NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

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COURSE TITLE:INTRODUCTION TO LAW

controlled by the mind or will. A pure reflex action, something done while sleep walking, concussed, or in some cases of extreme intoxication, the defendant's will may not be voluntary. Suppose, a person was charged with dangerous driving causing death arising from a car accident which killed a passenger. The circumstances were that the driver fell asleep at the wheel and the car left the road and hit a tree. Since the defendant was asleep his actions were not conscious or voluntary and he would not criminally be responsible. You should not assume from this case that a defendant in such a situation will always escape criminal liability as there could be other circumstances where the offence of culpable driving may be committed or where other offences could apply.

(c) Causation

Some crimes are what are known as 'result crimes' which means that the prohibited conduct brings about a certain **result,** such as the death of another person. In this case the conduct of the accused must bring about or **cause** the result in question. The conduct need not be the direct or sole cause of the result but it must be 'an operating and substantial cause'. This is known as the concept of causation and it arises also in the law of negligence where substantially the same law applies.

In a simple case where a person shoots another then the case of death is directly attributable to the actions of the accused. However, if it could be established that the victim was already dead before the bullet left the gun, the crime of murder is not committed. Similarly, if the victim was wounded and taken to hospital but died of an illness that resulted from his poor treatment in hospital then the crime of murder may not be made out. In this case there is an intervening act, namely, the negligence of the hospital, which causes the death. The presence of an intervening act is the most common reason the prosecution in these types of cases fails to show the required level of causation.

Issues of causation do not arise in the other broad type of crime known as 'conduct' crimes where the conduct itself constitutes the crime. An example is the possession of an unlicensed firearm. No 'result' is required here, simply the possession of the firearm which is not licensed to the defendant is all the prosecution has to prove.

In some of the examples given above, the state may fail to prove an element of the offence and the defendant is acquitted. You should not take it from these examples that the defendant escapes punishment entirely. In the instance of the person dying in hospital as a result of an illness contracted there, murder may not be made out but a lesser charge of an assault occasioning grievous bodily harm could, or perhaps

attempted murder.

(d) *Mens Rea*

To complete a crime the *actus reus* must be accompanied by a guilty mind. It is known as the **mental** element of the crime. To have the guilty mind generally, two matters usually arise for consideration: that the defendant had the requisite **knowledge** of the circumstances (eg that the goods in question did not belong to him) and secondly that she or he **intended** the result of his/her conduct (ie to steal the good or to kill the victim). It should be said, however, that intention need not always be present, it will vary with the criminal offence. This is why it is safer and more accurate to say that the *mens rea* is the guilty mind **however defined** in the offence rather than that the accused has the requisite intention or some other state of mind. This is especially so under the Criminal Code and the Penal Code.

In many cases, the crime will be committed even if the defendant does not intend the consequences of his actions but is reckless in that regard or in some cases if they are negligent. While the term 'reckless' is not used directly in the Criminal or Penal Code, the notion can be found in some provisions such as those that utilize the term 'wilful'. Negligence finds its way into the Code by the imposition of a duty, such as the duty of a parent to provide the necessities of life to a child. Failure to do so can lead to the conviction of an offence of murder or manslaughter. In other words the parent may not have intended to kill the child but they are nevertheless guilty because of their negligent failure to sustain it.

3.2.2 Strict Liability

In some cases, a statutory offence may be introduced where there is no need for the state to prove *mens rea* at all. In this type of case, they only need to establish the *actus reus.* Whether this is the case is a matter of statutory interpretation in each instance. Since the state need only prove the physical element, there is no need to establish that the defendant acted intentionally, recklessly or negligently.

The presumption at law is that all offences have a *mens rea* component. Why has this changed? Four reasons might be advanced:

1. Generally, strict liability offences are **not serious** and so lack of *mens rea* is not seen as a major reduction of civil right. Invariably strict liability offences are tried summarily.
2. Commonly strict liability applies to statutes dealing with the 'regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice

whether they participate or not'. *Sweet v Parsley* [1960] 2 W L R 470 at 487. Strict liability offences are usually found in statutes dealing with traffic matter, selling contaminated foods, pollution, selling liquor to a person under 18 years and so on. Here the **public interest** is placed above the rights of the individual.

3. Given that the offences are relatively minor, it is argued that to require the prosecution to prove *mens rea* would render the **legislation unworkable**. Imagine the difficulties faced by the prosecution in showing that a speeding motorist had the necessary intention to speed especially if they were only just over the limit. As Gillies, Criminal Law, 2nd edn, page 83 notes, a defence that the driver was simply not concentrating would most likely succeed if *mens rea* was an element to a speeding offence.

4. Related to the difficulty of proof as mentioned above, it is recognized that given the **number** of these relatively minor offences, especially traffic, the courts would rapidly clog up if defendants were able to require the State to prove *mens rea*.

In summary then, the public good which presumably comes from requiring motorists to strictly obey the traffic laws, for retailers to sell pure foods etc., and the need to keep the court system functioning smoothly, outweighs the loss of the right to have the state prove *mens rea.*

3.2.3 Defences to Strictly Liability

A defendant who is charged with a strict liability offence ordinarily has a number of defences open to him:

- He can rely on the **normal criminal defences** of intoxication, automatism and the like.

- **Honest and reasonable mistake:** An example may be taken from a decided case which shows the operation of this defence. It involved the placement of an advertisement, which contained an untrue statement. The defendant advertised and sold a used car, misstating the size of the motor. Having taken reasonable steps to establish the size he may be able to rely on the honest and reasonable mistake defence. Note that the mistake must not only be honest but also reasonable.

  The latter element probably would not have been made out if no steps were taken to establish the size of the motor in the example above.

- **Act of stranger** or non-human intervening act over which the defendant has no control. This defence could apply to an offence where an owner of cattle is strictly liable for cattle straying onto a public road. If the cattle get out onto the road due to the wrongful act of a stranger in circumstances where the defendant had no knowledge or control over the stranger, then the defence may be made out.

3.2.4 Absolute Liability

It is also necessary to mention that there is other type of offence which imposes absolute liability. Here, *mens rea* is absent but in addition, the defence of honest and reasonable mistake which applies to strict liability offence does not apply. Courts are quite reluctant to interpret a statute as one that imposes absolute liability but will do so if the legislative intention is clear. Courts ensure that by imposing absolute liability the objects of the legislation are being met and not merely that 'luckless victims' are being caught. In the example given above concerning the advertisement of the car, the court would reject the argument that it was an absolute liability offence.

3.3 'White-Collar' Crime

'White collar' crime is a very broad area of criminal law and little more can be done in this course than to give a brief overview and raise some issues, in particular, the difficulty that the law has in controlling this form of activity. The theme here is that the law is almost always behind the criminal.

3.3.1 Definition of 'White-Collar' Crime

There is no part of criminal law that is recognised separately as 'white-collar'. Rather, it is a collection of a broad range of offences, which are more likely to be committed by a person in business than the ordinary criminal.

3.3.2 Controlling White-Collar Crime

Four problems may be identified in this area:

- having the right law;
- catching the criminal'
- keeping up with technology; and
- securing convictions.

(a) Having the Right Law

A student of the branch of criminal law dealing with offences against property will notice how long it has taken for the law to develop a range of offences that might be effective in this area.

Part of the problem stems from a rather narrow common law offence of **stealing** which is the usual starting point in a discussion of crimes of dishonesty or 'white-collar' crime. (The term 'larceny' has the same meaning as stealing or theft.)

At common law as well under the Criminal Code. A person **steals** if:

- Without the consent of the owner, that person;
- Fraudulently and without a claim of right made in good faith;
- Takes and carries away;
- Anything capable of being stolen belonging to another;
- With intent at the time of taking to permanently deprive the owner of it.

For the purposes of the present discussion note the three anomalies arising from the definition of stealing:

- Need for the removal of the property to amount to trespass to goods (asportation). This will not be the case where the defendant had possession of the property by consent. An example would be where an employee is allowed to keep in their possession tools belonging to the employer to be used at work. In this case should the employee keep the tools for their own use there is no removal amounting to a trespass to goods;

- The removal of the property and the *mens rea* must occur simultaneously. In order to steal, the defendant must possess the *mens rea* at the time of the taking. As with the example given above of the employee, it frequently happens that a person takes the property with the consent of the owner (such as when they borrow it) and only later they form the intention to steal it. In this case, there is no offence of stealing.

- Difficulties with the words 'capable of being stolen'. Here consider the case of *Oxford v Moss*.

There are just three examples of the problems with stealing. You may be wondering why the law has been constructed so narrowly. The reason was that in the 18th century the penalty for stealing was death and the

courts were reluctant to see a defendant convicted unless the offence was clearly established.

You should not be left with the impression that the anomalies in the common law definition of stealing remain as they were. In Nigeria, the offence of stealing has been incorporated into s 390 of the Criminal Code in substantially similar terms to the common law definition. However, additional sections have been added over the years, which cover some of the more obvious shortcomings of the common law, e.g stealing by employees, agents and directors of companies.

Having said that, many commentators still regard the law as unsatisfactory. As one author put it:

The distinctions between offences are often fine spun and technical – but potentially fatal to a prosecution which chooses the wrong classification of wrong.

Moreover, there is practice of some white collar criminals transferring large sums of money to large countries to which they might later escape to prevent prosecution or plough into legitimate trade.

(b) Keeping up with Technology

Catching the Criminal and Technology has enlarged the province of stealing and criminal law is yet to catch up. Examples are computer crimes e.g

- Deception of ATMs;
- Falsifying of digital records; and
- Prevention of computer hacking.

4.0 CONCLUSION

In this unit, we looked at the Criminal Law. This is the body of laws that defines offences and regulates her persons suspected of such offences are investigated, wronged and tried. It also sets punishment for those conucked of times. Some understanding of the criminal justice system is important because business has close links with crime and criminally

5.0 SUMMARY

We have seen why you need to know something about the substantive criminal law. It is different form unit law. Elements of crime are also different and include *mens rea*, actions *rens*, causation and element of unenntariness except in few cases of strict or absolute liability, whether white collar crimes are mere deviance or crimes properly so caked is arguable and the argument rages in the face of the problems of having the right law, catching the criminal and securing conviction. Those problems are compounded by new technologies.

6.0 TUTOR-MARKED ASSIGNMENT

1. Identify three differences between criminal and civil Law.
2. Give examples, not taken from the Study Guide, of where Criminal Law and Moral Law, differ.

3(a) What role does the victim play in the criminal trial?
(b). "Some indictable offences can be tried summarily and some summary offences can be tried indictment at the option of the defendant/offender Comment.

7.0 REFERENCES/FURTHER READINGS

Gillies, P 1990, *Business Law*. 2nd edn., Sydney: Federation Press.

Gillies, P 1997, *Business Law*. 8th edn. Sydney: Federation Press.

UNIT 2 TORTS

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1.0 INTRODUCTION

Tort Law concerns the civil liability for the wrongful infliction of injury by one person upon another. Its objects are monetary compensation or damages. The problem with Tort is that there is no single principle of liability. It is not also the sole sources of monetary compensation for harm. Furthermore, the same harm which is the basis of tortuous liability can in some cases be pursued through the criminal justice system. You need not be perplexed. We are not going into detailed study of law of tort. However, we shall discuss some key topics or specific torts like negligence, defamation etc, and conclude by reference, to vicarious liability, defences and remedies.

In this unit, our focus is an over view of tort law.

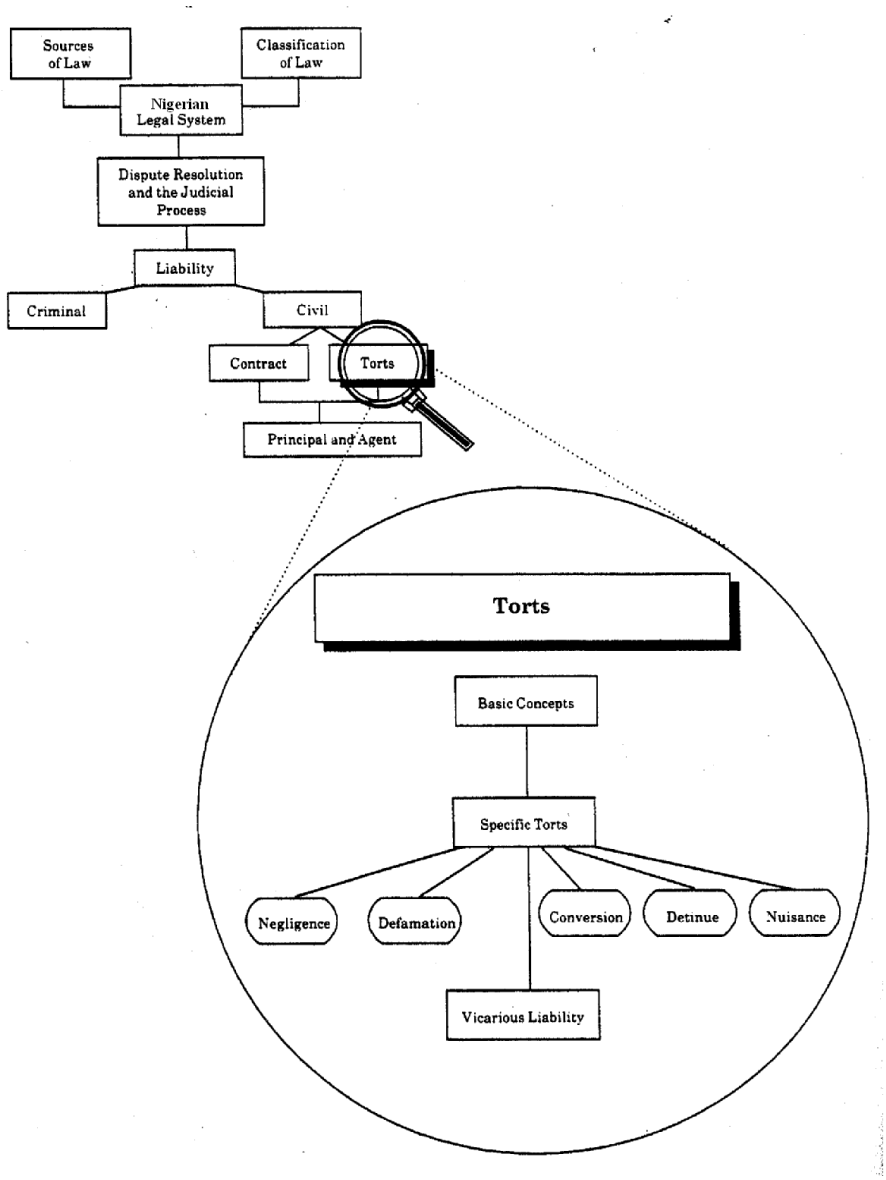
2.0 OBJECTIVES

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

- explain some of the underlying policy issues surrounding the development of the law of tort
- describe the role of the basic concepts of fault, damages, causation.

3.0 MAIN CONTENT

3.1 Overview of Torts



By now you would have had some appreciation of the difference between torts, crimes and contracts. Can you attempt to enumerate those differences without reference to the study guide?

It will be realized that, like all other areas of law addressed in this course, it is not possible to do more than provide a very general outline of tort law. While the law of negligence will occupy the most space, other specific torts will be mentioned. In addition, the more common defences are dealt with briefly.

3.2 Basic Concepts

There is some debate amongst commentators in this area as to whether there is a law of tort or a law of torts. In other words, is there a unifying

principle or set of elements that is common to all actions based on tort or is the law in this area just a group of miscellaneous wrongs that do not necessarily bear any relation to each other? Probably the answer lies somewhere in the middle. One of the leading legal writers in this field, Professor Fleming, suggest it would be 'bold' to attempt to reduce the law of torts to a single principle but on the other hand, it is incorrect to view it as nothing but 'shreds and patches'. What is reasonably clear is that there are certain notions or features that are common to at least most torts. These are:

3.2.1 Fault

Almost all torts have at their core the idea that the defendant must have been at fault. The plaintiff will usually need to show that the defendant acted deliberately, intentionally, recklessly or negligently. Having said that, there are a small number of torts where strict liability is imposed. Here the required mental element, as is the case with the criminal law, is missing.

3.2.2 Damages

Once the plaintiff has established that the defendant was at fault then he or she must show that they suffered damages. This is critical because the central policy behind tort law is to compensate the plaintiff. Types of damages and the circumstances in which they arise are discussed later.

3.2.3 Causation

Not only must the plaintiff show loss or damages but that there is a link between the act and the damage, in the sense that the act causes the damage. Again this matter is further explored below.

3.2.4 Policy

The three matters outlined above, fault, damages and causation are likely elements of tort. These matters are discussed in more detail in respect to the individual torts. For the moment, however, the elements of a tort should be contrasted with the policy of tort law generally. You will recall that in the context of the application of precedent, the role of policy was identified as an important consideration in the development of the law. This is especially true in the area of tort law. As Professor Fleming puts it (1992, P 6):

> *... the adjudication of tort claims calls for a constant adjustment of competing interests. Opposed to the plaintiff's demand for protection against injury in invariably the defendant's countervailing interest not to*

> *be impeded in the pursuit of his own wants and desires. Hence the administration of the law involved a weighting of those conflicting interest on the scale of social value, with a view to promoting a balance that will minimize friction and be most conducive to the public good.*

So tort law is seen as an instrument through which society is regulated. In that way it must take into account social and economic practicalities. An example of this is the tort of trespass to the person. Technically, a traveler might commit such a tort on a fellow traveler when they bump together on a crowded train. But since the conduct is a result of people living in crowded societies and engaging in activity that is socially and commercially productive, namely train travel, the law will not (without some extra element such as intention) give redress. The activity is purely a by-product of modern industrial life.

Leaving those broad considerations to one side, more specific policies can be identified. In the first place, there is the function of tort to **compensate** the plaintiff. It is not to punish the defendant. This means that the focus is on the loss suffered by the plaintiff. If there is no loss, there is no tort. So even if, for instance, the defendant was guilty of very reckless driving but luckily the plaintiff was not injured, the courts, in administering tort law, will not punish the defendant. This is the function of the criminal law. In fact, the plaintiff will not succeed at all, or if he or she does, the damages will be minimal.

In looking to compensate the plaintiff, the law traditionally has focused on **individual responsibility** based on fault. This notion arose in part out of religious influences on the law which looked at moral culpability of the parties. This approach also satisfied the aim of deterring anti-social behaviour by the defendant and serve as a warning to others. This was a by-product of the fundamental object of compensating the plaintiff.

While fault is still the fundamental principle of our tort law it is gradually being regarded as out-model. Sometimes the degree of loss suffered is out of all proportion with the degree of fault. Also it is not always easy to pinpoint actionable fault. In many cases, the accident causing the harm arises out of our busy industrialized society and perhaps it is necessary for society to accept some part of the burden of loss. This concept is known as **loss spreading.** Here, the law, rather than attaching liability to the wrongdoer, focuses on the person who is best able to spread the loss. The system is already at work through insurance. The best example of loss spreading is the system of worker's compensation. If a person is injured at work, irrespective of whose fault it is, the worker is compensated by the employer. However, the