa) vs George Livanos (owners) and others,[28] the appelants and Abadesa collided in the Scheldt. To avoid being involved, the respondents ran aground and so sustained injury. The appelants sued Abadesa for the collision, the respondents ran aground and so sustained injury. The appelants sued Abadesa for the collision, the respondents sued both the appelants and Abadesa for being grounded. The trial court

28. (1967) 1 AC 826

found the appelant liable up to 1/3, and Abadesa liable up to 2/3. On the grounding, it was observed that the respondent is negligent; and act which the court treated as "one unit" in respect of the grounding, and then treated the negligent of the respondent as other unit. But the court could not differentiate between the degrees of fault of the two units, and so held that respondents were 50% liable for the grounding and entitled to recover the remaining 50% from Abadesa and the appelants in ratio 2/3 and ½ respectively. But, on appeal, ratio of liability was varied to; 45% to Abadesa, 30% to appelants, and 25% to respondents. Yet, on further appeal, the House of Lords held that to know fault under section 1 (1) "unit approach" was wrong because it may be misleading to make a substitute for a measurement of the individual fault of each contributor to the accident, a measurement of the fault of one against the joint faults of the other two. That as to the fault between appelants and Abadesa, the ratio found by the court in respect of the grounding is OK, but fault found on the respondents should be altered, and so should now read as follows:- 2/5 to Abadesa, 2/5 to appelants and 1/5 to respondents. Then, Lord Peace observed that a person who does n a deliberate act of negligence, will in general bear a greater degree of fault than a party who did not cope adequately with the resulting crisis which fall upon him.

2.4 CONTRIBUTORY NEGLIGENCE ACT, AND A LOSS CAUSED BECAUSE OF A BREACH OF CONTRACT.

At times, it does happen that the tort in question arose out of a breach of contract. In this regard, can the plaintiff maintain a valid action against the tortfeasor under the Act? In answering this question, it seems that the answer is yes. For example, section 11 (4), as applicable under the provision of the 1945 Act provides that section 11 (supra) shall not be used to defeat any defence arising under a contract.

Similarly, in the case of Quinn vs Burch Brothers Builders (Ltd)[29], the plaintiff (an independent contractor) sued the defendant on the injury he sustained as a result of the defendant's breach of contract. This is on the ground that the defendant failed to give him a ladder. In giving judgement, the court held that the defendants were in breach, but that the breach did not cause the accident. So, the plaintiff's claim was dismissed. On a further appeal, the court dismissed it, and observed that even if the defendant could have forseen that failure to supply the ladder may cause the accident, yet this breach has not caused the accident. That, rather it was a mere opportunity on the plaintiff to injure himself by a use of unsuitable equipment.

Moreover, in Sole vs W.J. Halt Ltd,[30] the plaintiff

29. (1966) 2 Q B 370

30. (1973) Q B 574

while doing some work for the defendant fell down and injured himself. The plaintiff then sued for damages for breach of contract, and negligence on the defendant's part. At trial, a question arose on whether the plaintiff can sue as a visitor under section 2(1), occupiers' liability Act 1957, or, if the Act is limited to only his contractual right of entry; a claim under section 5 (1). In giving its judgement, the court observed:

a. The purpose of occupiers' liability was to equate duty owed by occupier to a party who entered by right of contract with that of visitor, and unless there are circumstances which limited the claim to a contractual one, a person who under a contractual duties, can sue both in contract, and in tort. And that since there is no implied term to restrict the plaintiff to a claim in contract, he can claim both in contract, and in tort.

b. That since it was the plaintiff's fault to have worked backwards in a direction of what he knew was unguarded, and while looking at the ceiling, his contributory negligence means a break in the claim of cousation, and precluded him from claiming in contract, but it was open to him to find his claim in tort within section 2(1). He was accordingly held entitled to 2/3 of his total damages.

Equally in support of the above authorities is Driver vs Willian Willet (contractors) Ltd and Anors[31] Here, the plaintiff, working as a general labourer on a building site was injured when a scalfolding bird fell from a hoist. It was on evidence i that the defendants were negligent, and in breach of statutory duty for using the hoist in an unsafe manner. It was also shown on evidence that the foist was unsafe for use, even though the consultants knew this, but did not advice the defendant. In giving its judgement, the court held amongst othet things that;

a) The defendants owed a duty of care to the plaintiff because he fell within the class of persons whom the consultants would have reasonably forsee, would be injured, if they failed to give the necessary advice.

b) That the plaintiff was therefore entitled to damages for breach of contract as against the employers.

2.5 LIABILITY UNDER ORDINANCE POLICIES.

Under the provision of some statutes, a person could be held guilty of contributory negligence, consequent upon which liability follows. This arises in a situation where idemnity clauses are inserted by such statute to guide the parties, but either of the parties breach the terms. Under this point, two available decided cases will be examined to underscore this.

31. (1969) 1 ALLER 18

In W & J Lane vs Spratt,[32] the plaintiffs, a private firm were insured under standard Form Llod's Goods in Transit Policy. Contained as part of terms of condition was clause 9 which provides that the insured is to "take all reasonable precautions for tle protection and safeguarding of the goods------".

The plaintiff's driver, while carrying goods went away with them. Plaintiff sued on this, and argued that the defendant underwriter was liable "in his due proportion to idemnify them". The defendant raised a defence and cited clause 9, which the plaintiff had breached its contents. The defendants argued that the phrase "protection and safeguarding of goods" extend to cover taking all reasonable precaution not to employ dishonest servants. And that failure to comply with this phrase is a breach of the clause, and hence the insured had acted recklessly.

Afterall the submissions of counsel, the court, held amongst others, as follows:-

a. That looking at the phrase as a whole, the clause limited the obligation to the taking of reasonable precautions for the physical protection and safeguarding of the goods, but, it did not extend to cover taking of all reasonable precautions. in the selection and vetting of staff. Therefore, the plaintiff can be idemnified under the policy.

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32. (1970) 2 Q B 480

b. Even if clause 9 extends to selection of staff, the plaintiff's will still be idemnified because the plaintiff's failure to use ordinary care will not in itself amounts to a breach of clause 9. That there was no reckless because the plaintiff has not acted with the actual knowledge that a danger existed, nor did they fail to take care to avert it, nor a failure to take a precaution which he knew it ought to be taken, and that on the evidence of the plaintiff's conduct in the circumstances, the defendant had failed to show that the plaintiff was recless.

c. per Roskill, J,[33] if the underwriters want to impose a condition, it should have added;

> also to take reasonable care to vet their staff before taking them.

Equally in support of this is the case of Smith and others vs South Wales Switchgear Ltd.[34] Here, the respondents have for some years engaged the appelants to do an annual overhaul of electrical equipment at the respondents' factory. Their general conditions of work makes provision for an idemnity clause which provides that the respondents will be idemnified against;

-------any liability, loss, claim

i. in respect of personal injury to, or death of any person whom so ever

ii. in respect of any injury or damage whatso ever to any property-------"

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33. W.J. Lane vs Spratt (supra) at p. 482 —.

34. (1978) 1 ALLER 18 .

While working at the respondent's factory, the appelants/employee sustained injury. The employee now sued, alleging negligence, and breach of statutory duty and hence make a claim under the idemnity clause. The respondent got judgement, and the appelant appealed. He argued that the clause did not require him to idemnify the respondents against liability of the respondents' own negligence or that of their employees. After these, the court ruled as follows: "hat a person whose favour an idemnity clause was made is entitled to idemnity against the consequence of his own negligence or that of his servants provided the clause in their ordinary meaning were wide enough to cover negligence on the part of the proferens. That, "A clause did not contain an express provision idemnifying the proferens against his own or his servants' negligence unless it contained the word "negligence"---- it was therefore intended to apply only to liabilities incurred by the respon'ents for acts or omissions of the appelants or their servants in connection with carrying out the contractual work, and not to liability incurred by the respondents for their own or their servants negligence towards the appelants/ employees engaged on the contractual work by the appelants. If followed that the appeal would be allowed".[35]

35. Smith vs South Wales (supra) at p. 19

Lord Fraser went on: if there is an idemnity against a breach of statutory duty by proferens but no express provision applying the idemnity to negligence, if the liability of the proferens is founded upon breach of statutory duty without any finding against him of negligence of common law he will not lose his idemnity if the breach of statutory duty can be regarded as negligent. It cannot be relevant, for the purpose of ascertaining whether the indemnity applies or not, to enquire whether the breach of statutory duty involves negligence.[36]

2.6 STANDARD OF CARE

Under the provision of the Act, certain behavioural standard has been deemed expected from the parties; and this standard is that a person must act as a reasonable man for his own safety, and also for the protection of others. Although, in practice, a less standard of behaviour is expected from the plaintiff than the defendant. And a justification of this disparity is based on the fact that before 1945, courts have discounted minor carelessness of the plaintiff so as to arrive at a just decision. Thus, Glanville Williams echoed:

> A reasonable defendant is not allowed to have lapses, but the reasonable plaintiff is.

In an attempt to arrive at a just standard between the parties, it is of essence that the defendant proves a contributory negligent of the plaintiff. And in doing this, the defendant must proof that the plaintiff owes him

36. Smith vs South Wales (supra) at p. 20

a duty of care. It suffices, if the defeddant can proof that the plaintiff did not take reasonable vare, and so contributed by his want of care, to his own injury. After this, it is then the duty of court to take into account the extent to which the plaintiff's conduct fell below the standard expected of a reasonable man, and the extent to which it caused the damage.[37]

Meanwhile, a measure of care is subject to the following rules, namely:-

a. If the immediate cause of damage is that of plaintiff's negligence, so that,but for such negligence on his part, the damage would not have happened. In this case, the plaintiff will not recover anything under the Act.

b. If there is a much want of reasonable care from both parties, then the plaintiff cannot sue the defendants.

c. But, the plaintiff can recover, unless it is shown that by the use of a reasonable care, the result of the defendants act can be avoided. Or, if it is shown that the defendant cannot avoid the result of the plaintiff's negligence by the use of an ordinary care.

At this point, a standard of measure is an objective one. It is therefore not out of place to give some

37. UMERAH, B.C.: Medical Practice and the Law in Nigeria (Ikeja) Longman (1989), at p. 128.

concessions in some certain difficult situations, and in these situations the provisions of the Act will not apply as a matter of law. These instances can be seen as follows:-

2.6.1 Tresspassers. As a matter of fact, courts have often not apply the provision of the Act against the tress-passers. In an attempt to justify the position of law in this regard, Lord Kilbrandon has this to say.

> -----While the man in the street might say that the trespasser ought, in the moral sense, not to recover his full damages, such a conclusion would be an attempt to punish disobedience, not to adjust liability in damages-------[38]

In Westwood & Anor vs Post Office[39], the appelants, staff of the respondents are of the habit of going on its flat roof for recreation, even though there was a notice by the respondent that only an authorised attendant is allowed to enter the room. One day, the appelant used it as usual. On his way back. he stepped on strap door, fell and fatally injured. The appelants' administrators sued, and alleged a breach of statutory duty. The respondent pleaded contributory negligence of the appelant. The court rejected this defence, and so held in favour of the plaintiff. This was however set aside on appeal on the ground that the plaintiff is not entitled to protection under the Act.[40]

38. Westwood & Anor vs Post Office (1974) Ac. 1 at p. 16 para. E.

39. (1974) Ac. 1

40. S. 16 (1) Offices, Shops and R/way Premises Act (1963)

This is because while in the lift motor room, the plaintiff was a tresspaser there. On further appeal, the appeal was allowed, and the court observed: The fact that the plaintiff went to the motor room for things not related to his job did not take him out of protection of the Act. This is because in relation to a breach of statutory duty, it will be irrelevant to show that an employee was injured during the course of his work. That it suffices if he can show that he was employed at the premises to which the statute in question applies. That it is also irrelevant that the plaintiff had been a trespasser. Thus, it was held that the defendant's fault had been the causative of the plaintiff's death. So, the plaintiff can recover.

In the same vein, Lord Kilbrandon[41] observed:

> The act of negligence that lead to the accident was defendant's breach of duty. Any fault of plantiff isthat "of disobedience, not fault of negligence becasue he had no reason to foresee that disregard of order to keep out of the lift motor room would expose him to danger----

Similarly, on the same issue, Lord Tucker remarked:

> ----In factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting negligence so that too strict a standard would defeat the object of the statute/42

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41. Westwood & Anor vs Post Office (supra) p. 17, para E & F

42. Staveley Iron & Chemical Co. Ltd vs Jones (1956) Ac 627, 648.

2.6.2 Children:- Generally, there is no age limit below which a child cannot be held liable for contributory negligence. Yet, practice of courts has shown their unwillingness to find children guilty of contributory negligence. And in support of this assertion is the remark of Lord Denning ,M.R.,

> A very young child cannot be guilty of contributory negligence. An older child may be; but it depends on the circumstances. A judge should only find a child guilty of contributory negligence i he or she is of such an age as reasonably to be expected to take precautions for his or her own safety. 43

In Gouch vs Thorne[44] a child under the custody of his three brothers wanted to make a cross to the other side of the road. She was knocked down and injured by the driver. She sued, but the court found her contributorily liable. This was however reversed on appeal. In support of the court's decision, Lord Denning M.R. reitereated that an ordinary child of 12½ years, unlike an adult cannot reasonably be expected to paulse to see for herslef whether it was safe to go forward when the lorry driver had beckoned her on, and so the plaintiff had not been negligent in relying entirely on the lorry driver's signal to her to cross . Accordingly, the appeal was allowed

43. Gouch vs Thorne (1966) 3 ALLER 398 at 399

44. (Supra)

Another argument in favour of court's unwillingness to find children guilty of contributory negligence is based on the obvious fact that negligence is a state of mind; but children do not have sufficient mind to make a quick judgement as an adult. Therefore, a room is often left for this their lack of experience and infirmity of judgement.

Moreover, a blameworthy on an account of contributory negligence is premised upon a standard of behaviour that is expected of a reasonable man at a point in time. But, this cannot be reasonably expected from children because they lack this quality. Therefore, in the case of Yachuk vs Blais,[45] a 9 years' old child who wanted a petrol for a game was upplied with it on an account of a lie he told that his mother needed it for her car. He played with it and hence sustained injury. Inspite of this, the defendant was held liable for contributory negligence for supplying the petrol to the boy.

However, if the child is a plaintiff, he can successfully raise the defence against the defendant on the ground that the defendant failed to show as much care as a mature person will do. Thus, it is a trite law that a child can recover inspite of the fact that his act contributed to the injury provided that the defendent is proved to have failed in his duty to the child.

45. (1949) Ac 386

Nevertheless, this law is with some qualifications, namely:-

a. A child will be guilty of contributory negligence if the defendant is able to show and proof a sufficient maturity of understanding on thepart of the child at the material time in question. As an illustration, in M and S.M. Railway Co. Ltd vs Jayammal,[46] a seven years' old girl was hit while crossing a railway line. It was shown on evidence that proximate cause of the accident was the negligence of the girl for not looking out for a passing engine when crossing. Again, that the child was capable of appreciating the danger, and old enough to have a sense of discrimination. Accordingly, she was held liable.

b. Doctrine of Identification:- This doctrine is to the effect that if a child is in the actual custody of an adult at the time the tort was committed, contributory negligence of the adult wil estop the child from recovering damages. The rational of this is based on the fact that the child is so identified with the adult that his negligence will amount to that of the adult.

Before now, it was thought that a contributory negligence of an adult who has actual custody of a child at

46. (1924) 48 mad 417

a time of the wrong will bar an action in the child against the tortfeasor. In Waite vs N.E. Railway,[47] a child of 5 years, under the control of his grand mother was injured because of the contributory negligence of the grand mother. Based on this law, the child was held identified with the grand mother, and accordingly she was prevented to maintain an action against the company.

But this law is now obsolete because it had since been changed in the case of Mills vs Armstrong[48]. Under the lnew law, if a child is in actual custody of an adult at the time of the wrong, contributory negligence of the adult will not bar the child from recovery. In this case, a y 4 years old boy crossed a road under the care of his grand father. He was hit by a motor omnibus. On an action for contributory negligence, it was found that the accident occured because of negligence of the driver and contributory negligence of the father. Inspite of this, it was held that the child can recover. In another case[49] with the same issue, the court held:

> If the accident was due solely to the negligence of the person in whose care he was, there seems to be no doubt that he could recover from the person. If the accident was due to solely to the third person, it would indeed seem very odd that if the accident was due to the combined negligence of both, he should be without remedy.

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47. (1858) E.B & F 219

48. (188) 13 APP. cas. 1

49. Per Macnaghten, J. in Oliver vs Birmingham & Midland Motor Ombibus Co. Ltd (1913) 1 KB. 35

2.6.3 Rescuer cases:- It is also the law that courts have been very unwilling to hold a person guilty of contributory negligence on an account of injury he sustained while making an attempt to safe another person from being hurt. In this regard, the blameworthy will be put on the torfeasor. The rational of this law is based on the fact that the law reckons with protection of lives and property. Similarly, it is also based on the fact that a person in a dangerous situation cannot be required to use as much judgement and self control as will be reasonably expected in an ordinary situation. Therefore, the standard of care is not whether the plaintiff has used a careful and prudent judgement in what he has done, but whether what he did was what an ordinary, prudent man would have reasonably done in that circumstance.

Moreover, in Brandon vs Osborne, Garret & co[50], because of the negligence of the defendant's workmen, broken glass fell on the plaintiff's husband. In an attempt to draw the servant to safety, she injured her leg. The court held that there was no contributory negligence. Again, in Ridley vs Mobile Rly Co.[51a] an engine was passing a level crossing without giving a whistle. The defendant seeing that a child on the level crushing was in imminent danger, rushed and saved the child.

50. (1924) IK.B. 548

51a. (1905) 86 S. . Rep. 606

In doing this, he fell down and one of his legs was cut off. It was held that the law allows a liberty of action to save a person who is in great danger, but that the blame-worthy will be put on the real tortfeasor.

However, it is to the defence of the defendant, if he can proof that the plaintiff had acted with less than average, prudence and care expected of him in the circumstances.

Lastly, it also seems that the law is still the same if the rescue to be made is not on a third person, but on the body of the person to make the rescue. On this ground, if there is an alternative danger and the rescuer is expected to make a choice, the fact that he makes a type that has a high inbuilt risk will not avail the defendant from blame-worthy, / Thus, in Jones v Boyce 51b, because of the negligent's driving and imminent danger caused by the defendant, the plaintiff jumped out of the coach, and hence sustained injury. The court still found the defendant liable.

And in concluding this sub title, one must admit the fact that there are few defects and weaknesses injerent in the c use of this defence. But these had been deliberately omitted. This is because they are going to form the main body of a chapter. And there, suggestions would be proferred.

51b. (1 Stark 493)

2.7 CONSENT

The word consent is used as a voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an inteliigent choice to do something proposed by another.[52] The word agreement as used in this definition is to the effect that the plaintiff has consented (express or implied) to exempt the defendant from a duty of care which he would have otherwise owed to the plaintiff so as to avoid a wrong. Therefore, this by implication means that if the defendant owes the plaintiff no duty at all, then the issue of whether the victim consents to the act complained of will not even arise at all.

A defence of consent is rooted on a common knowledge that a person who consents to an injury will not be heard to complain of it thereafter. In other words, a person cannot in law enforce a right which he has voluntarily waived or abandoned. Therefore, intentional acts which would have been tortious namely; injuries received during the course of a lawful game, or in a lawful surgical operation will not be actionable in law by virtue of the operation of this defence.

In the modern time, the defence is now used interchangeably with the phrase; "voluntarty assumption of risk", meaning that a person who knows of the risk involved in an act should not be heard to complain again.

52. See Black's Law Dictionary (5th ed) at page 305

Despite some statements to the contrary, the defence is now a settled law that the defence is available in cases of pure tort, and where the wrong complained of is not related to contract.[53]

On a general note, certain considerations must be put into mind , whenever the defence is to be invoked namely:-

2.7.1 Valid consent: A valid consent in law must be genuinely and freely given. And essentially, the victim must understand exactly what he is consenting to and the complication attached to it.

A consent may be implied from the conduct of the victim, or could be given out expressly. This is because it is supposed to be voluntarily given, and on this ground, a type got by means of force, threat, fear or fraud is invalid in law.[54] In the case of Fasoro vs Abdullahi[55] the appelant/landlord sublet part of his premises to the respondent/tenant with a condition that the tenant is not to make alterations and additions to the premise without express consent of the landlord. Later on, the tenant sought for permission to make an additional structure, which the

53. See Danns vs Hamilton (1939) 1 ALLER 59 or (1939) IKB 509.

54. See Hobbs vs Kizer 236 F 681 cited in Medicin, Science and the Law Vol. 5 (1965) p. 99

55. (1987) 2 NSSC 857

landlord granted. The landlord now sued among others, an injunction to stop the respondent. The trial court dismissed this claim and held for the tenant. This judgement was confirmed on appeal by the court of appeal. On further appeal to the Supreme Court, the court observed that the latin maxim "volenti non fit injuria" is applicable where a party knowing and comprehending a given set of fact, consents to them, he will be deemed to have assumed the consequences of his consent. And that such a party will be precluded from bringing a successful action in damages for an injury resulting there from.

The appelant in this case gave his consent to the respondent to build some additional structures on the demised premises, and this permission was given as required under clause 2(c) of the sub lease. On the law therefore, the trial judge was correct in applying the principle of volenti non fit injuria to the facts of this case. The defendant cannot complain of a breach of covenant by the respondent since the acts complained of were permitted by the landlord as required under the sub-lease . So, appeal dismissed.

Similarly, consent to a given state of fact is not a licence to the fact that such act must be done in a negligence manner. This is very important because once negligence is proved, then the defence of consent will fail. In Danns Vs Hamilton[56], the plaintiff was injured while travelling as a non paying passenger in a car driven by

56. (1939) 1 ALLER 59

the defendant. Before, the accident happened, the defendant had been drinking and this greatly affected his driving. There was a stop over middle way, and this was seen as an opportunity for the plaintiff not to continue with the journey again, but he elected to go on. On account of the accident, the plaintiff sued, but the defendant raised a defence of consent. In giving its judgement in favour of the plaintiff, the court observed that by voluntarily travelling in the car with the knowledge that the defendant was drunk did not impliedly means a consent to or absolve the defendant from liability for any negligence on his part, which may cause injury to the plaintiff so, the plaintiff must succeed in his action.

2.72 Appreciation:- In a simple term, the plaintiff must fully understand and appreciate the risk. If this is the case, then the defence will be used to negate the defendant's liability. For example, if a dangerous physical condition is brought by negligence of thedefendant and then, the plaintiff fully appreciating its dangerous character, choose to assume the risk, the defence will apply to protect the defendant. In Culrer vs United Dairies (London) Ltd,[57] the defendant's horse bolted and t ran towards the plaintiff's garden. The defendant pursued it, and shouted, help! The plaintiff, in an

57. (1933) 2 KB 297

attempt to hold the horse sustained injury when the horse threw him to the ground. The plaintiff sued the defendant. The jury found that the plaintiff did not freely, voluntarily and with full knowledge of the nature of risk he ran, impliedly agreed to incur it. That the defendants were guilty of contributory negligence in employing the horse to draw the van, and that negligence was cause of the accident.

The court held that the defendant's negligence, if any, in employing the horse cannot be said to be the cause of accident provided that the plaintiff's attempt to hold the horse, which he must have known was attended with risk; and that the defence applies to preclude the plaintiff from recovery. Appeal allowed.

Scrutton L.J.[58] observed: If a horse holts in a highway and a by stander tries to stop it and is injured, the owner of the horse is under no legal liability to the injured person.

Similarly, Slesser L.J.[59] also has this to point out: If a man sees his child in great peril in the street from a runaway horse, and moved by paternal affection, dashes out and is injured in attempting to stop the horse it may in those circumstances well be said that there is in law no actus interveniens.

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58. Cutler vs United Dairies Ltd (Supra) p. 305

59. Cutler vs United Daries Ltd (Supra) p. 306-307.

2.7.3 Voluntary: As a mater of fact, the plaintiff's agreement must be voluntary; meaning that a genuine choice must exist. Infact, Scott L.J.[60] summarised the position of the law as follows:-

> A man cannot be said to be trully "wiching" unless he is in a position to choose freely, and freedom of choice predictates, not only full knowledge ofthe circumstances on which the exercise of choice is conditioned, so that he may be able to choose widely but the absence from his mind of any feeling of constraint so that nothing shall interefere with the freedom of his will.

Before, now, the old law, especially, as it relates to risk of employment is to the effect that an employee who knew the risk of his employment, yet continued, was volens. In other words, he had assumed the risk himself thereby absolving his employer from any responsibility.

However, the current reality of the economic pressures shows that in actual fact he has no choice as such. This is because it is this economic pressure that forced most people to accept the risks of their employment, thereby, removing the essential voluntary element.[60] Impliedly, this therefore means that an employee's knowledge of the existence of a danger does not necessarily mean a consent to run the risk. In Imperial Chemical Industries Ltd vs Shatwell,[61] the plaintiff, inspite of knowledge of the risk, accepted to use the dangerous method of work which

60. See Smith vs Baker (1891) AC 325

61. (1965) Ac 656, ante p. 688

caused the injury. Infact, he was even warned of the risk involved in the method to be carried out. Yet, the defendant was held liable. The rational of this decision was premised on the fact that it was the economic pressures that made him to undertake the risk. And that it will be unjust for the defendants to argue that the plaintiff ran the risk with his eyes open, inspite of the danger.

However, it is possible that the defence may not apply in an action for breach of statutory duty that is instituted by an employee against his employer. This is because the law is that if a person is duty bound to do an act by a statute, he cannot raise the defence of consent for failure to do that duty on the ground that the person to benefit from it has condoned his failure to do the fact expected of him bysuch statute.

2.7.4 Knowledge:- A basic tenet of law is that a person who is consenting to an act or omission must have a full knowledge of what he is consenting to. Therefore, anything short of this will render such consent to be invlaid. in law.

Similarly, a mere knowledge of a wrongful act may not necessarily amount to consent, even though the plaintiff has not make any attempt to avoid the act in question. This is because the law is that a plaintiff must not only have a knowledge of the existence of a risk, he must also have full knowledge of both its nature and its extent. It is after this that one can say that a valid consent exists.

The concept of knowledge is based on the old legal maxim, "volenti non fit injuria" but it is not "scienti non fit injuria." Although, this cannot be used to situation where there is an absence of negligence.

As it has been pointed out earlier, it is not used to make an inquiry into what the plaintiff felt or inwardly consented to. Therefore, a person cannot be held guilty ot consent purposely on a mere ground that he knows of it. Rather, it must be fully shown that the plaintiff consented not to hold the defendant liable by consenting either to the breach of duty or to waive his right of action.

The present age of increase in the industrial technology has made the defence to be very relevant. This is because in factories, accident are bound to occur. Here, can workers sue successfully on the accident/injury caused to them during the course of their employment? Or, can the employers argue in law that, employees having a full knowledge and risk involved in the job, will be barred from suing; the latter having consented to waive their rights (if any)? Before the decision in Smith vs Baker,[62] the argument of the employers will hold in law. But, the decision in Smith Vs Baker,[63] has now changed the position of the law. This is because the effect of that case is to the effect that it is the economic pressures

62. (supra) page 55

63. (Supra)

that force people to undertook such risks and not necessarily because they have consented to the risk.

Meanwhile, knowledge of a wrong does not necessarily mean a consent to the wrong in question.

This is especially so in a case where it is alleged that the wrong in question was negligently done. Therefore, a knowledge that a driver of a vehicle is incompetent to drive does not necessarily mean that the plaintiff has consented that the car be driven in a negligent manner. In Dann vs Hamilton,[64] it was held that the fact that plaintiff voluntarily travelled with a drunk driver did not impliedly mean consent to, or absolve the defendant from liability in negligence for the injury caused to the plaintiff.

Although, in some certain situations, warning or notice of an existence of danger may be a complete defence in favour of the defendant. In this case, it will be deemed that the plaintiff knows of the risk, and so should not be heard to complain later on. In the case of Bennet vs Tugwell (An infant),[65] it was held that a notice in a car stating that passengers travelled at their own risk estopped the plaintiff from making recovery from the insurance company, even though, both he and the driver believed that it did not affect the liability of the insurers.

64. (supra) page 48

65. (1971) 2 Q B. 267

2.8 SCOPE OF THE DEFENCE

2.8.1 Sporting Activities:- In all sporting events namely, boxing, football, motor racing etc, tortious acts which ordinarily would have amount to liability will be excusable in law. Although, before the defence applies, the alleged tortious acts must have been committed within the confinement of the rules and regulations of the game.

Basically, the defence is open for a plead by both the participants and the spectators. This is because of an assumption that consent to the risk has been implied thereby. In the case of Wooddrige vs Sumner,[66] Diplock, L.J. summaried the position of the law as follows:-

> a person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition.

The justification of this law is premised on the fact that in sporting events which involve some bodily contacts, the participants can be taken impliedly to consent to those contacts which happen within the ordinary performance of the game.

However, this implied consent does not apply to acts that would amount to battery. It does not also apply to negligence by other participants. This is because for the purpose of a valid defence in this area, the consent "is not consent to the risk of injury but consent to the

66. (supra) 1963 2 QB 43

lack of reasonable care that may produce the risk".[67]

The rational of this is because of the fact that it is one thing to say that spectators at a footbal match "assume the risk" of injury as a result of a ball struck beyond the boundary, but it is another thing to say that they assume the risk of negligence by the players.

Meanwhile, it should be noted that a person cannot be guilty of consent to situation where the plaintiff can hardly have appreciated the full exent and the nature of the risk. Therefore, each case is to be treated on its own merit. Similarly, an expected standard of care varies from case to case. The type of care expected from a plaintiff in sporting events will definitely not be the same from the type expected when one is driving in the highway. Therefore, the two cases must have to be appreciated in the light of their peculiar circumstances.

2.8.2 Medical Treatment.

As a matter of fact and law, the general principles is that a medical treatment of any form without the consent of the patient is an actionable trespass to the patient because the act amounts to a direct and unauthorised inreference with the patient's body.[68] This is because

67. Woodridge vs Sumner (supra) at p. 44

68. NWOGUGU, E.I:- Current legal problems in Nigeria. (4th Dimension publishing Co, Ltd), Enugu, Nigeria (1986) at P. 104.

doctors do not have an automatic right to submit a patient to any form of medical treatment.

Similarly, when a treatment is done on the body of a wrong person, the act will still be deemed to mean a tort of trespass. In this case, for purpose of blame-worthy intention will be presumed. Therefore, a defence that he had acted without negligence will not avail him because he ought to have known his patient.[69]

At times, consent may be inferred, especially, if the patient voluntarily submits to physical examination of his body. For example, a severe cut which needs stiches. This is because, it may show a desire, for an assent to the necessary treatment. Yet, a borderline should be drawn, because at this stage, there may have been another further examination like where the physical examination reveals that the problem is internal and so needs an internal treatment with the aid of instruments. In this case, prudence demands that a formal consent should be made known.

In the medical field, people prone to this type of tort are "men and women who have acquired the requisite knowledge and skill in the faculty of medical science and who are duly qualified practitioners of that knowledge and skill and are said to be members of the medical profession".[70]

From this definition, such people include physicians, surgeons, anaethetists, radiographers, nurses, dentists etc.

69. (Supra) at page 61

70. (Supra) at page 61

But this excludes quacks, even though quacks have been accomodated in Nigeria. A quack is liable in negligence for the tort commited, though this is not based on the fact that strictly speaking, he is regarded as a doctor. Rather, he will be "deemed to have falsely obtained money from the patient by pretending to be a duly registered medical practitioner".[71]

In a doctor/patient relationship, there is a supposition or an implied undertaking that the former possesses the requisite knowledge and skill to treat the latter's illness.

A doctor owes his patient the duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, and a duty of care in the administration of that treatment. While performing his duty, a doctor is expected to display a reasonable degree of care; not too high and neither should it be too low.[72]

2.9 LIABILITY FOR MEDICAL NEGLIGENCE.

As a matter of fact and law, doctors and/or, hospital authorities could be held liable for tort caused to a patient for being guilty of negligence while performing their duties. The simple reason for justification of this is due to the fact that consent of the patient to submit to treatment is not a licence that such treatment should be done in a negligent manner.

71. (supra) at p. 61

72. Harlsbury's Law of England 3rd ed (Simond) Vol. 26 Article 22 p. 17

It is a trite law that he who alleges must proof. Therefore, a patient who alleges negligence of his doctor while carrying out the treatment on him must show this on evidence. Otherwise, the claim will fail, if the plaintiff cannot meet this simple requirement of the law. In the case of Kanu Okoro Asegbu Vs. Dr. E.S. Etuk,[73] the deceased was on admission at the Onitsha General Hospital on 16/8/61. There were series of treatment made on him, but failed, and so died on 21/8/61, The defendant, thereafter sued on the defendants' negligence for the death of the deceased. This claim was however dismissed on the ground that the plaintiff did not prove allegations of negligence.

On this supposition, once negligence is proved, liability will follow accordingly. For example, in the case of Dickson Igbokwe vs University College Hospital Board of Management,[74] the deceased was on admission for delivery, but after the delivery she was not discharged. This was on the basis of suspicion that she was mentally deranged. She was put on drug, and a nurse was asked to keep an eye on her. Later on, she was found dead as a result of injuries she sustained when she fell from the 4th floor. The authority was held liable on negligence because of the fact that it agreed under cross examination that if someone had been specifically assigned to watch the deceased, the incident would probably not have occured. Similarly, in Chin Keow vs Government of Malaysia,[75] a doctor injected

73. (1962) 6 ENLR 196

74. (1961) WNLR 173

75. (1967) 1 WLR 813

a penicilin drug on a woman. The woman died an hour later. The mother now sued in negligence for failure to conduct test so as to know whether the deceased was allergic to penicillin injjection or not. The trial judge found for the plaintiff for failure to make this inquiry. On further appeal, however, the Federal Court of Appeal (Malaysia) rejected this. But on a further appeal again, the privy council restored the judgement of the trial court.

Equally important is the case of Reibi vs Hughes[76]. Here, the patient was in need of surgery, and consented to the treatment, after he has been informed of the high risk involved in it. The result of the operation was a stroke and paralysis. On this piece of evidence, the defendant was held negligent. And the court further added that a specific consent was not informed; general consen being insufficient. Although, it must be added at once here that as a contrast to the later part of the decision above, in jurisdictions like Canada, U.S.A., e.t.c there is no liability for failure to warn a patient,[77] unless the patient sought for such information.

Meanwhile, hospital authorities can as well be liable to a patient if in treating him, the nurse or other skilful persons negligently prescribe a wrong treatment. And this include both in his professional callings and/or administrative duties, for example, serving of meals.[78]

76. (1977) D.L.R. 35

77. (Supra) p. 66

78. (supra) pp 107-108

However, there is no liability in negligence if a doctor acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, although a body of adverse opinion also existed among medical men.[79]

As an illustration, in Bolan vs Friern Hospital Management Committee,[80] the plaintiff suffered from mental illness. He was advised to undergo a particular treatment. The risk involved under this treatment was not mentioned to the patient. It was shown on evidence that there were two main ways of treatment, one of which was the one undertaken by the doctor. The plaintiff sued on negligence. The court held that a doctor is not liable if he acted in accordance with a practice accepted as proper by medical men who are skilled in that field, although other medical men may have a contrary view. Again, that before a failure to warn a patient on the risk involved in a particular treatment, such plaintiff must proof that the doctor was negligent in failing to warn him, and that if he had been warned, he would not have consented to such treatment.

The above decision was also arrived at in the case of Maryland vs Westlands Regional Health Authority.[81] Here, the court put the position of the law as follows:

79. (Supra) p . 64

80. (Supra) 2 ALL E.R. 118

81. (1985) 1 ALL E.R. 633

> It is not enough to show that there is a body of competent professional opinion which considers that there was a wrong decision, if there also exists a body of professional opinion, equally competent which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need have been performed, if at the time the decision to operate was taken it was reasonable in the sense that a reasonable body of medical opinion would have accepted it as proper.

2.10 MEDICAL TREATMENT.

It is truism that doctors do not have an automatic right to submit a patient to any form of medical treatment. It is therefore incumbent on him to obtain a proper and valid consent from the patient whenever any form of medical treatment is desired. Otherwise, lack of a required consent may amount to both civil and criminal blameworthy in a law court. For example, an operation of any type, often, in itself is a bodily grevious harm. Therefore, a patient's consent is lawful and valid provided the treatment is bonafide and it is meant to benefit the patient.

Similarly, it is also the duty of doctors to tell their patients all the basic and necessary information about the nature of treatment and the risk involved in the treatment. Thus, in the case of Chalterton vs Gerson,[82] it was observed that a failure to explain the general nature of treatment may render such consent as invalid,

82. (1930) 3 WLR 1003 at p. 1014

and it is the duty of a doctor to warn his patient of all the foreseable ill-effects that is inherent in the treatment, but not possible ill effects that might result from negligence. This is because in the latter situation, consent is not covered by it.

If a patient asks about the risk of an operation or procedure, or a likely result of the treatment, then an answer to it should be given at once. In Smith Vs Auckland Hospital Board,[83] the plaintiff's consent was sought, for a preliminary exploratory procedure, before deciding on the next step. The patient then asked whether there is any risk, to which the surgeon gave an evasive reply to mislead the patient to mean that there was no risk. The operation was done, but it lead to a gangreneous condition consequent upon which the plaintiff's leg below the knee was amputated. The plaintiff sued, but lost the case. On appeal, the court of Appeal, in applying the decision in Hedley, Bryne & Co Ltd Vs Heller & Partners Ltd[84] found for the plaintiff. The court observed that the particular relationship of doctor and patient is enough to to impose on a doctor a duty to use due care in answering a question put to him, if the patient, to the knowledge of the doctor intends to place reliance on that answer in making a decision as to a treatment or procedure to which he is asked to consent. And that if in answering the question,

83. (1965) N.Z. 191

84. (1964) ac 465

he fails to use due care, and the patient suffers injuries, the doctor will be liable once an evidence shows that it is probabale that if a proper answer had been given, the patient would have refused to undergo the treatment or after further questions. Again, Sir Harold Barrow Clough, C.J.[85] in giving judgement went further:

> I do not think that it will be disputed, and I cannot imagine Mr. Windsor disputing that he had not answered truthfully in this case. Of course, I do not mean that he acted mendaciously. He meant only to be reassuring and he avoided a real answer, and one can understand his reasons for that. But what he said was so reassuring as to be capable of the construction that there was no risk. That would not have been the truth; at least it fell short of the truth.

Prudence however demands that a patient can question and push the doctor to ensure that he gives an enough information needed for the patient to make up his mind on whether or not the treatment can be done. This is because it is the patient who is to ask supplementary questions if the answers given by the doctor did not satisfy his inquiry. And the justification of this is based on the fact that the doctor is not bound to supply information beyond what is positively asked.

Again, in exceptional cases, an untrutful evasive answers may be justified. Although, a burden of proof of

85. (1965) N2 191, 198.

And in answering issue two above, the court was of the view that unless a patient proves that he would not have taken the treatment if he had been warned, his case will fail in court. And this is in consonance with the decision in Smith vs Auckland [87] which says that it is the duty of the defendant to answer questions truthfully.

Meanwhile, if there is an elective treatment, then the patient should be informed of this possible options so that he can make a choice for himself. In Hatcher vs Black, [88] the type of plaintiff's sickness can be treated with drugs, and/or by means of an operation. But the doctor encouraged him to treat it by way of a surgical operation and which was actually treated in that way. In the process, her larangeal nerve was destroyed and this substantially affected her voice. She sued the doctor for informing her that there was no risk in the method adopted. The plaintiff's case failed, and so it was dismissed. However, Denning L.J. is of the view that a surgeon is justified if he says untruthfully that there is no risk, if he thinks that it is in the best interest of the patient to do so (obiter), yet, rather than legal, but ethical and moral, that would give the patient enough time to tidy up his affairs.

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87. (Supra) at p. 72

88. (1954) The Times July 2

2.11 TYPES OF CONSENT

a. Express consent: - This is a type of consent which is made in an oral form, and at times it may be put in a written form. But where it is put in a formal form, then it is adviceable that it is done in the presence of a witness. And the justification of this is to ensure a protection of the doctor, in case of a likelihood of a future litigation.

By and large, a consent got in a written form is very vital, at least it consolidates the position of the doctor, for an obvious reason that hardly can the patient denies his own written statement. Thus, it is usual to have the format got prepared in advance, and then the patient fills it whenever an operation is to be carried out on his body.

In the modern time, it is usual and often it is the practice to obtain a patient's signature to a stereotype consent in a folder before the treatment is carried out. The format runs as follows:-

> This is to certify that I give permission for an operation to be performed on an anaesthetic administered to------and that I leave the extent of the operation to the discretion of the surgeon. 89

However, the above specimen consent is faulty for obvious reasons.

The specimen is more of a mere blanket consent and can still not be taken as an informed consent. This is

89. UMERAH, B.C.: Opt Cit, at P. 132.

because the specimen has not indicated the nature of the operation. This explains the reason why courts often do not regard it as an informed consent and so disregard it for being of no useful value. In its stead therefore, it is the practice these days to give the necessary details to the patient, write the nature of the treatment in the consent form, after which it is then signed by the patient.[90]

At times, the need often arises for more than one operation. This is because the patient may have consented to a particular operation. But middle course of the treatment, complication sets in which there requires a further operation. In this case, it is advisable, to add at the onset, the phrase: "such further or alternative operative measures as may be found to be necessary during the course of the operation"[91] may be inserted. Although, it is preferable that a fresh consent should be got from the patient.

In an emergent cases like accident cases, it may be difficult to get the consent of the victim at that time. In this case, his close relations may give the necessary consent on his behalf, and where there are none, then it will be presumed once the operation is necessary in the circumstances. In this case, the doctor will be acting acting as agent of necessity to to do what is reasonable in

90. UMERAH, B.C.: Opt. Cit, at 132,

91. SPELLER, S.R.: Law Relating to Hospitals and Kindred Institutions - p. 104.

the circumstance.[92]

Similarly, where the patient is a child, it is often difficult to get his consent. Although, the parent or guardian may give the consent on behalf of the child. This is because under the common law rule, the child is ordinarily, under the custody and control of his parent or guardian. Otherwise, an interference by way of a medical treatment without lawful excuse (consent) will amount to trespass on the body of the child.[93]

However, it seems that if the child has a sufficient understanding of what he is doing, his consent, without the necessity of getting that of the parents will suffice, "because that to which he is agreeing is something which is parents are under a duty to provide-----[94]

2.12 SPECIFIC CONSENT

This is a type that is used as a contra distinction to the usual form of a general consent. It is a type that evolved in the recent time.

However, a further development has also been made to types of consent. This came about as a result of the fact that a specific consent is often rejected by courts as a defence if the alleged specific consent is not well informed.[95]

92. SPELLER, S.R. Opt Cit, at P. 79
93. SPELLER, S.R. Opt.Cit, at P. 79
94. SPELLER, S.R Opt.Cit, at P. 79
95. (supra) at p. 81

An informed consent is to the effect that evidence of a specific consent will not suffice if such specific consent is not well informed. Informed consent is used as an outcome of an informed exercise of choice that entails an opportunity to evaluate knowledgeably all the options and the material risks.[96] Therefore, subject to emergeny cases, a patient must have full information of the risk involved in the treatment, and then gives his consent before the treatment is done. But, if the doctor fails to obtain specific consent based on full disclosure of facts, he may be liable in trespass or negligence or both.[97] The case of Reibi vs Hughes[98] is very illustrative in this regard

Here, it was opined that there was a need for an operation. The patient was actually informed of the desirability of an operation, and it was actually carried out. The patient was however not informed of the high degree of the risk involved in such type of operation. The patient later on suffered from stroke and paralysis. The doctor was accordingly held liable in battery and negligence because specific consent was not obtained, general consent insufficient in the circumstances.

Similarly, in the case of Hively vs Higgs,[99] an

96. Supra at p. 81
97. (supra) at p. 81
98. (supra) at p (1977/78) DLR 35
99. (1927) 253 p. 263

iii A full disclosure of an expected risk and the discomfort that may follow it.

iv. A full disclosure of any reasonable advantages expected from the treatment.

v. He must answer any inquiries put forward to him by the patient.

Against this scenario, a doctor is presumed to have possessed all the required skills expected of him in discharging his professional duties. It is an implied warranty that he possesses it. Therefore, subject to emergency case , he is not expected to carry out treatments which are beyond his skill. Otherwise, he will be tortiously liable if there is any complication, and such complication leads to an injury on the plaintiff. Infact, this is why the law allows him to decide when and how to treate a patient. Such freedom of treatment cannot be faulted unless it is shown that no reasonable doctor faced with such similar problem will treat the illness in the way and manner he carried out the treatment.[100]

Meanwhile, a non disclosure in some certain cases may not necessarily make the doctor to be liable. Such cases included emergency situations, or if the procedure of treatment is simple and the expected risk is remote, or, if in the doctor's opinion it is not in the interest

100. (supra) at p. 81

of the patient to know it.

Finally, this doctrine is used less often in Nigeria. This is largely due to low literacy level of the populace. On this ground, most patients rely on the judgement and opinion of experts,

Although, most often, for the purpose of avoiding psychological problem, or on an increased damage that will be caused if the patient is informed, doctors often refused to inform their patient. In this case, the doctor is left entirely on his own to make a free expert choice in the circumstance. Therefore, there may be no liability if he acts reasonably and in good faith. But, above all, each case must be treated on its own merit.

CHAPTER 3

3.0 NECESSITY AS A DEFENCE IN TORT

3.1 INTRODUCTION

Necessity as used in this chapter is used as a collective noun to comprise, and include certain defences[1] available to a tortfeasor so as to discharge him from tortious liability. Thus, the heading of this chapter differs from a defence of necessity as a singular and distinct type.[2]

In this regard therefore, it is a :

> controlling force, irresistible compulsion; a power or impulse so great that it admits no choice of conduct. That which makes the contrary of a thing impossible. The quality or state of being necessary, in its primary sense signifying that which makes an act or event unavoidable------- condition arising out of circumstances that compels a certain course of action. 3

On a careful study of the above definition, necessity as a defence will include areas where in some certain situations, an act or omission of the defendant causes a wrong, yet, liability may not necessarily follow.

1. They include; Necessity as a singular type, Inevitable Accident, Act of God, etc.
2. See FLEMING J.G.: ; op. cit, at page 94.
3. See Black's Law Dictionary (6th ed) at page 1030

The simple reason being that the defendant is not in full control, as per causes and/or a prevention of the alleged wrong.

Meanwhile, a fundamental question to be asked at this stage is: Are the defences under this heading a total or a partial negation of liability ij favour of the defendant? And, though, it may not be easy to provide a straight forward answer, yet, it suffices at this moment to say that it is a mixed up. In other words, depending on the circumstances, it may be a partial negation, and at times a total negation of liability.

At this juncture, the defences to be examined under this chapter include the following:

3.2 NECESSITY.[4]

This defence is open to a defendant who can show that the wrong caused to his victim was done in a circumstance which he cannot control. This is because there is no liability for involuntary conduct.

The basis of this defence has been described as:

> a mixture of charity, the maintenance of public good and self protection.5

On this account, Mr. Justice Coke has been quoted to have said:

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4. See No. 2 above (supra) for a comparism.

5. W.W.H. ROGERS: Opt Cit at page 79

> For the commonwealth, a man shall suffer damage; as for saving a city or town, a house shall be plucked down if the next be on fire-----and a thing for the common wealth every man may do without being liable to an action.6

On the basis of public policy, it is the law in Australia that fire brigades may destroy houses, for the purpose of extinguishing, or preventing the spread of fire without being tortiously liable. This is because any damage caused during this time would be deemed to include any fire insurance on the property.[7]

Primarily, the law seems to reckon with emergency situations or a state of imminent peril and risk which could be directly attributable to the wrong complained of. In this regard, the defendant will be freed from the blameworthy. The risk to be avoided may have been for the sole aim of protecting the defendant's personal interest. Or, to protect the personal interest of a stranger, or, even the personal interest of the plaintiff himself.

However, the only condition is that the measure(s) taken to stop the threatened wrong are reasonably necessary so that it can be inferred that they are acts which in the circumstance, it is what a reasonable man will do in that circumstance. For example, in the case of Cope v Sharpe,[8] two questions were raised before the court

6. Saltpetre's case (1606) 12 Co. Rep 12, 13
7. N.S.W.; Fire Brigade's Act 1909. SS 29 & 32
8. (1912) 1 KB 496

so as to know whether the defendant was liable or not. These were:

a. Was the method used by the defendant necessary so as to protect his master's property?

b. If the answer to (a) above is in the negative, was it reasonably necessary in the circumstances

The court answered (a) above in the negative and (b) above in affirmation. On this basis, the defendant was given judgement.

In Mouse[9] case, the defence was raised and upheld; which is to the effect that there is no liability for value of a cargo that was jettisioned with the whole purpose of saving the lives of the passengers in a storm on a river. This principle was also followed in the case of Watt vs Hertforshire County Council.[10] In this case, the plaintiff was travelling in the back of a lorry to the scene of an accident. In the lorry, there was a jack weighing between 200 and 300 weight. It was not possible to fix the jack as the lorry was not fitted for it; the usual vehicle not being available. The driver was forced to apply brakes suddenly and this caused the jack to move forward and strike and injured the plaintiff. Based on this ground and the urgent call, the defendant was freed from blameworthy.

9. (1609) 12 Co. Rep. 63

10. (1954) 1 ALLER 141

Similarly, in the case of cf. Esso v Southport Corporation,[11] the defence was raised and upheld; Here, an oil tanker was stranded in a river estuary and to prevent her breaking her back; the master jettisioned her back; the master jettisioned 400 tons of her oil cargo which the tide carried to a foreshore, thereby occasioning damage. On the basis of the defence, therefore, the defendant was held not responsible for the wrong.

Meanwhile, it must be known that the wrong caused because of the imminent danger must not be done in a negligent manner. Otherwise, the defence will be rejected. Therefore, the case of Rigby v Chief Constable of Northampton.[12] illustrates this point. Here, the police were held liable for firing a C$ gas canister into the plaintiff's shop to flush out a dangerous psycopath. without having adequate fire fighting equipment available. Furthermore, the court observed that though necessity is a good defence to trespass in such an emergency, but that the police were held liable in negligence because of their failure to ensure that they had enough fire fighting back up when the canister was released onto the plaintiff's property.

In a certain situation, it does happen that the danger tobe prevented needs certain skills and special

11. (1956) AC 218

12. (1985) 2 ALL ER 985

knowledge; but the defendant is unskilled in the field. In this regard, he will be deemed to have done it at the risk of exposing himself to a civil liability for the wron g caused to his victim. But, this defence may excuse him from liability. Therefore, an unqualified person who perfom a surgical operation must be deemed to pay for the consequence if he fails to exercise the skill of a surgeon.[13]

However, he will not be held liable, if using such care as an unskilled person might be expected to use, he was compelled to operate by pressure of circumstances. For example, where a climber who was isolated upon a mountain attempts to save the life of a fellow climber by amputating his leg.[14]

Meanwhile, it should be poin ed out at this juncture that the danger to be avoided need not be a private interest of the defendant. At times, it may be an interest of the plaintiff himself. Thus, in an emergency situation, a medical treatment is justifiable, if it is done to a patient who was incapable of giving a consent at that time. In the case of Leigh v Glasstone,[15] a suffragate prisoner who was fasting was forcibly fed through the mouth and nose by the prison officers. She sued for battery. It was held that this is a good defence because the act of the forcible feeding was necessary so as to save her life.

13. JAMES, Phillip, S. : General Principles of the Law of Torts, William Clowes & Sons Ltd (London) (4th ed).

14. See, JAMES, Phillips, S. (supra) at page 72.

15. (1909) 26 TLR 139.

Conclusively, and inspite of this defence, care must be taken to know whether the defence can avail the defendant or not. Otherwise, and in the words of John G. Fleming:

> Necessity becomes simply a mask of anarchy------16a

Therefore, the cost of avoiding a risk must be weighed against the danger of running it. In other words, the harm to be avoided must be disproportionately lesser than the one committed. In Latimer v AEC Ltd,[16b] an exceptionally heavy rainstorm flooded the floors of respondent's factory and this caused oil, normally contained within channels to be washed over the floors. The respondent then used available supplies of sawdust to cover the floors, but insufficient to cover them all. The appelant slipped on an uncovered area and so was injured. The court held that since the respondent had done all reasonably expected to be done to make the floors sage, they were not liable. Although, it was also shown that if they had closed the factory, the accident, could not have occured but that a reasonable prudence did not demand the taking of such a drastic step.

3.3 INEVITABLE ACCIDENT

3.3.1 ORIGIN:- Historically, the defence of inevitable accident was in relation to actions in trespass, where upon, on a proof of interference, the defendant is bound to explain his actions. And that the defendant will only

16a. (1953) AC 643 or (1953) 2 ALL ER 449

16b. (Supra)

be free from liability if he can show that his act was unintentional or/and negligent. Thus, by this singular act, it means that he has raised a plea of inevitable accident.

Now, however, the defence means a denial of negligence. In this context, the simple rule of law is that the onus of proof is on the plaintiff.[17]

3.3.2 MEANING

It is an "accident which cannot be avoided by the exercise of ordinary care, caution and skill."[18]

It is also "an accident which cannot be prevented by human skill or foresight, but results b from a natural causes such as lighting or storms, perils of the sea, inundations or earthquakes-----"19

Similarly, it is an accident "not avoidable by any such precautions and there could be expected to take."[20]

In the case of Stephens v Virginia Elec. & Power Co,[21] it was observed that an accident is inevitable so as to preclude recovery on ground of negligence, if person

17. Okubule v. Oyagbola (1990) 4 WNLR pp 147,723
18. See Osborn's Concise Law Dictionary (7th ed) p. 178
19. See Black's Law Dictionary (6th ed) at p. 76
20. See Pollock, Torts (15th ed) at p. 776
21. 184 va 94, 34 S.E. 2d 374, 377.

by whom it occurs neither has nor is legally bound to have sufficient power to avoid it or prevent its injuring another.

Fundamentally, the defence postulates that the defendant did not intend the wrong. And that no fault or negligence is attributed to him. The wrong must also be unforeseenable. The defendant must have used the highest degree of care and caution to prevent the wrong. And the wrong complained of must be a type that cannot have been avoided physically.

By way of an illustration, in the case of Jibosu v Kuti,[22] Lord Esher observed as follows:-

> To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence - that is a mere want of reasonable care and skill. -----In my opinion, a person relying on inevitable accident must see that something happened over which he has no control and the fact of which would not have been avoided by the greatest care and skill.-----In my opinion, a person relying on inevitable accident must see that, something happened over which he had no control and the fact t of which would not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken between the cause of inevitable accident and a mere want of reasonable care and skill.

Similarly, in the case of Shocco v Bewala, Structural Steel Works (Nig) Ltd,[23] the defence was raised and upheld. In this case, the defendant, on

22. (1970) 2 ALL NLR 102 at 111

23. CCHCJ 12/73/, page 91

getting to a hilly of a road, saw a parked trailer at the left side of the road; a place he wanted to park his vehicle. All of a sudden, he saw an appearance of another lorry coming from the opposite direction. All attempts to avoid a collision with the lorry failed. It was during the process that he hit the back of the lorry. It was held that the first defendant was very vigilant and kept a proper look out. He did n all what was humanly possible to avoid, it , but could not. And he had shown clearly the cause of the accident, and also showed that the result of the cause was unavoidable. And that the plaintiff's evidence showed that there was nothing apparent or really wrong with the car that the first defendant was driving which the ingenuity of man could have forseen before the accident.

However, this defence was raised, but rejected in the case of Foloye v. Olaniyan,[24] Here, / it was observed amongst other things that the nature of the accident raised a presumption of negligence, but which the first defendant failed to rebut. The defence was accordingly rejected.

Meanwhile, the defence w has often been raised and upheld in accident cases on highways. And once it is pleaded and accepted, it will operate to defeat the plaintiff's claim, in favour of the defendant.

24. (1954) 14 WACA 608

However, in some certain situations, and even where the defence is pleaded, the plaintiff's claim will still fail. This can be seen where an accident has happened, but the plaintiff is unable to show how the accident occured for the purpose of attributing blame-worthy on the defendant. In this regard, the law is that such action will fail. The hardship caused to the plaintiff because of a strict adherence to the rule is obvious. And it was through an attempt to remedy this hardship that there evolved the introduction of the doctrine of Res Ipsa loquitur.

3.4 RES IPSA LOQUITUR

This doctrine is a common law maxim which means; "The thing speaks for itself".

John Flemming, in elaborating the maxim remarked as follows:

> Res Ipsa Loquitur is no more than a convenient label to describe situations where, nowithstanding the plaintiff's inability to establish the exact cause of the accident is by itself sufficient in the absence of an explanation to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. 25

The maxim operates to shift the onus of prove of accident on the defendant. In this case, he can raise a defence that the accident was because of a cause which

25. FLEMING, J.G: Opt. Cit at Page 302

did not amount to negligence on his part, or that he has used a reasonable care to avoid the accident.

In this respect, Adefarasin Ag. C.J. made the following observation:

> The maxim is no more than a rule of evidence affecting onus. It is based on common sense and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. 26

As a general principles of law, the defendant, in an attempt to dislodge the presumption that exist under the doctrine, should be able to establish and prove convincingly the following facts, namely:

3.4.1 MEASURE OF CONTROL.

The defendant must have a full control of the cause of the accident so as to prevent the wrong. Therefore, if the control is beyond him, then the cause of the wrong cannot be attributed to him. In the case of Jibosu v. Kuti,[27] the plaintiff sued the defendant in negligence as a result of collision of the cars. The defendant argued that the cause of accident was because of tyre burst and so pleaded the defence of inevtiable accident. At

26. Akinola vs Gurranti & Co. Ltd (1974) 5 CCHCJ 671

27. (1972) 2 UILR 367

the court of first instance, the defence was upheld.

But, on appeal, the court of Appeal observed as follows:

> When there is a violence swerve, as in this case, there is no doubt in our minds that the doctrine of res ipsa loquitur apply-----In our view, a bus properly driven does not leave its side of the road, cross an island and hit another vehicle which completely on the other side of the road.-------The learned trial judge clearly, mis directed himself when he said that once the defendant explained that the cause of the accident was due to a burst from front tyre, that explanation obviated the doctrine of res ipsa loquitur. Evidence should have been called to show that the tyre burst was not due to the negligence of the defendant/respondent. Very many things could have been responsible. The burst could have been due to a factory fault, or a puncture, or lack of maintenance, or insertion of a weak inner tube. The onus clearly is on the respondent to establish the cause of the tyre burst, and it is only when this would been satisfactorily done that the doctrine of res ipsa loquitur could be obviated.

The rational of the rule on control is premised on the fact that the defendant ought to be in an exclusive control of the thing which caused the wrong. Control need not always be actual, because at times, an inference on it can be made.

However, where a control is to be imputed, then, a reasonable length of time over which such control will last will be an important factor to be put into

consideration. Therefore, in the case of Easson v LN2 Railway Co,[28] it was observed that it would be difficult to say that the doors of a travelling bus from Edinburgh to London will at all times be under the control of the company. And that it is unnecessary to say that at all times, all the circumstances must be under the control of the defendant. Thus, this defence was rejected.

Moreover, it is truism that control b need not be in the hand of an individual. This can be illustrated in a situation where the defendant is an organisation with many organs and individuals involved in the day to day running of such organisation. In this situation, it may be tasky to point out an individual. In this regard therefore, such organisation may be vicariously liable for the act.

At times, it may happen that the defendant is in control, but, the cause of injury was because of an act of an authorised person. In this regard, the defence will still fail because the onus of discharge is on him.

3.4.2 DUTY OF CARE

A want of this presupposes a lack of diligence and a reasonable care to avoid the cause of the wrong. Infact, the defendant must give a reasonable explanation as to cause(s) of the accident, and that the wrong was not because of this lack of duty.

28. (1944) K.B. Page 421, or (1944) 2 ALL ER p. 425

When driving on a highway, the basic rule is that drivers should take proper care not to cause any injury to other car users. To observe this rule, they must keep a proper look out, observe traffic rules, avoid excessive speed, avoid driving while drunk etc. And if he is in want of these duties, the defence will be presumed. However, it will be a defence for him if he can rebut it by showing that the accident did not occur because of want of care from his part.

The defendant must show that the wrong does not ordinarily happen inspite of his proper care and caution. And where the defence fails, negligence will be presumed against him. In Byrne v Boadle,[29] a flour barrel fell from the window of an upstair building on the head of the plaintiff who was walking on the street. It washeld that if the defendant had taken a proper care, the flour barrel would not have fallen and injured the plaintiff. Similarly, in Forsbroke-Hobbes v British American Airworks Ltd,[30] there was a plane crash immediately after take off. The trial court was of the view that if proper care had been taken the crash would have been avoided. The defence of inevitable accident failed.

Moreover, in the case of Anichebe v Onyekwe,[31] the plaintiff pleaded the maxim or an accident which caused the death of the plaintiff's brother. The defendant countered the claim that the cause of accident was because of sudden

29. Byrne v Boadle (1863) 2 H&C p. 493
30. (1937) 1 ALL ER p. 108
31. (1965) NMLR 108

and unexpected breaking of a U-bolt on the vehicle. Ajegbo J.S.C. remarked that it is not sufficient for the defendant to plead that the U-bolt break was because of a latent defect. But that he had to show that t he had taken all reasonable caution to show that the bolts were in a good condition and that the car was in a fit road worthy. But because he failed to discharge the onus of proof, he was accordingly held liable.

These lines of principles above were also adopted in the case of Koiki V NEPA,[32] In this case, the plaintiff was injured by the fallen down of a sacffolding which was erected by the defendant agent. It was noted that in the absence of an Act of God such as excessive flooding, it will be impossible, if the scaffolding is well constructed, to have collapsed. Thereafter, Mr. Adefarasin, J. observed as follows:-

> The erection of the scaffolding in my view must have been done negligently and I think it was the reason that it gave way and injured the plaintiff. To my mind it must have been constructed in such a way that it could not stand the weight of one man.

Conclusively, and inspite of the defence as discussed above, the defence may still be rejected in some certain situations. In other words, a prove of the defence by the defendant may not discharge him from blameworthy. Therefore, he will still be held liable for the alleged conduct that causes the injury. For example, the defence

32. CCHCJ 1272 at p. 11

will hold good in law, if the subject matter of dispute relates to the rule in Rylands vs Fletcher,[33] the defendant will still be held liable. In this context, it will be immaterial that he has taken all reasonable care to avoid the injury. And the basic of this change in the law is due to the fact that the offences created under the rule are strict.

3.5 ACT OF GOD

This offence put into consideration event of some natural forces, occurence of which cannot be prevented because it was unforseen and undesired.

It has also been described as:

> an accident or event which happens independently of human intervention and due to natural causes such as storm, earthquake etc. which no human foresight can provide against, and of which human precedence is not bound to recognise the possibility ---------.[34]

Similarly, it may also arise from some irrestible force or inevitable accident, or from some overwhelming power, which cannot be guarded against by ordinary exertions of human skill and prudence.[35]

In the same case, Cockburn C.J. went further:

> The rain which fertilises the earth, and the wind which enables the ship to nagigate the ocean are as much within the term "act of God" as the rainfall which causes a river to burst its

33. (Supra)

34. BIRD, Roger: Osborn's Concise Law Dictionary (7th ed) at p. 10.

35. Per Cockburn C.J. in Nughut v Smith L.J.N.S. 45 (Common law) at p. 707

> banks and carry destruction over a whole district or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier, who by the rule is entitled to protection in the latter case, would clearly not be able to claim in the former.

Most often, the defence is used to serve as an exception to negate a blameworthy under the rule formulated in Rylands v Fletcher.[36]. As an exception therefore, if a reservoir is built for the purpose of a storage of water, and after the construction, but before water is stored in the reservoir, there was a heavy down pour, fill the reservoir and flooded the lines of A. B will successfully raise the defence. Therefore, before "escape of a thing is covered under the exception to the rule, such must be a type which is caused directly by natural causes without any human interference. The circumstance leading to the escape must be above any human foresight; prevention of which human prudence is not bound to recognise the possibility.[37]

Examples of Act of God include all natural forces like eartnquake, storms, thunderstorm, tornadoes etc. Acts of natural forces must however be differentiated from human acts which may have been done deliberately by human beings. For example, an act may be violent, yet this may not necessarily be contemplated by the defence. This is because

36. (Supra)

37. See Tennent vs Earl of Glasgow (1864) 2m. (H.L.) 22, 26-277

such act ought to have been prevented by the use of a reasonable care. In the alternative, the defence will only be upheld if inspite of a use of a reasonable care and dilligent, the alleged wrong would still have happened.

As a general law, the guiding principle is that an alleged wrong must have been because of a direct natural causes without any human intervention. Therefore, if a ship driven ashore by a tempest, the cause of the wrong will be covered under the defence. But, if, however, it is run ashore during a fog which was because of a mistake, then this will not be within the contemplation of the defence. This is because it will be regarded as an act of man.

If the case of Nichols v Marsland,[38] the defendant was an owner of some pools formed by damning a natural stream. The embarkments and weirs were carefully constructed to be used for all ordinary purposes. A violent storm broke down the embarkments, and a rush of water down the stream carried away some bridges. It was observed that the rule in Rylands v Fletcher[38b] apart, the defendant will be held liable because the accident was a direct act of God.

However, the defence could not avail the defendant from blameworthy as seen in the case of Omotayo v Arbucle,[39] In the case, the defendants' servants were sued negligence for the loss caused to 52 tons of Obeche logs. The defendants deny the allegation. The court observed that there

38. (1876) 2 Ex. D.1
38b (Supra)
39. (1954) 14 WACA 515

that there was no evidence upon which he could find that they did know or "must have known" and that as they "did not know that the logs would not be loaded, they cannot be said to have been negligent for not taking the logs back to their base". Based on this reason, and some other ones, the plaintiff's claim was dismissed. But, the decision was however reversed on appeal in favour of the plaintiff. It was pointed out that the onus of prove that there was no reasonable precaution from the defendant was on him. That, although, tide in the ordinary course of nature, and in that sense an "act of God", I think when considering the legal implications in a case such as this it is misleading to classify it as such, which the trial court in effect did. That it is true, as trial court said that the defendants were not the cause of the tide, but through their servants and agents, caused the logs to be subjected to tide, and in an absence to negative negligence on their part i.e.reasonable care to avoid the loss.[40] So, the defendant is liable.

Meanwhile, in most of the cases, it does happen that there exist a combination of human acts, and natural events which then lead to the act complained of. In this regard, the immediate and the dir ct cause of the wrong will be examined so as to know if the cause falls within the confinement of the defence or not. And while doing

40. Omotayo Vs Arbucle (supra)

this, the conduct of the defendant must be borne in mind. This is because he has a duty to take extra cautions against the event; even though this varies from cases to cases.

3.6 SELF DEFENCE

This defence signifies certain circumstances which compel a person to behave and act in an unusual way. The defence envisages that if out of force and compulsion, a person commits a tortious action, he may be exculpated from blameworthy.

Essentially, the act that causes the wrong must have been done out of compulsion or force. This is very important because that is the gist and basis of the defence.

In view of this, the defence can be highlighted under the following headings, namely:

3.6.1 SELF DEFENCE (of physical self).

It is a good law that an assault or battery is a tortious act and redressible against the tortfeasor at the instance of the victim. But, this defence operates to negate the blameworthy of the defendant.

The defence is premised on a common rule of logic which postulates: Nature demands that a man who is struck is bound to resist. The right of this reaction is a natural type and so it should not be infringed upon.

A right of reaction is premised on a reasonable apprehension of physical attack from the assailant. For example, the defendant, may, at times, not wait until he is struck. Infact, it suffices if A raises his hand against B within a close range, and B at once strikes to prevent the assault.

Basically, however, the defence subject to a test (A reasonable man's Test). Although, there is no fast rule on the applica tion of this test. This is because each case mustbe described on its own merit. For example an alleged wrong must have been done out of an actual defence from attack, but not by a way of a retaliation after the attack. Therefore, if A hits B on the face, B cannot be justified in law by striking A from the back in retaliation.

Similarly, a retaliation must be in the same proportion with the attack. For example, if A slaps B, B may retaliate by slapping him too, but not by shooting A with a gun. This simple rule of law has been highlighted in Cockcroft v Smith[41] In the case, A sued B for biting off his forefinger in a scuffle in a court. Holt C.J. remarked that:

> that in itself it was no defence that the plaintiff had first run his fingers towards the defendant's eyes, for a man must not "in case of a small assault, give a violent or an unreasonable return.

41. (1705) 2 Salk 642

Similarly, in criminal law, a person attacked in such a way that it indicates that his life is in danger, may in retaliation inflict a bodily grievious harm or even kill, provided that there are grounds to make an inference that reasonably his life is in danger, and that he cannot save himself by a lesser means.

Meanwhile, it must be pointed out that a measure of a dggree of force is always an issue of fact, but not of law. Therefore, when examining it. such variables facts such as the degree of the violence offered, nature of weapon used, assailant's previous conduct etc are issues to be put into consideration.

However, it should be noted that if the defendant is guilty of an excessive force,yet, he may stillraise a defence i.e. by way of a counter claim against the plaintiff for having initiated the first attack. In this regard, the plaintiff's recovery may be scaled down, or at times, the two parties may be asked to forfeit each other's loss.

The defence may also not be raised and accepted in situations where the defendant is guilty of a wrong doing i.e. if he sets the action in motion.

3.6.2 SELF DEFENCE (THIRD PARTY)

Under this sub-heading, it is also a good law that a person may commit a tort (assault or battery for the preservation and security of a third person.[42]

42. The defendant cannot rely on a private defence because "I cannot "defend" my self against one who has done me no unlawful harm". Per Winfield at p. 721, 12th ed. W.V.H. Rogers.

Therefore, this defence is open for a parent to defend a member of t his family[43] against personal attack from a third party.

In those days the view was that the third party to be defended must have a personal relationship.[44] But this view now seems to be obsolete. Infact, in some jursidictions, the law is that it is lawful to use force of any degree provided it is done in good faith. But before the defence succeeds, all the conditions[45] noted above must necessarily apply here.

As a corollary to the submission raised above[46] a parent or guardian may also commit tort against a child or ward. Therefore, for the purpose of a corrective measure, or, to instil discipline, a moderate and a reasonable corporal punishment may be alllowed on such a child or ward. Therefore, there will be no ha inability if a parent imposed a moderate beating onto his infant child, or to restrict his movement because of the child's bad behaviour.

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43. Husband in favour of his wife, or vice versa. A parent in faour of the children and vice verda. A guardian in favour of the ward and vice versa.

44. See No. 43 above.

45. The attack and the revenge an must be proportionate, there should be no lapse of time, it must be done in good faith etc.

46. See 43 above (supra)

At this juncture, it is timely to put into sharp focus the constitutional implication of this type of disciplinary measure. In other words, can a ward or a child sue his guardian or parents in tort for the disciplinary measure imposed on him as unconstitutional? For example, section 31 (1) of 1979 constitution provides that every individual is entitled to respect for the dignity of his person. Therefore, no person shall be subjected to torture, or to inhuman or degrading treatment.[47]

Similarly, section 32 (1) of the 1979 constitution provides that every person shall be entitled to his personal liberty and no person shall be deprived of such liberty.

Against this background, a disciplinary measure of a moderate beating and restriction of movement of a child or ward because of his bad behaviour violate the sections[48a] mentioned above. But, a careful analysis and consideration of some factors may make one to have a second thought.

To start with, exceptions have been given to the two constitutional provisions to sections mentioned above. For example, the moderate beating as cited above can be deemed to mean exceptions, mentioned and covered under section 31 (1) (c) and (d) (i).[48b] Therefore, a moderate beating on a child by his parent for the purpose of a

47. Section 31 (i) (a) of 1979 constitution

48a. Sections 31 (1) and 32 (a) respectively (supra)

48b. See 1979 Constitution.

corrective measure will not attract a tortious liability or deemed to mean a violation of the constitution.

Similarly, a restriction of movement of a child by his parent or account of his bad behaviour cannot be said to mean an act which violates section 32 (i) of the constitution. Infact, the constitution itself encourages this type of disciplinary measure, and so can be deemed to mean an exception of the provision as clearly provided by section 31 (1) (d) of the constitution.

And in support of this submission above is the provision of the criminal code.[49] For example, section 29 (1) [50] stipulates that a blow or other force that does not lead to a wound or a grievious bodily harm will suffice if it is done by a parent so as to correct the child.

Meanwhile, all constitutional provisions mentioned above aside, it should be noted that each case should also be treated on its own merit. Therefore, the type of the discipline must be reasonable in the circumstance; thereby putting the nature of the offence, the age of the child, his physique, his past behaviour, the type of punishment, and the injury etc into consideration.

These factors are important because if the child is too young so as to defeat the effect of the punishment

49 Cap. 42 Laws of the Federation (1958 ed)

50. Criminal code Act; cap. 42 laws of the Federation (1958 edition)

or if the punishment is too severe, it may amount to causing a bodily physical harm to the child. This is because excessive discipline can be checked and contested undder the criminal law. Infact, the case of Ryan v Fildes[51] is an illustration of this submission. In this case, the plaintiff, s chool boy of 10 years old was because of hid insicipline, boxed on the ear by his school mistress. Because of the blow, which though, it was not severe, the boy became deaf in the ear. The court held that, though, it is moderate, yet, the blow exceded a reasonable and lawful correction. The mistress was accordingly held tortiously held liable to the plaintiff.

Similarly, and also by a necessary implication, a school teacher may also not be held guilty of an assault caused to his student.[52] In olden days, it was thought that a parent who places his child with the teacher means that he has delegated to him all his authority, as far as it is necessary for the welfare of the child. Therefore, a teacher can impose a moderate physical pain on the student.[53]

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51. (1938) 3 ALL ER 517

52. The Defendant in Ryan (supra) would have been free from liability if he blow had not "exceeded a reasonable and lawful correction"

53. See Ryan Vs Fildes (Supra) Rex v Newport ETC (supra)

However, this thought had since been changed. What seems to be the correct law now is that a school teacher has his own independent authority to discipline the student. But, what is however not clear is that does this punishment be imposed only within the school premises? In Rex v Newport E.T.C.[54] a school teacher caned a student, who contrary to the school rules smoked in the street during the holiday. It was held that the boy's father, by sending him to the school had authorised the child to use a reasonable punishment on the boy for breach of the school rules and regulations, and that the punishment was quite reasonable.[55]

Similarly, in the case of Ekeogu v. Aliri [56] Wali, J.S.C. summarised the position of the law as follows:

> A teacher vis-a-vis his pupils stands in loco parents to them. In that capacity he has the authority to discipline them. What happens in this case was nothing more than the appelant discharging that duty and it was only by sheer accident that the respondent was hit on the left eye resulting in its damage----

In the same vein, a captain of a ship or an aircraft will not be held liable for causing an assault, battery or false imprisonment on the plaintiff. In this regard, the person referred to are members of the crew or the persons ob board provided he reasonably belives

54. (1929) 2 K.C. 416.
55. See also Rainsay Carsen (1964) 111 CLR 16
56. (1991) 3 NWLR (pt 179) p. 260.

that such restraint is necessary for the safety of the ship or the aircraft.[57]

3.6.3 SELF DEFENCE (AGAINST A PROPERTY)

A defence against an attack on one's property is akin to that of self defence against agression. The defence envisages that an assault or battery is justified in law if it is done in the defence of one own's property e.g. land or chattel.

And by a necessary implication, it applies to a property which a person is defending as an agent of an owner, occupier, or by any other third party.

Meanwhile, a defendant must be in such a position that would enable him to sue the plaintiff in trespass. He must be in possession of the land, but need not be a real owner. And if he has a right to possess, but not in possession, he may plead a defence of re-entry. He cannot plead a defence of re-entry, and neither can he plead a defence of defending the property.

In the case of Holmes v Bagge,[58] it was pointed out that a captain of a cricket club who removed the plaintiff from the field cannot plead the defence successfully, this is because the captain had no possession of the field.

Therefore, before a valid defence holds in this respect, a force to be used must not be more than necessary.

57. See Hook v Cuward Steanship Co. Ltd (1953) 1 WLR 682

58. (19853) 1 E & B 782

Even though, an amount of force to be used varies from case to case. Of course, a person cannot first of all use a force until a request has been made to leave, and then a reasonable opportunity is afforded for the purpose of compliance with the order.

However, this is also subject to limitation. For example, if a force is used in committing the wrong, then a counter force, if used may be justifiable. But if a greater force than the expected one has been used, then he can be compensated for the excess of the difference.

Meanwhile, as regards to a measure of a reasonable force to be used, it has been pointed out as follows:-

> If a person enters another one's house with force and violence the owner of the house may justify turning him out (using no more force that is necessary) without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out, without a previous request to depart. 59

Of recent, it is common for animals to make a destruction on people's property. In this regard, if there is an anticipation that the danger is imminent, than an owner may use such force as it is reasonable to prevent such danger. But, the onus of prove is one the defendant to show that the property was in a real danger and that there was no other means to have avert the destruction, unless by a a means and measure he has adopted to avert the danger.

59. See STREET, [illegible]Y - Opt Cit P. 81.

As regards to a defence of property, the defence may also be used in an ini rect form so as to safe the property against attack. or example, a barrier or barricade, and at times a mechanical device may suffice in this regard.

Howeve , what often arise here is that such forms at times, lack the necessary discrimination as to the premise amount of force that is needed in the circumstances. Although, there is no hard and fast rule in this circumstance, because an amount of force varies from case to case. Yet, a guiding principle has been evolved. And this is to the effect that a person may not inidrectly do what is unlawful in a direct manner. Otherwise, the person may be guilty of using an excessive force.

Although, a compromise has now been adopted by way of a distinction between barriers that are likely to cause death or a heavy bodily injury, and those which are very unlikely. Therefore, where the barriers are likely to casue death or heavy bodily injury, then, caution dictates that they should be mounted in the night.

3.6.4 ACTING IN SUPPORT OF LAW.

To start with, there is a great overlap of this defence between the criminal law and the law of torts, Therefore, that is why most of the provisions found in this area are provided under the criminal law. But, inspite of this overlap, what we are mostly concerned under

this sub heading pertains to areas that are tortious acts. Thus, the question to be asked is: what is the extent of the tortious liability (if any) of the defendant?

For example, because of the nature of the roles and duties performed by the police in the society, the law allows them to make arrest. Similarly, in some certain practical situation, the law also allows a private citizen to arrest a criminal persona. And the rational of this is for a timely prevention of a crime, or to prevent a criminal from escape.

Moreover, apart from the power of arrest, the police during the course of carrying out their legitimate duties, may commit a wrong against an innocent citizen. Again, a private citizen, in an attempt to enforce or maintain the law, he may commit a wrong against an innocent person.

Furthermore, out of a genuine mistake, an innocent person may have been arrested wrongly. The warrant issued may have been defective for want of jurisdiction, or the proper procedure may not have been followed. —

Against this background, can the defendant successfully raise this defence? And to answer this question, it must be shown that there exist a reasonable ground to justify such arrest. Intact, the test of a reasonable suspicion had since been laid down by the supreme court as follows:

> ----suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking" I suspect but I cannot prove". Suspicion arises -- at or near the starting point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete; it is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbideen, it could seriously hamper the police. To give power to arrest or reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it, many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar. There is no serious danger in a large measure of executive discretion in the first instance, because in countries where common law principles prevail the discretion is subject to judicial control.[60]

On the basis of this formulation, therefore, the court held that the arrest and detention of the plaintiff on suspicion of the offence of failure to pay tax[61] is not an enough reason because the plaintiff was unable to produce tax receipt at once, when asked to do so. Thus, the defence could not avail him from liability.

Meanwhile, it is a trite law that the laid down procedure must be followed during and after the warrant is

60. Oteri v Okorodudu (1970) 1 ALL NLR page 194

61 An offence under section 255 of Local Government Law (Mid west)

executed. For example, the rule is that an arrested person is not to be handcuffed, unless it is considered necessary for safety of the person. The cause of of restraint must be told unless he is caught while doing the act. And once he is arrested, he should at once be taken to the lawful authority. Infact, it is now a constitutional provision [62] that he should be informed in the language he understands the reason of his arrest.

Importantly, whether police or a private citizen, the facts on the ground must indicate a prima facie case against the accused person. For example, the length of training and experience of the police should help him to make a good sense of judgement. He is not to be rushed or allow himself to be rushed in taking an irrational decision. He must not be guuilty of bad motive. Otherwise, the defence may not avail him from from liability. And in this case, he may be successfully sued for false imprisonment.

In the case of Gbajor v Ozunburegun [63] the defendant complained that the plaintiff had wilfully damaged his property. Five persons including the plaintiff were identified, and so they were arrested by the police. But, investigation showed that the plaintiff was innocent and he was therefore released. The plaintiff thereafter sued for false imprisonment. It was held that the arrest was

62 See Section 32 (3) of 1979 Constitution.

63 (1961) ALL NLR 856

done in the exercise of the police's independent judgement, and so the defendant cannot be held liable. Quashie-Idun C.J. observed:

> It is the duty as well as the right of every citizen to bring to the notice of the police either a report or a specific complaint against persons who are suspected or alleged to have committed offences. It is a matter for the police to decide what action they should take on the report or complaint. If the police decides on an action on their own initiative which is ultimately proved to have been detrimental to the person against whom the complaint or report ismade, the citizen is made cannot be held responsible. If the citizen were to be held responsible where he has not taken the law into his own hands, the duty of investigating and defecting crimes by the police would not only be extremely difficult, but efforts by the police would be abortive.

But in the case of Atta v Amoasi[64], the informant was held liable. This is because he lied that the plaintiff stole some bags of cocoa in his farm. Charges were then preferred, but later dismissed. The respondent now sued the appelant. It was observed that the appelant cannot say that the police use their own discretion in arresting the respondents. This is because he had done more than a mere report to the police. The court obserded as follows:

> He "not only laid the complaint but pressed charges, and insisted on action being taken----. He kept vigil, as it were, at the police station where the police respondents were confined and indulged in vituperative exchanges with the

64. (1976) 2 GLR 201

> respondents, persuading the police all the time to keep the respondents ------The facts-----show too close an involvement in the respondents' arrest and detention to admit of the appelant's innocent participation. 65

Therefore, the guiding principle is: Does the informant directed or authorised the arrest and detention? If no, there will be no basis for liability in an action for false imprisonment. And it will be immaterial that the informant knew the information to be false and deliberately set out the law in motion so as to implicate an innocent person. Therefore, in Danso v Oteng,[66] though, he knew that the complainy was false, yet he was not held liable. It was observed as follows:-

> -----entitled to say, as they do say, that they only placed the matter before the police for investigation. There is no conclusive evidence to show that they so influenced the (constables concerned) that (the later can be said to have) acted under their direction or authorisation, and therfore the------- defendants cannot be held responsible for the arrest and detention. 67

However, at times a lack of prove will still not affect liability. Therefore, in the case of Onwubiko v Okoroafor,[68] the court observed:

> If the defendant should make a report to the police, which was groundless to his knowledge, and the police, in consequence of such report arrest the plaintiff, the defendant cannot escape liability in an action for false imprisonment or malicious prosection

65. per Francois J.A. in Atta v Amoasi (Supra) at p. 212.
66. per Coussey p. 172 in Danso v Oteng (supra)
67. (1974) ESCLR 233 q at page 239
68. Per Araka J. in Onwubiko v Okoroaftor (supra)

> by saying that the police acted on their own initiative.

Furthermore, certain conducts of judicial officers[69] if committed or omitted during the course of their official duties can also be used as an exception to tortious action under this sub heading. For example, an aggrieved party who is dissatisfied of the conduct of a judge can take a procedure spelt out under the Nigerian constitution[70] instead of suing the judge in tort. Therefore, in the case of Sirros v Moore[71], it was held that a judge of a superior court of Record is not liable in tort for any judicial act performed by him within his jurisdiction, even though it was done out of malice.

The rational of this immunity has been founded on public policy, and also the need to protect judges from wanton attack and law suits. On this ground, Denning MR describe the basis as follows:

> Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belong to him. The words which he speaks are protected by an absolute privilege. The orders which he gives and the sentences which he imposes cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or actuated by envy or hatred and malice and all uncharitableness, he is not liable to an action. The remedy of the

69. See part I, Second Schedule of The 1979 constitution of many Judicial officers.

70. See 256 of 1979 constitution.

71. (1974) 2 ALL ER 776

> party aggrieved is to appeal to a court for habeas corpus, or a writ of error or certiorari or take some step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has prevented the course of justice, he can be punisjed in the criminal courts. That apart, however, a judge is not liable to an action for damages. 72a

The law above, even though a foreign one has now been part of statutory enactments in Nigeria.[72b] Thus, the decisions in Onitiri v Ojomo[72b] and Egbe v Adefarasin[73] tally with this law. And in both of the twocases, the provision of section 88 (1) High Court law of Lagos State, and section (1) Magistrate Court law which are pari materia in their wordings with section 83(1) and (2) District Court of Northern Nigeria, and section 115(1) and (2) High Court law of Northern Nigeria were examined and put into sharp focus.

First, in the case of Onitiri v Ojomo,[74] the plaintiff sued for damages against a magistrate who had detained him for h few hours in his court. In absolving the magistrate from tortious liability, the court remarked as follows:[75]

> ----Here in Nigeria sub section (1) of section 61 of cap 122 protects a

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72a The laws of Northern Nigeria (1963) Vol. II

72b At pages 781-782

73 21 NLR 19

74. (1985) 1 NWLR pt 3

75. Supra

> magistrate who acts in good faith outside the limits of his jurisdiction, whether he does so through a mistake of law or fact. 76

Added to this De Commarmond SPJ also observed as follows:-

> It is clear to me that the law giver intended that a magistrate should not be inhibited from doing his duty, or what he conceives to be his duty, by fear of being sued if he makes a mistake. This to my mind is a most important provision--------77

Secondly, in Egbe V Adefarasin,[78] the scope of the immunity of judges of superior courts was highlighted. Here, the claim of the plaintiff was dismissed as urged by the defendant on the ground that the defendant, being a judge is immuned in law from a civil suit. The plaintiff not satisfed with this decision, appealed to the Court of Appeal. In giving its judgement, Nnaemeka-Agu, J.C.A., gave a construction of section 88 (1) above, and which the other members of the court concurred with said:

> It is clear from the wording of the section that the judge is fully immune from liability from any act done or ordered to be done by him in the discharge of his judicial duty when acts within his jurisdiction when. He is also fully protected when he acts outside his jurisdiction ifhe believed, in good faith, that he was acting within his jurisdiction. It is only when he is acting outside the jurisdiction at time of the act which is called in question that he is not protected. The good or bad faith relates to his believe and not necessarily to his act.79

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76. Onitiri v. (Ojome (Supra) at p. 23 .....
77. (Supra)
78. (1985) I NWLR pt. 3 p. 564
79. Supra

On further appeal to the Supreme Court,this decision was affirmed; and the appeal dismissed with costs.

3.6.6 STATUTORY AUTHORITY

Under this sub heading, some certain statutory enactments can also be used as a defence to tortious liability. In other words, an unlawful act of a statutory authority or corporation may be justified in law so as to negate tortious liability if the enabling statute allows such tort.

But, before this defence can be raised successfully it must be shown that the tort was an inevitable result of performance of the act as allowed by the statute.

It must also be shown that every reasonable precaution consistent with the exercise of the statutory power has been taken so as to prevent the occurence. And the burden of prove to this lies on the statutory authority.

On this premise, this example illucidates this point. Therefore, if a local authority built an elective generating station and the fumes from it caused a destruction to the plaintiff's crops, a defence under this sub heading will only hold good if it can be proved that the engine is efficient and that all reasonable care had been taken in the light of current technical and scientific skill to prevent the commission ofthe tort.

Thus, in the case of Metropolitan Asylum District v Hill[80a] it was held that a general power to provide hospitals does not authorise the provision of a fever hospital in a populous place where it will be nuisance to the neighbours.

Again, in the case of Ajayi v The Electricity Corporation of Nigeria[80b], the plaintiff sued for nuisance and trespass caused on his land but lost. The argument of the plaintiff, at the trial, was that the construction of a high voltage transmission lines over his building constituted a grave danger to him and the occupiers.o In holding in favour of the defendant, the court observed that section 16 (1) (b) Electricity Corporation of Nigeria (cap 58) imposed on thedefendant a duty to establish, manage and work such electricity undertaking as they deemed it expedient to establish in the public interest that the transmission was done to serve public interest, and that it was done under the powers conferred on the defendants under section 16(2) (b) of the Act. And that the defendants had not acted unreasonably or negligently to the plaintiff.

Moreover,the defence was also raised with success inthe case of Voughan v Taff Rly.[81] Here the defendant company was empowered under the law to use steam locomotives. It

80a. (1891) 6 APP. cas 193

80b. (1961) 1 NWLR 107

81. (1860) SH & N 679 (Engine Spark case)

was held that it cannot be held liable for a fire caused by escaping sparks, it being proved that the engines were constructed with all due care and skill and that it was impossible wholly to prevent the escape of sparks.

On a final note, the defence under this sub heading may be an absolute one,[82] regardless of proving the precautions, if the authority can show that the enabling law/statutory act authorised it to disregard it.

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82. STREET, Harry - Street on Torts (London) Butterworths & Co (Publishers) Ltd.(1983) at p. 8

CHAPTER 4

4.0 DEFENCES TO TORT OF DEFAMATION

Defamation is a tort of a false and derogatory statement in respect of another person without a lawful justification. The statement may have lowered the plaintiff's reputation in the eyes of the public. It may have created hatred, contempt or ridicule the palintiff. At times, the publication may have caused people to shun or avoid the plaintiff. Infact, it is possible that the statement affected him in his trade or profession, or even affected him financially.

Like other tortious actions, a tort of defamation is actionable at the instance of the victim, and to which the tortfeasor will be liable in a court of law. Also like other tortious wrongs, there are legal defences which if raised and upheld will serve as negation of liability.

As a matter of fact, the defences[1] to be examined under this chapter are peculiar and common only to tort of defamation. This is unlike other defences examined earlier which cut across other tortious actions.

Against this background, it is the purpose of this chapter to enumerate and examine these defences. While some of these defences serve as total negation of liability,

1. Apology, Fair Comment, Privilege etc.

others serve as partial defences. Still, others are only to the effect of mitigation of liability. Such defences include :

1.4 JUSTIFICATION/TRUTH

It is a trite law that a defamatory statement is false. This falsity is a presumption of law which is in favour of the plaintiff.[2] So, he need not prove that the statement is false. In the case, the plaintiff sued a on a publication which reads that the plaintiffs were handed over to a police because of an attempt to bribe one Mr. Eborieme with the sum of £21. It was held amongst tothers that a plead of justification, the burden is on the defendants to prove truth of the words in their natural and ordinary meaning.

The rational of this defence is rooted on the old common law rule, and also on an ordinary sense of justice. Therefore, the general principle of law in this regard is that the law will not allow a man to recover damages in respect of an injury to a character which he does not, or ought not to possess[3]. In Onwuchekwa v Onovo,[4] the issue was whether a statement that the plaintiff was a lunatic and a proper subject of confinement was defamatory to the plaintiff or not. It was on evidence that

2. Akurefe v The Sketch Publishing Co Ltd (1971) 1 UILR 13 at p. 16

3. M'Pherson v Daniels (1829) 10 B&C 263 at p. 272, per Little dale, J.

4. (1974) 12 CCHCJ 1919

the plaintiff was "very irritable and in a fighting mood, that she felt victimised and was very suspicious, aggressive and paranoid". This piece of evidence and others which showed an abnormal behaviour of the plaintiff was held sufficient to establish a defence of justification.-

Kassim, J. observed as follows:-

> The law will not allow a man to recover damages for injury to a character he is not entitled to bear. For example, if the allegation in a libel is that the plaintiff is addictedt to drink, it is admissible for the defendant to show in justification thereof that on the day succeeding the day of the libel he-. (the plaintiff) was suffering from delirium tremens."

However, as a negation to a presumption of falsity,[5] it is the duty of the defendant to show through evidence that the statement is truth in substance and in fact. In discharging this duty, all relevant facts must be strictly proved. This is a requirement of the old common law rule which provides that the defendant must justify everything that is contained in the publication. For example, calling a person as habitual liar must be supported by some repeated acts. Again, if a person is referred to as a theief because he has stolen some money, that assertion cannot be justified by proving a theft of another item, if the item differs from money. The defence will also fail if five distinct defamatory statements are made, but only three were proved. Although, this may be relevant for the purpose of mitigation when award of damages will be made.

5. Akurefe vs Sketch (Supra)

It is truism that this rrequirement of the common law rule has occasioned a substantial injustice because it has affected the defence not to be pleaded successfully. To avert this injustice, the Defamatory Act of 1961[6] has now been enacted. This Act, an equivalent provisions in all the states of the federation are to the effect that the defence will not fail on the ground of inaccuracies in the defamatory publication.

For example, S.7, The Law of Defamation Law of 1961 (Lagos)[7] provides:

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

Therefore, by the effect of this law, the defendants is no longer required to prove every word of the defamatory publication. Thus, it suffices if he can prove the main charge or a part that contain the gist of the defamation. In the case of Alexander v North Eastern Railway Co,[8] an attempt to argue that the material fact is

6. 1961, Laws of the Federation of Nigeria.

7. Cap 34, Laws of Lagos State; with the exception of Northern States which still apply the old common law rule, see the identical provisions of the Defamation Law (Eastern states), cap. 33 and Defamation Law (Western States) cap. 32, s.11

8. (1865) 122 E.R. 1221

inconsistent with the gist and so the defence should be rejected was rejected. In the case, the defendant published a notice that the plaintiff who rode their train without a ticket had been sentenced to a fine of £1 with an option of three weeks' imprisonment in default instead of £1 and an option of two weeks imprisonment. It was held that the inaccuracy as to length of alternative was not the gist. Thus, the defence succeeded.

Again, in the case of Stephen v Atugebehunu,[9] the main gist of the publication was that the plaintiff had spent official hours of his employement for doing work on a private car in a private workshop. Evidence on both sides revealed this. The plea was therefore accepted, and the plaintiff's claim was dismissed accordingly.

However, if Mr A repeats the statement already made by the tortfeasor, then, Mr. A. must prove that the statement was true. It will not be sufficient to only prove that the statement was actually made. The law in this regard is that:

> "I tell the tale as it was told to me" is not a defence.[10]

In another development, it should be noted that under the old common law rule, truth was not a defence to a change of criminal defamation. But, under the present criminal law rule, the guiding principle is:

9. (1971) 1 UILR 101

10. HEUSTON, R.F.U.: Salmond on the law of Torts Sweet and Maxwell, (London), p. 159.

"the greater the truth, the greater the libel". But, this has now been modified[11]. Thus, the law now is truth shall be a defence if the publication was for a public benefit.

Meanwhile, it is the law that an acquittal of the accused of the charge may not necessarily affect the defendant from raising the defence of justification. Although, it may be very difficult for the defendant to establish the defence. This is because the law is that a record of plaintiff's acquittal is not a good evidence of his innocence so as to meet the requirement of the plea of justification.[12] On the same token, it can also be said that a previous conviction in a criminal trial is irrelevant in a subsequent civil proceedings. Thus, an evidence can't be given about it.

Although, this law had since been changed in England.[13] In England therefore, a previous conviction has the effect of creating a rebutaable presumption, and unless this is rebutted, the court is bound to accept as a good piece of evidence.

4.2 FAIR COMMENT

This defence is based on the fact that the alleged defamatory statement was a fair comment on an issue that a is at a great public interest. In other words, it is a defence that the words complained of are fairly commented

11. See S. 377 cc and S. 391 (2) (1) PC
12. See Akurefe v Sketch (Supra)
13. S. 11, Civil Evidence Act of 1968

upon i.e. "something which is, or can resonably be inferred to be a deduction, inference, conclusion, criticism, remark or observation madein good faith on a subject of public interest."[14]

As a matter of practice and procedure, the defence is usually pleaded as follows:-

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

In the light of this, once it is done in the above form, it means that the facts on which the defendant based his comment are true. Infact, it also helped the public to draw their own inference or deduction from the facts stated in the alleged defamatory statement.

A defence of fair comment is rooted on a long recognition which permits and encourages a critical views and opinions to be expressed upon. In the early 18thc, Lord Ellenborough summed up the need of this defence in the following words:-

> "Liberty of criticism must be allowed, or we should have neither purity of taste nor morals. Fair discussion is essentially necessary to the truth ofhistory and the advancement of science. That publication, therefore, I should never consider as a libel which has for its object not to injure the reputation of any individual but to correct misrepresentations of facts, to refute sophisticated, to expose

14. FLEMING, J.G.: The Law of Torts (Law Book Co. Ltd), (London), p. 528

> a vicious taste in literature or to censure what is hostile to morality".15

It promotes a need and a desire to protect and preserve the fundamental right to freedom of expression. It recognises the need to comment fairly within the legal definition on all issues that may be of a public concern and benefit.

Meanwhile, a successful plead of the defence is subject to the following conditions:

4.2.1 Comment/Opinion.

A matter commented upon must be an opinion, but it should not be a statement of fact. This is because if the matter commented upon is a statement of fact, as opposed to an ordinary opinion, then the defence of fair comment will not be upheld. In the case of Nthenda v Alade,[16] a defamatory statement was made of a University lecturer that he is engaged in an immoral association with a female student. The defence of fair comment failed because if was clear that:

> "the whole of the publication compalined of, from its caption to the last sentence, contains salient and plain statments of fact and there is not an iota of comment".[17]

Although, it must be pointed out that it is always very difficult to differentiate between a fact, and a comment/ opinion. In the case of Bassey v Mid West Newspapers Corporation and Agun,[18] Okara J. raised the problem involved

15. See Tabart V Tipper (1888) 1 Camp 353, 10 R.R. 698

16. (1974) 4 ECSLR 470

17. Per Bello SPJ at 479 in Nthenda v Alade (Supra)

18. New Nigerian, 14th/13/78 at p. 10

as was also noted in the case of Kingsley v Foot,[19] quoting from;[20]

> "---sometimes, however,-----it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some man has really done and then asserts; "that such conduct is disgraceful", this is merely the expression of his opinion, his comments on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore what would otherwise would have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of a disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference willbe treated as an allegation of fact. But it he sets out the fact correctly and then gives his inference from these facts such inference from these facts such inference, will as a rule, be deemed a comment. But even in this case a writer must be careful tostate the inference as an inference and not to assert it as a new and independent fact; otherwise his inference will become something more than a comment and he may be driven to justify itas an allegation of fact".

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19. (1952) Ac 345 at p. 356

20. Odgers on libel and Slanders (6th ed) 1929, at p.166

In the case of Bardi v Maurice,[21] the defendant wrote of the plaintiff; His "tenure as Selondi Tokaradi Ibo Head was suspicious and inimical to the welfare and interests of the Ibos at large". The court observed that this is a statement of fact, but not a comment or a criticism because the words "carried the meaning that the plaintiff was corrupt and dishonourable", and "to allege a disreputable motive, as was done here, is to make an allegation of fact".[22] Therefore, the defence failed.

Against this backdrop, it is therefore of essence that the facts should be set out, and then a comment is made. But, a fact upon which a comment is made upon cannot be presumed. This is because, the defence, if it is raised, cannot be upheld. Infact, comments need to be differentiated from facts so that they are not mixed up. In thisc case, the readers will have the opportunity to draw their own conclusion as to what is really a comment, and what is really a fact.

4.2.2 FACTS UPON WHICH THE COMMENT IS BASED MUST BE TRUE.

It is a trite law that a comment must be based upon true, and facts that existed as at the time the comment was made. As regards this requirement, Winfield and Jolowicz, at page 305 observed:

21. (1954) 14 WACA 414

22. Bardi v Maurice (supra) at p. 45

> "You cannot invent untrue facts about a man and then comment on them". 23

In the case of Bakare v Olumide,[24] Adedipe, C.J. commented on the requirement as follows:-

> "It is a defence to an action for libel or slander that the word complained of are fair comment on a matter of public interest, but thedefendant must prove that the facts on which the comment is founded are true and that the comment on these facts is fair. If the facts upon which the comment purports to be made did not exist, the defence of fair comment must fail. Comments based on matters of opinion only which may or may not be true equally affords no defence."

Basically, an essence of a dfeence of "truth" is to justify an allegation of fact, and also to establish that the comment is fair. In African Press Ltd v Ikejiani,[25] the publication that the plaintiff is "dishonest", "fraudulent", and a "quack" was based on a fact that the plaintiff was kicked out of the University; the degree being possessed, through a fake means. The defence failed because the main fact upon which the comment was based (plaintiff's degree in medicine) was false.

Similarly, in the case of Enahoro v Associated Newspapers of Nig Ltd,[26] the alleged defamation was a publication of the proceedings of House of Assembly, But, a comparison of the proceedings of that day differs from the publication. It was found that the publication was

23. HEUSTON, R.F.U.t Op.cit., p. 172
24. (1969) 2 ALL NLR 324 at 332
25. (1953) 14 WACA
26. (1960) WNLR 219

grossly inadequate. Accordingly, it was held that the facts must be accurately stated, and because of this failure, the defence was rejected.

Under the common law rule, facts set out in the publication must be proved as true. Thus, a failure to justify the statement, even though unimportant will defeat the defence. But, application of this rule has caused untold hardships to the defendants. Thus, in an attempt to mitigate this suffering, Defamation Act of 1961[27] was evolved. By operation ofthis law, a defence of fair comment will not fail only on a mere failure of the defendant to prove every allegation of fact provided his expression of opinion is a fair comment, regard been put to thefacts alleged and proved.

In the case of African Newspapers of Nig Ltd v. Coker,[28] the trial court observed as follows:

> "In the defence of fair comment, the whole of the facts must be correctly and fairly stated, or the premise upon which the comment is based must be the whole truth. Anything short of these would destroy the defence of fair comment".[29]

4.2.3 THE COMMENTS MUST BE FAIR AND HONESTLY MADE.

In this regard, the comment must be free of bias. But, it will be immaterial that the statement is violent or

27. See S. 8 Defamation Laws, cap 34 laws of Lagos State.

28. (1973) 5SC 257 at 274

29. Per Udo Udoma J.S.C. in African Newspaper of Nig Ltd. (supra)

exaggerated provided it was honestly made. A guiding rule is not whether a reasonable man would hold and made such expression. Rather, has the defendant made his real view? In other words, "would any honest 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 criticised"[30]

In the case of Slim v Daily Telegraph Ltd,[31] Lord Denning remarked as follows:-

> "If he was an honest man expressing his genuine opinion on a subject of public interest, no matter that his words conveyed derogatory inputations:no matter that his opinion was wrong or exagerrated or prejudiced; and no matter that it was badly expressed so that people read all sorts of innuendes into it; nevertheless he has a good defence of fair comment. His honesty is the cardinat test. He must honestly express his real view. So long as he does this, he has nothing to fear, even though other people may read more into it." 32

However, the defence is not to be used in a way to make attack on a person's moral character on the pretext that the public office he holds needs a public comment. In other words, a comment is not to be used as a way o to make personal attack. Thus, an immputation of corrupt or dishonourable motice is outside the defence unless the defendant shows that he honestly believe the inputation

30. (1968) 1 ALL ER 497 at page 503

31. (1968) 2 Q B 157 at page 170

32. per Lord Denning in the case of Slim v Daily Telegraph Ltd (Supra).

to be true, and that he has personal foundation for the believe.

In the case of Campbell v Spottish Woode,[33] it was published that the plaintiff who seeks to propagate the gospel amongt the Chines, was, in reality an impostor (inspired by motives of pecuniary gains) trying to increase the sales of his newspapers. It was held that such comment was outside the realm of a criticism. The Court observed:

> "It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motives by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen - even though it opens to ridicule disapprobation - base, sordid dishonest and wicked motives, unless there is so much ground for the motivation that a jury shall be of opinion not only that you may have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause"34

4.2.4 EVIDENCE OF MALICE

It is a general rule of law that an evidence of malice defeats a defence of fair comment. As regards this issue, Salmond and Heuston[35] remarked as follows:- An objective comment and a prima facie fair one may be unfair if made with malice i.e. Is the comment made for aim of hurting, or enlightening the public? If the sole

33. (1863) 32 L.J. Q B 185

34. per Cockburn C.J. in Campbell v Spottish Woode (Supra) at page 199

35. HEUSTON, R.F.U. Opt Cit P. 72

aim is to hurt, it is malice.

Meanwhile, malice has been defined as "any corrupt motive or wrong motive", or "making use of the occasion for some indirect purpose".[36]

Evidence of malice are many. An example is personal hostility at trial or evidence of previous dealings which shows a desire for revenge. In the case of Ebuwa v United Africa Co Ltd,[37] the plaintiff was accused of unfair and improper conduct in the management of the plaintiff's bulk oil plant. Evidence of malice was shown through the following facts; one of the defendants who were in compeitition with the plaintiffs in the buying of oil had tried to exceed his bulk allocation, but the plaintiffs had failed in this attempt and so reported the case to the Department of Marketing and Exports. Again, it was shown that the defendants had failed to persuade the department to introduce a system of allocation given the defendants a preferential treatment.

Similarly, in African Newspapers v Coker,[38] evidence of malice was shown as the defendants continuous campaign for investigation into acts of corruption by the plaintiff, thus is inspite of existed report already made and which had

36. Bakare V. Ibrahim (Supra)

37. (1955) 14 WACA 56, at page 60

38. (1973) 1 NMLR 386

freed the plaintiff. "Such persistent campaign would inferentially be evidence of malice, sufficient to destroy the defence of fair comment".[39]

4.2.5 PUBLIC INTEREST

The subject matter been commented upon must be of a high public interest. For example, it must be "such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on or what may happen to them or to others".[40] Therefore, matters on an administration of justice, governmental affairs, public institution etc are matters which the general public has a legitimate interest.

Against this background, if the plaintiff is a public officer, then he should expect a public attack from the way he performs his duties.

In the case of Saraki v Soleye,[41] the plaintiff argued that the subject matter of dispute did not touch a public interest. But, rejecting this argument, the court held that "the conduct of a private venture which affects and relates to a whole community and its interests, and which affects public health generally, is a matter of public interest".

Similarly, in the case of Bassey,[42] it was observed

39. African Newspapers vs Coker (Supra) at page 396

40. Per Lord Denning in London Artists Ltd v Littler (1969) 375 at 391.

41. (1972) 2 UILR 271 at page 282

42. (supra)

that, "judges being persons holding high public offices, their appointments and removals must be of public interest. An individual would have a right to comment on such appointments and removals, and therefore a newspaper can also comment on them, the right of the press being measurable only in terms of the rights of the individual in society".

4:3 PRIVILEGE

A defence of privilege is a right or immunity which is accorded to a person by virtue of his office or community. The general rule of law in this regard is that a defamatory statement is a tortious wrong to which liability is attached. Yet, a privileged statement (absolute or qualified) eventhough defamatory in nature negate liability. It is premised onthe fact that one should write with an absolute freedom without a fear of liability.

The defence can be seen in two ways namely:-

4.3.1 ABSOLUTE PRIVILEGE

This is a complete defence, no matter how untrue, or malicious the statement was made. The rational of this type of defence is because of the high value and a high public interest that is attached to the subject matter of discussion which is now alleged as been defamatory in nature. Instances of the defence include the following

4.3.2 PARLIAMENTARY PROCEEDING:

While a parliament is in session, any statement made by a member of the state or federal legislator is covered by a defence of absolute privilege. In this-regard, such member will be immuned from a legal action. In the case of Church of Scientology of California v Johnston Smith,[43] the complaint was that the defendant had defamed the plaintiff at a Television interview. The defendant raised a defence of fair comment and privilege The plaintiff countered this defence by raising an existence of malice. He attempted to tender some extracts from Hansard of what the defendant had said and done in the parliament, Browne, J. observed that it was not open to either party to a directly or indirectly into anything said or done in the parliament.

Meanwhile, it should be pointed out that the defence also covers statements made in a debate or in a committee or made by witnesses to give evidence. Although, this is subject to some qualifications. For example, the defence will not protect a witness, who while giving evidence, use this opportunity, by making no reference to subject matter of discussion, but to other matters with a view to defame the character of the plaintiff. In this regard, he will be held liable.

43. Supra

4.3.3 JUDICIAL PROCEEDINGS:

A statement made with reference to, and in the course of judicial trial is also covered undder this defence. The defence extends to judges, witnesses, solicitors, parties e.t.c. Similarly, it covers trials and pre trial documents, pleadings, affidavits, and/or communication made between parties and their solicitors before trial. A case in point is that of Foley v Asfour,[44] where it was observed that an affidavit sworn with reference to and in the course of judicial proceedings was also privileged. Wheeler, J. went on;

> "I have no hesitation in concluding that what was said in the paragraph in the affidavit which has provoked the present action was said, to use the language of Sir Baliol Brett, M.R. in Minister v Lamb,[45] "with reference to and in the course of an inquiry which was taking place". As Brett, M.R. went on to point out in a passage in his judgement which I applied in Adene v. Oyeyemi[46] once that is established, it matters not whether it was an irrelevant statement or a statement actuated by malice, no action can be founded upon it".47

Similarly, in the case of Adene v. Oyeyemi,[48] it was an affidavit sworn for use in inter-locutory proceedings is also covered as defence of absolute privilege.

44. (1970) NNLR 74

45. (1883) 11 QBD 588 page 601

46. (1969) NNLR 37

47. (1970) NNLR 74

48. (Supra)

Meanwhile, the defence only covers statements made before a competent law court, and to other tribunals that are recognised by law. For example, courts marital, disciplinary committees, provided they exercise judicial but not a pirely administrative functions. Thus, in the case of Majekodunmi v.Olapade,[49] it was observed that defamatory statements made to an anti-corruption officer were not covered by the defence, because the function is that of an administrative type, but not a judicial duty. It was also observed in the case of Saraki vs Soleye[50] that certain defamatory allegations made against a medical doctor and published to Nigerian Medical Council were outside the scope of the defence because "it is true to say that the work of the Council is in the main administrative even though it is clear that it has a responsibility for receiving complaints concerning medical and dental practitioners----. It seems to me that the Nigerian Medical Council has no quasi judicial foundation."[51]

Similarly, Lord Atkin in the case of O'Connor v. Parkinson[52] made the following observations:

> "In their Lordships opinion the law on the subject was accurately stated by Lord Esher in Royal Acquarium vs Parkinson, 53 where he says the principle applies wherever there is an authorised

49. (1963) WNLR 12

50. (Supra)

51. (Supra) pages 280-281

52. (1935) Ac 76 at page 81

53. (1892) 1QB 431-432

> inquiry which, though not before a court of justice, is before a tribunal which has similar attributes----. The doctrine has never been extended further than to courts of justice and tribunals acting in a manner similar to that in which such courts act."

Apart from tribunals, the defence does not also cover domestic forum which derive its authority from consent of the parties. This is because such forum cannot be regarded as judicial tribunal[54] for the purpose of the defence. Also, a defamatory statement by witnesses before a village gathering for the purpose of trial of a theft case and then to apportion a punishment cannot be said to be a privilege statement.[55] This is because it is an illegal court, and to liability will follow accordingly.

4.3.4 STATE COMMUNICATION.

A defamatory communication made by ministers, ambassadors and other high ranking officer of state is privilege and so libaility to tortious liability will not necessaryly follow, provided such statement is made within the course of their duties. The basis of justification for this is not for the benefit of the official concerned, but premised on: "All judges have said that the ground of existence is the injury to the public good which

54. Omenwa v. Okonkwo (1963)7 ENLR 189. per Kaine J.

55. See Agoaka V. Ejiofu (1972) 2 ESCLR at page 10?

would result if such an enquiry were allowed as would be necessary if the action were maintainable. An inquiry would take away from the public official his freedom of action in a matter concerning the public welfare because he would have to appear before a jury and be cross examined as to his conduct. That would be contrary to the interest of the public, and the privilege is, therefore, absolute."[56]

Although, it must be pointed out at this juncture to observe that the extent of the application of this defence, and the type of categories of the staff is with doubt. In Key v Kofi,[57] it was remarked as follows:-

> "Although Chatterton v Sec of State for India is authority for the proposition that a document of state is one which cannot form the subject matter of an action, because on the ground of public policy, the court cannot allow it to be given in evidence, or secondary evidence of it to be given, it is no authority for the proposition that a letter written in the circumstance here, objecting to the plaintiff's election to the native authority, must be regarded as a "state matter" and as such absolutely privileged."

Similarly, a similar remark was observed in the case of Gibbons v Duffel[58] as follows:

> "Absolute immunity from the consequences of defamation is so serious a derogation from the citizen's right to the state's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cast across this elementary right of civic protection, and any extention of the

56. Per Lord Esher M.R. in Chatterton V. Sec of State for India (1895-6) ALL ER 1035.

57. (1954) 14 WACA 480, Per Foster Sutton.

58. (1932) 47 CLR 520 at page 534

> area of immunity must be viewed with the most jealous suspicion until its necessity is demonstrated".

4.3.5 REPORTS OF JUDICIAL PROCEEDING.

Under the provision of defamation Act, 1961, "absolute privilege" is accorded to a fair and accurate report of judicial proceedings if published contemporaneously in a newspaper or broadcast.[59]

However, this law is subject to a fact that such publication must be fair and accurate, but not indencent. In Omo-Osagie v Okutubo, Daily Times of Nig Ltd,[60] the publication reads: "C.J. tells a teacher, "you are a bad woman". It was argued by the defence that this is a fair and accurate report of proceedings which the public was interested. The court held that, no doubt newspaper has a right to publish either verbation or abridged a report of what goes on in a court of justice, but must be done r fairly and honourably so as to convey a just impression of what took place. But, because it was unfairly reported with many inaccuracies, the defence was rejected.

4.4 QUALIFIED PRIVILEGE

Unlike, in a defence of absolute privilege, where the defence operates to negate total liability, a defence of qualified privilege operates only on a perfection of

59. See S. 15 Defamation Law of the State Laws of Oyo, Ogun, Bendel and Ondo states. But, in Anambra, Imo and Abuja States, the sections does not confer absolute privilege.

60. (1969) 2 ALL NLR 175

certain conditions or requirements. Although, the higher desire in the two kinds is to protect the common convenience and a welfare of the society. However, a proof of an existence of malice is used to differentiate the extent of operation of the two defences. While a proof of malice in the publication will not affect the former, but a prove of it will affect the latter.

The justification of a qualified privilege is to let the public know what is going on in public occasions. For example, public trials. But if it so happens that the aim of publication is for an improper purpose, then the defence will be lost. And in this context, an improper purpose has been used as a synonym to malice. In Oweh v Amalgamated Press of Nig Ltd[61], it was observed as follows:-

> Actual malice does not necessarily mean personal spite or ill will, and it may exist even though there be no spite or desire for vengeance in the ordinary sense. Any indirect motive other than a sense of duty is what h the law calls malice. Malice means making use of the ocassion for some indirect purpose. 62

In the case above, the aim of publication was to damage the political advancement of the plaintiff an act of "indirect motive, other than a sense of duty". Therefore, the defence failed accordingly.

61. (1975) LLR 6

62. per Abbot, J. at page 9 (Supra)

Similarly, in the case of Okon v The COR Advocate Ltd,[63] the aim of publication was to discredit the plaintiff in his office as a principal of a secondary school. In view of this, the defence was rejected on the basis of an improper motive malice.

Meanwhile, occasions of qualified privilege can be seen as follows. In the case of Adam v Ward,[64] a guide was given as:

> ---- a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made has a corresponding interest or duty to receive it. The reciprocity is essential. 65

Meanwhile, with the above quotation as a guide, such occasion can now be seen under the following headings:

4.4.1 STATEMENT MADE IN THE PERFORMANCE OF A DUTY.

It is important that a duty, whether moral, legal or social must exist before saying it to a third party, and that person must have a corresponding duty to receive it. In the case of Ayoola v Olajure,[66] on a request, the defendant made a statement as to the fitness and competency of the plaintiff in her work place. The reply concluded as follows:-

63. (1960) 5 ENLR 21
64. (1917) AC 309 at 334
65. per Lord Atkinson at page 334 in Adam v Ward (supra)
66. (1977) 3 CCHJ 315

> "We therefore doubt is she would be an asset to your company".

In upholding the defence, Dosumu, J. observed as follows:-

> I am not in doubt that the said letter is privileged in the circumstance that (the defendants) are under a moral duty to answer the inquiries made of it by a party who has a legitimate interest in the information sought---- It is so manifestly for the advantage of society that those who are about to employ a servant should be enabled to learn what his previous conduct has been, that it may be deemed the moral duty of the former employer to answer enquiries to the best of his belief. Such privilege is only destroyed by proof of express malice--- On the whole, I hold that no express malice is proved and the defendants are entitled to the verdict of the court 67

The defence also extends to a legal duty. For example, a duty to report a commission of crime to a police. However, this does not extend to cover information given by volunteers, "unless there is such a confidential or other relationship between the parties as to create a duty to speak without being asked"[68]

Although, there seems to be some exceptions to this rule. Therefore, in the case of Economides v Thomopulos,[69a] it was held that a letter sent by a company to an Assistant Commissioner of Income Tax shows that the plaintiff, a former staff of the company had

67. Ayoola v Olajure (Supra)

68. HEUSTON, R.F.U: Op. cit, at p. 166

69a (1956) NLR 7 at page 11

been found guilty of tax evasion, was privileged; even though there is no such request for the information.

Meanwhile, under a social duty, a parent may warn her daughter as to character of her suitor. The guiding rule, in this case is :will a resonable right minded person not have recognised a duty to communicate the duty. This is because o it will not be a defence that the defendant believed honestly and in good faith that he has such duty.

4.4.2 A STATEMENT MADE IN SELF DEFENCE:

By way of an example, this may be a statement made in response to an attack caused to his reputation or property. In Osborn v Boutler,[69b] a publican made a complaint that the beer supplied to him was of bad, quality. The brewery, in answer said that they heard it was because it was watered down by the publican. The defence was upheld because the statement was made in defence of the defendants own property and reputation. Although, this defence is to be limited to the charge and relate it only to it, but issues not related to it are to be avoided. Therefore, in Majekodunmi v Olapade,[70] unrelated and unreported matters were brought in Duffus, J. observed

> "a person cannot---in his defence charge his accuser with offences unconnected with and not relevant to his defence of the charge against himself".

69b (1930) 2 K.B. 226
70. (supra)

4.4.3a STATEMENT MADE BETWEEN PARTIES HAVING A COMMON INTEREST:

For example, where it is made by Mr. A to Mr. B and it is defamatory of Mr. C. In this regard, it will be a defence if Mr. A and Mr. B have a common interest in the subject matter of discussion. For instance, if an insurance company writes a policy holder warning him not to deal with a former agent of the company.[71] It may also happen in a situation where an auctioneer writes other auctioneers that a person has bought goods at an auction and received them without paying.[72] At times, it may also occur where a tenant made a complaint against other tenants and made it to the landlord. Although, such mutual interest must be "a real and direct personal trade, business or social concern, it must be something more than "mere vulgar curiosity or officious meddling in the concern of others".[73]

4.4.3b A STATEMENT MADE TO A PROPER AUTHORITY FOR REDRESS ON A PUBLIC OR PRIVATE GRIEVANCE

In the case of Ajala V Showunmi,[74] Dosunmu, J. cited with approval the following passage from Gatley. It runs:

71. Neville V. Fine Art and General Ins. Coy (1897) AC 68

72. See Boston V. Bagshaw (1966) I WLR 1126

73. HEUSTON, R.F.U: Opt. Cit P. 326

74. (1977) 1 CCHCJ 25

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

Against this background, in the case of Dikey V Odeniyi,[75] the defence was upheld because the Chairman of Education Committee of Muslim Dis rict Council was the proper authority to whom a public grievance should be addressed to. Similarly, in the case of Saraki V. Soleye,[76] a letter from the Permanent Secretary, Ministry of Health and Social Welfare Kwara State, to the Nigeria Medical Council about malpractice in the plaintiff's hospital was held alright because the issue was of public interest; so the Council has an investigatory power, and that the defendant had a duty to make the communication.

4.4.4 FAIR AND ACCURATE REPORTS OF A PROCEEDING IN THE LEGISLATURE.

In this regard, once it is made in this way, such publication will be covered by the law. But this will be subject to a qualification that there should not be an existence of malice. The justification of the defence is that an advantage of publicity to the society outweigh

75. (1960) WNLR 102
76. Supra
77. (Supra)

any private injury that may result from the alleged publication. In the case of Oweh V Amalgamated,[78] because what was published was different from what was ultered in the Assembly, the defence could not avail the defendant.

In an attempt to give a standard of measure, an what is fair and accurate, Abbot, J. gave the following as aguide;

> "It is not necessary that it should be verbati , an abridged or condensed report will be privileged, provided it gives a correct impression of what took place. It is sufficient to publish a fair summarised account. If the whole report is a substantially accurate account of what took place, the fact that there are a few slight inaccuracies or omissions is immaterial. But where the inaccuracy is of a substantial kind, the report as not privileged though the publisher exercised reasonable care and deligence in endeavouring to ascertain the facts, and though the mistake was an honest mistake---It is clear that a report of parliamentary proceedings which states that a speaker said things which were not said at all is not a fair accurate report". 79

4.4.5 JUDICIAL PROCEEDINGS.

As a matter of fact, all the requirements noted above also apply under this defence i.e. A requirement of accurate and fair report. In the case of Omo-Osagie V Okutubo,[80] it was observed that since the caption in the newspaper is different from what the C.J. ultered, the defence cannot be upheld because it was not fair and

78. Supra
79. Oweh v Amagalgamated (supra)
80. Supra

accurate. The court also observed amongst other things:

> "---publication must be done fairly and honourably so as to convey a just impression of what had transpired--- There can be no doubt that the report ------is not only grossly inaccurate, it is most unfair and cannot be said to have been done fairly or honourably".

The court went further:

> "----To my mind it is not a fair and accurate report to attribute words such as "you are a bad woman" to the judge when he never said these words or even words which were in anyway to these".

In the case of Bello V Oyebola,[81b] it was reported that the plaintiff was asked to be detained for questioning. The court held that the defence cannot be upheld because the magistrate did not utter these words. Rather, it was only a further inquiry into the matter that was directed.

4.4.6 PRIVILEGED STATEMENTS UNDER THE DEFAMATION.[82]

By operation of these laws, some statements have been itemised as privileged if published in a newspaper. These statements are of two parts. Part I are of statements which if published, there is no requirement of an explanation or contradiction from the defendant. But, part II are used only with a qualification that they are subject

81a Per Adefarasin J. at page 179 (1977) ICCHCJ 21
81b (1977) 1CCHCJ 21
82. See Defamation Law 1961) cap 34, S.9) Lagos State Defamation Law of Eastern States (cap 33, S. 10) Defamation Law of Western States (cap 32, S.14)

to explanation or contradiction.

Under part I, the defence will be upheld once the publication is fair, and accurate, and it was not done with malice

4.5 UNINTENTIONAL AND INNOCENT DISSEMINATION:-

In an action for libel, the general rule is that it is no defence that the defendant did not intend to injure or defame the plaintiff, or that t he was not aware of the existence of such a person.[83] The law propounded in the case of Cassidy V Daily Newspaper Ltd[84] is to the effect that a liability for a tort of libel does not depend on the intention of the defendant. Although, this law is with exceptions, namely:-

4.5.1 SEE S. 6 DEFAMATION ACT OF 1961.

Under this Act, the defendant will escape liability if he can show that publication was done innocently, and then be prepared to make an offer of amends. This is then accompanied by an affidavit, stating the facts relied on, and that the alleged publication was done innocently.

Therefore, as soon as this is done and the plaintiff accepts the offer, then, there will be no proceeding again. But if there is an action pending already, then it will be discontinued henceforth.

But, before the defendant escapes, liability, he must satisfy two conditions:

83. See Bakare v. Olumide (supra) at p. 333

84. (1929) ALL ER 117

4.5.2 That he did not intend to publish it of the plaintiff, and that he did not know of the circumstances by which they might have been understood to be defamatory of the plaintiff.

4.5.3 That the words were not defamatory on their face, and that the defendant did not know the circumstances by which they may be understood to be defamatory of the plaintiff.

Meanwhile, as a further condition, the defendant must investigate if (i) and (ii) above show that a reasonable care and dilligent is taken in relation to the alleged publication.

4.6 The exception here operates to cater for those who take a subordinate part in the dissemination of the publication e.g. by way of a sale, distribution or handing over.

The case of Emmens V Pottle [85] is very illustrative in this regard. In the case, the defendant, a vendor sold a libelious copies of newspapers. It was found out that he did not know the libellious content. No negligent was proved on his part. Neither did he know that it is likely to contained such statement. The court observed:

> "---The defendants did not compose the libel on the plaintiff, they did not write it or print it, they only disseminated that which contained the libel----

85. (1885) 16 QBD 354

> The defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known it, having used reasonable care----I think the defendants are not liable".86

Similarly, in the case of Awolowo v Kingsway,[87] the court alsohas this to say:

> "----where is there anything as there was in Emmens v Pottle,[88] to the effect that it was not by b negligence on the part of both defendants that they did not know that there was a libel----? In my judgements, both questions have to be answered adversely to both defendants-----the burden they have both failed to discharge. I am unable to find that they were innocent disseminators. 89

4.7 CONSENT

A defence of consent, generally, operates to negate liability to tortious wrongs. The justification is that a person cannot be heard to complain of a wrong he has freely and genuinely consented to.

Therefore, a person who has consented to a publication of a defamatory statement cannot thereafter seek for redress of the wrong again. But before the defence succeeds, the defendant must prove that the plaintiff expressly or impliedly assented to, or acquiesced, inthe publication of the matter. Again, there must be an evidence of consent which shows that it is clear and

86. PER ESHER M.R. In the case of Emmens V. Pottle (Supra) at PP 356 - 357

87. (Supra)

88. (Supra)

89. Per Adefarasin, J. in the case of Awolowo V. Kingsway (Supra);

and unequivocal.

In the case of Saraki v. Soleye,[90] the defendant admitted writing the letter, which is the subject matter of defamation, but raised a defence ofc consent. The court held that "the plaintiff himself had said he was taking the matter to the Nigeria Medical Council. It, however, what goes to the Council goes beyond the report of one Dr. S. and contains fresh defamation, the defendant cannot be heard to say that the plaintiff had consented to it. But to the extent to which the letter of the defendant relates to the subject matter of the plaintiff's letter i.e. the report of Dr. S., the plaintiff cannot complain; he conse..ted to it;

4.8 EXCESS PRIVILEGES

A defence of privilege, whether absolute or qualified is lost if the publication was done extensively than the required occasions. For example, if the publication is done in a newspaper instead of sending it to a proper authority, or if it is sent t by telegram instead of being sent in a closed letter.

However, the defence is not lost, if a defamatory statement made in a privileged occasion is published to a third party in the usual course of business. The case of Edemondson v Birch[91] is very illustrative on this point The court observed:-

90. (s upra)

91. (1907) I K B 371

> If a business communication is privileged, as being made on a privileged occasion, the privilege covers all the incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business."92

Against this background, because it is usual in the course of business for a business man to dictate his business letters to a typist, such publication will be privileged, though it has a defamatory statement provided the occasion is privileged. Thus, in Aruna v Taylor[93] the defendant accused the plaintiff in a letter of accusing him of divulging a trade secrets to a rival company. It was held that the communication made to the typist when typing it was privilege because such publication is within the usual course of the defendant's business. The defence was accordingly upheld.

Similarly, in the case of Saraki v. Soleye,[94] it was observed that the letter is privilege, despite its publication to office staff of the Council because "privilege covers all the incidents of its transmission and treatment which are in accordance with the reasonable and usual course of business".

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92. Edmondson v Birch (Supra); Per Flectcher Moulton L.J. at page 371

93. (supra)

94. (Supra)

4.9 SUMMARY

In the final analysis, this chapter can be summed up as follows:-

4.9.1 An attempt has been made to examine what amounts to a defamatory statements in law.

4.9.2 Available legal defences under the tort of defamation have also beenl looked into. These defences include;

a) Justification/Truth; under this defence the old common law rule which is used as an important requirement of the defence was examined. Then, exception of the rule, purpose of which was to address the injustice caused to a plaintiff was also looked into.

b) Fair comment. The legaljustification of this defence was examined. Similarlym the long acceptable requirements before the defence can stand in law were also discussed. The conditions, amongst others include; comment, public interest malice, etc.

c. privilege:- The meaning of this defence was examined. Categories of the defence namely absolute privilege and qualified privilege were also not left out. Then, the various conditions attached to the two types were also discussed under the defence.

Lastly, other defences, but which are not commonly raised as defences to tort of defamation were also discussed. Inclusive of these is consent, just to mention this out of others.

CHAPTER FIVE

5.0 MISCELLANEOUS DEFENCES

5.1 INTRODUCTION:

This research aspect, a kind of last discussion on types of defences to tortious liability is an attempt to touch other situations where a tortfeasor can escape liability.

It is the intention of this chapter to examine as briefly as possible other defences, which if validly raised and upheld, liability may not necessarily follow; although a wrong and damages have been caused to the plaintiff. Unfortunately, with the exception of the defence like contributory, negligence, consent etc. are found in most textbooks on torts, the defences under this chapter have mostly been omitted. This may have been an oversight. Perhaps, it may have been because in its strict sense, they are not regarded as defences as such. The defences under this category include the following:

5.2 MISTAKE AS A DEFENCE

An act of mistake is a positive believe in the existence of a particular fact, which in the actual sense, such belief does not exist. Such belief may therefore have caused the tortfeasor to omit to do an act, or to

caused him to behave in a particular manner, which is now the subject matter of seeking legal redress in a court of law.

There is no doubt that the result of a mistake is often desired. And it is based on a wrong thought and so the defendant will not know that such a wrong thought if acted upon, or ommit todo an act will interefere with the legal interest of another person.

A dictionary definition sees it as an unintentional act, omission, or error arising from ignorance, surprise imposition or misplaced confidence. It exists when the tortfeasor, under an erroneous conviction of law or fact, does or omits to do, some act which, but for the erroneous conviction, he would not have done or omitted.[1]

Meanwhile, it is a good law that a mistakem whether that of law or fact is not as a matter of automatic, an exemption from liability to toritious wrongs. For example, if the defence is that of mistake of law, the rule is always premised on the fact that an ignorance of law is never a defence.

By way of a small digression, in criminal law, the basis of mistake as a negation to criminal liability is the basic principle that such mistake must be both honest and reasonable.

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1. Black's Law Dictionary (6th ed). at page 1001

In the law of tort however, an existent and prove of a honest and reasonable mistake will still not affect liability. For example, an auctioneer who sells and delivers goods on behalf of a client in the honest, but a false belief that it is hiw own will be guilty, and liable to the true owner for conversion.[2] Also, a libellious publication of the plaintiff under a mistaken belief that he, the defendant is privileged to receive the communication will be held liable for the publication.[3] The rational of this is that a belief in the truth of the statement is not a defence in a tort of defmation.

Similarly, there is no defence on a doctor who carries out an operation exercise on his patient, under a reasonable but false belief that the latter has consented to such exercise.

Meanwhile, a reasonable man's test, if land down to measure a standard of behaviour, may be used to indicate whether liability follows or not. In this regard, an act of mistake will be used as a relevant consideration. For example, a judicial officer mayescape liability once it is proved that he acted under a reasonable mistaken belief as to the extent of his jurisdiction.

2. See Hollins v Fowler (1875) LR 7 HL 757

3. See Hebditch v Milwaine (1894) 2 Q B

Similarly, in a tort of false imprisonment the defendant may escape liability if he can show that he had a reasonable cause to belief that the plaintiff was guilty of an offence.

Also, in offence like a tort of deceit, where condition to liability is based on a wrong motive or reasonableness, then a prove of a bonafide mistake of fact may negativate liability.

5:3 STATUTE OF LIMITATION.

Generally, a defence under the limitation laws[4] operates to extinct liability of the tortfeasor. This is as opposed to the rules under the common law. This is because there is no such limitation under the common law rule. It is therefore true to say that the defence is a creation of statute.

Often, it does happens that a plaintiff may have a cause of action, yet, he loses that right of action by judicial means because the period of time within which to bring such action for enforcement has lapsed. Since this is a defence, the law enjoins the defendant to plead and prove that the action is statute barred.

As a matter of fact, this defence is rooted on period of time within which to sue. But it must be pointed out that period of time slightly differs from one subject

4. See Limitation Act 1966, Laws of the Federation of Nigeria.

matter of action to another. But as a general rule,[5] a tortious wrong is to be commenced six years of accural of action. Athough, this is with some exceptions.[6]

5.3.1 BASIS OF THE DEFENCE.

The justification of a defence of statute of limitation is rooted on the following principles, namely:

i. A long dormant claims have more of cruelty than justice in them.

ii. A defendant might have lost the evidence to disprove a stale claim.

iii. A person with a cause of action should pursue them with reasonable dilligence.

iv. Those who go to sleep on their claims should not be assisted by the courts in recovering their property.

v. There should be an end to stale demands.

5.3.2 RULE

As mentioned earlier, the basic principle of law under this defence is to the effect that an action must be maintained within a specified time limit. Otherwise such proposed action, even though, valid in law, may be barried for lapse of time.

5. See S. 7(4) Limitation Decree (supra)/

6. A tort of slander is to be commenced within 3 years; Again see Public Officers (Protection) Law.

For example, the law is that an action against a public officer for the tort committed during the course of his duties is to be commenced before the expiration of three months from the date of commission of the act.[7] But, if the action is brought after three months, it will not be maintinable in law. The case of Adigun v Ayinde [8] illustrates this point. The accident which is the subject matter of the cause of action occured on 10/2/78. However, the plaintiff did not sue for a legal redress, until after the month of January, 1981. This is a period of three years as against three months as laid down under the law.[9] The action was therefore dismissed for lapse of time.

Apart from the statute above under which thecases were decided, other similar statutes exist. Thus, it is a particular statute which accords to itself a time limit under which the subject matter contained therein in the statute that will specify a time limit.

5.3.6 COMPUTATION OF TIME

A knowledge on when an action accrues, and when to start calculation of time so as tobe within the prescribed time limit is very important. In view of this, the general rule of law isthat a period of limitation starts from the date on which a course of action has arisen.[10]

7. See S. 2 (a) public Officers Protection Law

8. (1993) 11 SCNJ p.1

9. See Obiefuna v Okoye (1964) NSCC 52, Savannah Bank of Nig Ltd v Pan Atlantic Shipping & Transport Agencies (1987) 1 NWLR pg 49 212

10. Nwadarow v Shell Petroleum (1990) 5 NWLR (pt 150) p.55

Meanwhile, a course of Action has been defined to mean that which makes an action to be possible. It arises as soon as a state of facts occur which therefore entitles a proposed plaintiff to maintain a successful action against a proposed defendant. Otherwise, an action whose subject matter is contigent upon a future occurence will be struck out for being unriped and premature. Therefore, if this is truism, then such time limit will not start to run.

5.3.4 EXCEPTIONS

It is a trite law that an action must be maintained by a proposed plaintiff against a proposed defendant within a specific time. However, in some certain practical situations, even though an action has accrued, yet time do not start to run, These situations include the following:

i. It is a common knowledge that our court encourage peaceful settlement out of court, whenever necessary. Therefore, if there is an attempt by the parties to settle, and there is an admission of liability so that what then remains is a fulfilment of that agreement, then the defendant cannot resile from it again.[11a]

ii. If the plaintiff is suffering from disability which prevents him to pursue his claim. For

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11a See Nwadigro v Shell Petroleum (supra)

example, if the plaintiff is an infant, or he is of an unsound mind. In this regard, time will not run until he ceases to be under such disability.[12]

iii If the defendant is guilty of fraud or concealment of a material fact so that the plaintiff is not aware of his existing rights. In this case, time will not start torun until this fraud or concealment is dicovered, unless with a use of a reasonable diligence, the plaintiff ought tohave known the existence of such material fact.

iv. If the plaintiff is unaware that a damage has occured to himself. This happens in cases of personal injuries.

v Continuing Wrongs: for example, in an action for trespass more especially in a continuous type, then a new cause of Action will accrue everyday until the wrong is ceased.

5.4 DEATH OF EITHER PARTY
(Survival of Actions)

A defence under this heading envisages a situation where either of the parties (plaintiff or defendant) dies during the pendency of action, or when cause of action has accrued, but before the plaintiff sues, he dies.

12. See S. 34 Limitation Decree of 1966.

This issue can be seen in two ways, namely:

5.4.1 Death of the plaintiff.

Under the old common law rule, if a wrong is done to a person or property of another, for which only damages is recoverable, such action will die with the person to whom, or by whom the wrong is done. This is so in order to give a legal effect to one important maxim in law; Actio personalis moritur cum persona, which means that a personal right of action dies with that person. Therefore, no exdcutor or administrator will sue or be sued for any tort committed against or by, the deceased in his life time except injuries to property. The justification of this law is premised upon a fact that an act of tort was regarded originally as purely punitive, but later on as compensatory in nature. The case of Squandron Leader Ode v COP Benue State[11b] illustrates this point. In the case, the plaintiff died while the case was pending in the court. The deceased's personal represntatives sought for a joinder of parties so as to continue with the case. This joinder was however objected to by the defendant. His argument was that, the suit been a personal one is insurvivable and dies with the plaintiff. This argument was accepted, and so the court held that the suit has abaited on his death.

However, this common law rule has since been watered down by the combined effects of some statutes namely;

11b. Unreported case; High Court of Justice, Benue State (1981).

i. The Law Reform (Miscellaneous Provisions) Act 1934.

The provision of this Act is to the effect that the law under the old common law rule above is no more the law. Therefore, the law is now that on the death of a plaintiff, all causes of Action that are vested in him survive for the benefit of his estate except actions for; (i) defamation, (ii) seduction, (iii) inducing one spouse to leave or remain apart from the other, and (iv) claim for damage for adultery.

Meanwhile, it must also be pointed out that this Act above had since been repealed by S. 1 of proceeding Against Estate Act of 1970.

ii. The Fatal Accidents Act, 1846

By the operation of this law, an executor or administrator of a deceased person whose death is caused by the wrongful act or default of another, can maintain a valid action for the benefit of the widow, husband or child(ren) of the deceased.

iii. The workmen's Compensation Act (1925). The provision of the Act is to the effect that a dependent of a workman can claim a compensation, if the workman dies of an injury, which, if he had survived would have entitled him to a claim of compensation.

iv. The Employer's Liability Act (1883).

Under this law, the legal personal representatives of a workman who dies of an accident while in his employer's service through a specified causes as herein contained in the Act can maintain a valid action for compensation against the employer.

5.4.2 Death of the Defendant.

A general principle of law under the old common law rule is that an action in tort abates on the death of the defendant. Thus, a personal representatives cannot be sued in respect of torts commited by the deceased, except where the deceased has committed a tort which involves a wrongful appropriation of the plaintiff's property and has added it (or its proceeds) to his own estate. In this regard, an action will be maintainable.

However, this old common law rule is now with an exception. This exception as contained under the Law Reform (Miscellaneous Property Provisions) Act, 1934 is to the effect that on the death of any person, all causes of action subsisting against him survive against his estate except actions on; (i) Defamation, (ii) Seduction (iii) Inducing one spouse to leave or remain apart from the other, and (iv) claim fordamages for adultery.

5.5 STATE IMMUNITY (Rex non potest pecarre).

5.1. INTRODUCTION.

This doctrine is rooted in the old common law rule of England. The operation of the doctrine is to the effect that, though, the king can commit a wrong, yet, such wrong cannot be redressed upon against it by way of a court action without the consent of the King. Similarly, neither can its servants be sued on the torts commited by them against the citizens.

In jurisdiction like United States of America, the operation of the doctrine is also/the effect that there to must be an express or an implied legislative consent before a suit can be brought against a state or federal government.

Meanwhile, it must be pointed out that at this juncture, the operation of the doctrine is no more a good law in England. It had since been repealed by section 2 Crown Proceedings Act, 1945 (England).

5.5.2 THE OPERATION OF THE DOCTRINE UNDER NIGERIAN LAW.

The old traditional linkage between Nigeria and Britain as per legal development had necessitated the apllication of this doctrine in Nigeria. For the avoidance of doubt, section 45 (1) Interpretation Act, cap 89, laws of the Federation of Nigeria 1958 preserves the use of common law of England, doctrines of Equity and pre 1900 statutes of general application.

Against this background, the state cannot be sued in damages on a wrong act of its agent unless it consented to a proceeding of such action. Such consent, if it is to be given must be by the Attorney General.[13] After the fiat of the Attorney General has been given, other procedures have to be followed before a valid action can be maintained. But, where these procedures are not followed, such action will be thrown out at the preliminary objection.[14]

The case of Mrs. Olunfunmilayo Ransome Kuti and Ors v AG of Federation and ors[15] is an illustration of the operation of the doctrine. In the case, the plaintiffs properties were burnt down on fire by some Nigerian soldiers. The Lagos State Government set up a Commission of Enquiry to identify the causes and persons responsible, for the act. However, the commission could not discharge these duties. It only found out that it was caused by an "unknown soldier". The plaintiff thereafter sued for N25m as ddamages caused by the defendants' agents and servants. This action was however thrown out by virtue of operation of the doctrine.

13. See Petitions of Right Act cap 149 and Petitions of Right Law (WRN)

14. See Ayorinde Martins v Fed Administrator Gen & Anor LD/346/60

15. Suit No LD/329/328/77 of 10/2/78

The decision had since been condemned because it showed that the government is in tort, above the law. Meanwhile, it had been observed that if the action had been brought under section 32, (Fundamental Human Rights Proceedings) a different result would have been reached i.e. The state would have been held liable for the alleged wrong complained off.

Similarly, under section 267 of the 1979 constitution, no civil or criminal action can be instituted or continued against the president, Vice President, Governor or Deputy Governor of a state during their period of office. Neither can they also be arrested or imprisoned while in office. However, this provision is subject to the fact that an action will be maintained against them as soon as they leave office. Again, a computation of time for the purpose of an action been barred under the limitation Act will not start to run during the time of their office.

5.6 CONCLUSION

On afinal note, this chapter has endeavour to briefly look into other defences which are less often raised as defences to tortious liability. Yet, these defences are included as integral part of the whole exercise of this research work. This is because they have often been used as partial or, a total denial of liability tot tortious actions. And as seen already, the defences discussed

under this chapter include; mistake, statute of limitation, death of a either party, and lastly state immunity.

However, observations and suggestions for future reforms, if any, have been deliberately omitted, but to be addressed under the preceding chapter.

CHAPTER SIX

6.0 INTRODUCTION

This chapter is to make an indepth attempt, commencing from chapter one to chapter five, on the problems and weaknesses on the laws, as they have been used in practice, at the present moment. Thereafter, solutions and suggestions would be proferred, where necessary for future reforms.

6.1 OBSERVATIONS AND SUGGESTIONS

In our introduction under chapter one, it was observed that tortious actions are aimed at preventing people ffrom hurting each others. Thus, the general law says:

Alterum non Laedere;
To hurt nobody by word or deed.

On the basis of this law, if there is a right, then it must be followed by a remedy whenever such right is breached. However, a departure from this law is often taken. For example, a victim of a wrong committed against him may be denied a remedy on account of triviality, the competing rights of the parties e.t.c.

With respect, it is my submission that this departure from the general law should always be used with caution. In other words, such victim should not be shut away from access to justice. So, he should be entitled to a remedy on the basis of what he has claimed, before the court. This suggestion is in accord with section 6(6) (6) of the

1979 constitution which provides that courts are to exercise judicial power in adjudicating over disputes between citizens inter se, between citizens and other resident in the state, between citizens and the states or its agencies, or between the federation and any states inter se.

Similarly, a redress by means of court processes is very low in this country. Thus, the citizens need to be encouraged to have a change of attitude in this respect, but not to do the opposite.

In another respect, it is a trite law that one of the basis of a tortious liability is rooted on the doctrine of "fault" of the tortfeasor. It is therefore usual to draw inference from the defendant's wrongful act e.t.c. Thus, it is common to remark as follows:

No liability without fault.

But inspite of this rule, it is truism that in some certain situations, a man may be held tortiously liable, even though, no fault has been attributed to his conduct. A good illustration of this point can be seen in the application of the doctrine of vicarious liability.

Against this background, it is my view that this doctrine, as it is been used under this context negates the concept of justice, and the basis of fault principle. For example, how can one justify the tortious liability of a person, on an offence he has no knowledge of, or

participated on it. But if the principle is highly desirous, then, it should be used with caution. Again, each case should be treated on its own peculiar merit. Thus, I am in total support of the decision of the court of first instance in the case of Obafemi Akingbage v Sgt Omonede and 1 ors,[1] where, absolving the second respondent from a blameworthy, the court observed as follows:-

> the Police Service Commission has not been shown to employ any person for deliberate shooting of innocent citizens. the first defendant was merely a frolic of his own------.

However, this decision was reversed on appeal, and so the court of Appeal held the second respondent vicariously liable.

Still under chapter one, public authorities, while carrying out their duties, often, cause injuries and wrongs to the citizenry. It is usual that the enabling statutes may bar tortious actions by the victim who may have been adversely affected from the activities of such bodies, and even in situations where those who performed the duties have been found guilty of negligence.[2]

In this regard, it is my view that the law as it is being used will cause untold hardships to the citizenry, the expected beneficiaries of the activities of such bodies.

1. (Supra)
2. NEPA V Akpata (supra)

Thus, it is my suggestion that the law should be amended to the effect that whenever a wrong is caused, the victim should be compensated, and this will be regardless of whether the body is guilty or not guilty of negligence in carrying out such statutory duties.

Under chapter two, many defences have been highlighted. For example, the defence of contributory negligence. Here, it was shown that it is the practice of courts to show their unwillingness to find children guilty of contributory negligence. The observation of Lord Denning M.R. in the case of Gouch v Thorne[3] is very illustrating.

However, the application of this law in Nigeria will cause untold hardships to the citizens. This is because children have often been used as a source of labour. Thus, it is common to find children in big cities, selling wares, minerals, ice water etc. Although, they lack the mental alertness to know when, and when not, to cross busy roads, yet, they should be held liable; in this regard, their parents or guardians who send them out on errands should be held liable.

At this juncture, it is my suggestion, for future reforms that their parents/guardians should be vicariously held liable.

Similarly, parents/guardians have both the moral and legal duties to be on the watch out for safety and protection of their children/wards. On this ground, they

3. Supra

will be failing in discharging these duties, if their children/wards negligently cross the road.

In support of the argument above, the general law is that a child can recover on an account of a loss that has been caused toh him as a result of a negligent act of an adult person. Conversely, therefore, it is good that a child should be held liable, liability in this respect to be through his parents/guardians.

It was also observed under chapter two that it is trite law that a man who consents to certain state of facts, cannot be heard to complain of it thereafter. In other words, he cannot in law enforce a right which he has voluntarily waived or abandoned. And in applying this defence, certain conditions must be complied with.

Inspite of this, however, the use of this defence has been found with suspect. This is because, it is always very impractical and impossible for a person to give free and genuine consent in certain areas that need a basic expert opinion before such person can give a valid consent. Example of this can be seen where a patient needs medical advice and treatment. Thus, in Nigeria, no such consent is often given out. But, it is only in few cases where actual consent is sought. Infact, even if the doctor complies with the law by explaining the nature of treatment and the risk involved to the patient, the patient still often relies on the expert opinion of

the doctors, which may neither be accurate and detail. Thus, this explains why, even if, there are complications, only few, or none go to court. Infact, this has been on account of lack of awareness and low literacy level about their rights in this regard.

Against this background, it is my suggestion that adequate awareness through health care programmes should be embarked upon by the government through the assistance of health officers and personnel. The legal framework within which these are to be done should always be an operating factors.

In addition, both the penal code and the criminal code should be reviewed to meet the present day realities. Yet, this should be used with caution so as to ensure efficiency and maximum output. Otherwise, simple medical treatments and advice will be abandoned for fear of stiff penalty of the law. Thus, the Nigerian Medical Council can liase with the government so as to ensure that medical personnel practice their profession under a peaceful atmosphere, and also within the legal framework.

Meanwhile, it has been noted under chapter three that as a general law, and under certain circumstances, police, or, a private person can arrest an offender. The case of Oteri v Okoroduduu[4] has been cited to illustrate ways and procedures when such arrest can be effected.

4. (Supra)

It was also pointed out that at times, the alleged tort may have been on account of a misinformation by the complainant, or, a conspiracy between him and the police, or by the police alone.

Inspite of this however, it is a fact that this law has often been violated to the detriment of the victim. For example, on receipt of an amount of money from a complainant, a suspect is often harassed even in obvious cases where the complaint lacks merit. Or, a policeman can use his uniform to intimidate, and thereafter extort money from innocent citizen.

Similarly, an innocent person has often been arrested on a defective warrant, but only to be released thereafter, without an apology, or, adequate compensation.

Surprisingly, these acts are condoned either on the wrong impression that the police are above the law, or, where the victim knows that this is wrong, yet, such victim cannot seek redress in a law court.

Against this background, it is my view that a vigorous campaign is desirous. Such will include educating the citizens about their competing rightsvis-a-vis the duties of the police. And where the rights are trampled upon, the citizens will know the means and procedures to seek redress in a law court.

Again, courses offered in our colleges and higher institutions should be widened to include the duties of police, vis-a-vis the rights of the citizens.

Similarly, the police needs to be given a thorough education. It should be part of their duties to carry out a detailed investigation on a complaint lodged before them, before an arrest is being carried out. They should see the citizens as brothers and sisters, but not as enemies. A suspect should be treated fairly, handled with care and utmost respect etc.

Although, it is a fact that some arrests must have been carried out in good faith, yet, the victims must have been adversely affected. In this regard, it is my suggestion that the victims should be adequately compensated so as to restore them to their former positions. At this stage, our judges should perform their traditional roles as custodians of justice in ensuring that such compensation is adequate and best in the prevailing circumstance

In another development, it is a fact that litigants are bound to feel aggrieved and dissatisfied with certain conducts of judicial officers during the course of their official duties. This is because it is the general law that a judge of a superior court of Record is not liable in tort for any judicial act performed by him.[5]

In its stead, other procedures[6] have been provided to an aggrieved person. I reckoned with the fact that on ground of public interest, and in the interest of justice,

5. See Siros v Mooore (Supra), and Onitiri v Ojomo (supra)

6. See S. 256 of 1979 constitution.

this provision is laudable. Yet, this provision should be used with care. For example, judicial officers are human beings; just like any ordinary citizens. They have feelings and emotions. Thus, it is often common for them to go out of their ways, and make a departure from the normal procedure during the course of their offcial duties. At this stage, the point of emphasis here is that the procedures available to an aggrieved party may always not adequately take care of their grievances. And inadequacy apart, due to low literacy level in Nigeria, only few Nigerians know the existence of proceedings mentioned above. Thus, this explains why their rights are trampled upon, without being challenged.

In view of this, it is my suggestion that there should be a massive campaign to enlighten the populace. Most of these elementary issues can also be incorporated as part of the subjects thought in our schools and higher institutions.

Meanwhile, it has been examined previously that a wrong caused by a statutory authorities while conducting their statutory duties may not be liable in tort on account of this tort, provided that they had reasonably and without wanton of negligence from their part.[7] The defence can be conditional, or absolute, irrespective

7. See Ajayi v The Electricity Corporation of Nigeria (supra)

of failure, to prove precautions, once the authorities can show that the enabling law authorised them to disregard it.[8]

Although, such activities are often done for the benefit of the public at large. Yet, a single individual or, group of individuals should not be made to suffer at the expense of this. Therefore, it is my submission that once a victim is not guilty of negligence from his part, then, such victim should always have a right of full compensation against the authority.

Meanwhile, it has been observed under chapter four that in a tort of defamation, publications made by a tortfeasor is bound to affect the interest of his victim. Yet, a tortfeasor has a defence to raise; if he can show that the publication touches on issue that affects the public truth e.t.c.

Since before the birth of modern Nigeria, governments have often seen publishing companies and journalists as rivals and enemies, who ought not to disseminate certain information for public consumption. In other words, the concept of public security and public interest will not permit certain information to be divulged to the public for their consumption. Thus, certain laws have often been promulgated at one time or the other so as to censure a piece of information that will be made to the public.

8. See Street on Torts (7th ed) (Supra)

Ideally, the simple logic should be that where the constitutional right to disseminate a peice of information ends, is where, (subject to defences of tort of defamation) the tort of defamation starts. But, other such considerations like political interest of the ruling class e.t.c. have often been used to obstruct the rule of law. Of course, it is a fact that our journalists often go out of their ways. Thus, it is at times difficult to know which of the parties have complied with the law.

In the case of Guardian Newspapers v A.G. Federation,[9] Adefarasin, C.J. of Lagos High Court observed that a true publication may be an offence under Decree No. 4 of 1984 and so he held that the law is;

> By the foregoing provision it is unlawful for a person to publish a report a statement which brings or it is calculated to bring the federal government or a state government or a publico officer to ridicule or disrespect even when the publication is true--- I would say that 5 S.1 (1) of the public Officers (Protection Against False Accusation) Decree 1984 makes it unlawful for the plaintiffs to publish any report or statement which is true but which brings or is calculated to bring the federal military government or a public officer to ridicule or disrepute. The provisions may seem harsh but it is nonetheless the law of the land and none can question it.

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9. Suit No. M/139/84

To start with, the phrase "False Publication", as used in the enabling law negates the concept of separation of powers. This is because the government, in promulgating the law has presumed that whatever is published is false; but this is a usupation of the constitutional roles of the court. Thus, it is my suggestion that, the court should have been left alone to make a pronouncement on whether such publication is false or not.

The Governments are to ensure that journalists are treated as partners in progress. They are to be allowed to practice their profession within both the legal framework, within the ethics and rules of the profession vis-a-vis the duties they hold to the citizenry. On the corollary, journalists should ensure that strict compliance with the above rules are followed. And once these are operating facts at the back of the minds of all the parties concerned, a cordial atmosphere will be best achieved.

On a last note, it has been observed under chapter five that in some circumstances, a statute of limitation can be used to escape liability of an alleged tortious act. Similarly, the underlying principles under which this defence has been based have also been discussed upon.

However, the competing rights of both the victim and the tort feasfor call for appraisal of the defence. For

example, it is no dispute that an average Nigerian is ill-educated about the general laws, and in particular, ignorant of the extent of their rights whenever it has been infringed upon.

In view of this, it is often common to notice with disgust rights of an individual average Nigerian been violated, without him knowing it, and where he is aware of this, he cannot seek redress in court so as to benefit from this defence.

Therefore, it is my suggestion that the populace needs massive and rigorous awareness on the extent of some of these rights, especially the simple ones, and which are devoid of legal technicalities.

Similarly, it was also observed under this chapter that under the doctrine of state immunity, the state cannot be sued in damages on a wrong act of its legal agent(s)., unless it consents to such proceedings.[10]

To start with, it is my view that the provision is unnecessary. This is because it is only in few cases that the state will give its consent to such proceedings.

Secondly, this law is obsolete and so it should be expunged from our statute books. Infact, in making a critical remark on the application of the law in Nigeria, Kayode J.S.C. Eso, Observed:

10. See Bakare v AG (1990) 5 NWLR (pt 152) 516

> Nigeria in retaining the 1947 English Law with relation to state liability in tort in the petitions of Right Act,"----more royal than the royalty itself..11

Infact, the use of the doctrine is a total negation of the concept of EQUALITY BEFORE THE LAW. Its use will lead to absurdity, having regard to how some public officers often use their powers tocause inconveniences to the citizenry.

By section 5, petition of Right Law, a governor's right to refuse a right is final and conclusive because there is no provision, For redress. Thus, in Imo State v. Greeco[12] there was an argument on whether this provision conflicts with section 6 (6) (b) of 1979 constitution or not Olatawura, J.C.A., in delivering the lead judgement of the court observed:

> -----a citizen who comes by way of the petitions of Right law is refused the fiat of the governor is without remedy. The refusal is final and conclusive. Consequently, he is denied access to the court. This is contrary to the constitution.

He concluses:

> ----I will hold that the combined effect of sections 3, 4 and 5 of the petitions of Rights Law is a denial of fair hearing entrenched in our 1989 constitution.

However, it must be pointed out that the above case

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11. Supra

12. (1985) 3 NWLR 71

laws cannot represent the law as it is now. Happily, the law has now changed. The case of Ezomo v AG Bendel State,[13] is an illustration of the current law. In the case, Aniagolu J.S.C. observed:

> With the coming into force of the 1979 constitution, by section 6 thereof, the government of the Federation or a state is liable to be sued, like any other individual, by any person aggrieved by its act without reference to the petitions of right Act.

In addition to the above case is also the case of Bello v AG Oyo State,[14] the Supreme Court confirmed an award of damages (in tort) against the Oyo State Government for unlawful execution of a convict during the pendency of his appeal against his death sentence.

In conclusion, each of the problems highlighted, commencing from chapter one to chapter five have been examined on their peculiar circumstances. There are other ones which time and space will not permit. However, a fundamental observation, which cut across all the previous chapters seems to be lack of awareness, ill education, or ignorance of the general law. Thus, rights have often been breached, unchallenged by the victims. Thus, it is my suggestion that certain elementary rules of law, devoid of legal technicalities should be at the finger tips of an average Nigerian and not necessarily by means of going to read law in the University. In this

13. (1986) 449 at p. 459
14. (1986) 5 NWLR 828

respect, a minimal education, and general awareness is highly desirous. And this can be achieved, if these are incorporated as part of subjects taught in our schools and higher institutions.

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