NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

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

d) Constitution or Theophanous Defence

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

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

3.2 Conversion and Detinne

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

3.3 Nuisance

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

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

So private nuisance cases usually involve neighbourhood disputes.

3.3.1 Let Us Take Those Elements in Turn:

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

nuisance over one loud party. There would need to be sustained noise over a much longer period.

(b) Interference to the **use** of land is clearly established when pesticide from next door kills the plaintiff's crops. However, actionable nuisance can occur where the enjoyment of land is interfered with. Noise will do this but other less tangible events such as the opening of a sex shop in a residential area as occurred in one case in England.

(c) Clearly the **owner of land** can complain of a nuisance but also a tenant. In cases involving inner city nuisance it will more often be the tenant who is affected – especially if the building is owned by a large anonymous company.

3.4 Vicarious Liability

The idea that persons can be liable for the acts of others has earlier been mentioned. An important practical application of this notion is vicarious liability. The key point here is that liability is attached to one person even though he/she is not the actual wrongdoer. It arises because of the relationship between the wrongdoer (the actual participant in the tort) and the other person (the one vicariously liable). The classic and most important relationship where vicarious liability is imposed is that of employer/employee. Here the employer will be liable for the wrongful (tortuous) acts the employee committed in the course of his/her employment.

Gillies (1993, p 100) sets out some reasons for imposing vicarious liability:

The justifications for vicarious liability vary. A broad one is that the culpability of the secondary party will often be equal, or indeed, greater in the case of the person made vicariously liable. The secondary party may be getting the benefit of the vicar's act, or at least, the general conduct of the vicar in the course of which the tortuous act is committed. The secondary party may have the greater ability to pay damages (obviously the case in the circumstance of an employer of substance). It may be unreasonable to allow the secondary party to shield him or herself from liability (again often the case in the circumstance of the employer). The fact situation may be such that the actual perpetrator of the tort may be impossible to identify, although the person vicariously liable can be identified (as, for example, where the party vicariously liable is the employer of hundreds of people, one or some of whom committed the tortuous act in the course of employment, it being unclear, however, exactly who was responsible).

Two common issues arise in relation to vicarious liability:

1. In the employer/employee situation what is 'in the course of employment'. Clearly the negligence of a delivery driver while picking up some goods will be covered. But what if the driver has an accident while going home for lunch (without the employer's permission) or an accident which occurs after the employee has visited the hotel on his way home. Let us assume he is permitted to take the delivery van home. You can see the difficulty in drawing the line in these cases.

Included in the term 'course of employment' are employee actions incidental to a person's employment. Also covered is an unauthorized mode of carrying out an authorized act. Clearly the employer does not instruct the delivery driver to drive negligently but vicarious liability still attaches because the employee is carrying out an authorized act (the delivery) albeit in an unauthorized mode (by negligent driving)

2. Another important question is whether the relationship in one of employment or an independent contractor. The delivery driver is clearly employed, especially if he works for no one else and he is subject to close direction by his employer. However, if the delivery drive had his own business and carried out delivery work for a range of clients then he would most likely be classified as an independent contractor.

So two tests are likely to assist in deciding between an employment situation and that of independent contractor:

One is the control test. If the employer controls not only what the employee does, but how he or she does it then it is likely that an employee and employer relationship is established. Contracts the independent contractor who is instructed what to do but not how to do it. A builder will instruct an electrician where to put the light fittings in the house but will not stand by and supervise how it is to be done.

A second test looks at whether the 'employee' has his own business. If he has, then it is highly unlikely he is anything other than an independent contractor. Relevant points here look at the degree of skill of the contractor (e.g. is it a trade such an electrician or plumber) and whether the 'employee' works solely for the employer.

In our legal system, a number of practical considerations turn on whether a particular relationship is employee/employer or employer/independent contractor. Two of them are taxation and workers

compensation insurances. If the person in question is an employee then the employer in responsible for extracting PAYE tax and also for covering their workers compensation insurance. Generally, independent contractors are responsible for these matter although there may be exceptions in different industries.

What you might ask is the significance of the distinction between employee and employer in relation to vicarious liability. The position is again adequately summarized by Gillies (1993, p 101):

Where the case is one of master-servant, [employer-employee] the employer is liable in tort not only in respect of the primary act commanded to be done, but also in respect of how it is done. If it is one of employer-independent contractor, the employer is liable only for the acts instructed to be done, but not for the manner of their performance. Thus, the shopkeeper who employs a signwriter will be liable in tort if, for example, the words which are painted under instructions, are defamatory, or provide ground for someone to sue pursuant to the tort of passing off. The shop keeper will not be liable, however, if in the course of painting the sign, the signwriter accidentally (or deliberately) drops a can of paint on a passer-by.

One final point to note is that where vicarious liability is established, the plaintiff can sue either the actual participant, (the person committing the actual tort, such as the employee) or the party vicariously liable (e.g. the employer) or both of them jointly. Commonly it is the latter.

4.0 CONCLUSION

We have concluded our bird-eye view of law of torts. In this unit we looked at slander and libel in the discourse on Defamation. The acid test is “would the words complained of tend to lower the plaintiff (Claimant) in the estimation of right thinking members of the society generally”.

5.0 SUMMARY

Defamation is a statement which is calculated to injure the reputation of another, by exposing him/her replaced the old writs of detinne, trespass and enover. Public nuisance is in crime and private nuisance line. Vicarious liability refers to liability that a supervisory party (eg. Employer) bears for the actionable conduct of a subordinate or associate (eg. Employee) because of the relationship between the two parties. Hence a car owned may be liable if the erring driver is his servant, acting in the course of his employment or is his authorized agent driving for and on behalf of the owner.

6.0 TUTOR-MARKED ASSIGNMENT

1. Aliyu accused Kenny on the floor of the State Assembly of being a cheat, 419 and a liar. This was televised during the normal broadcast of Parliament. It was also picked up by the local newspaper with a bold headline on the front page, stating: "Kenny is 419"

a. Advise Kenny.
b. Has Kenny any recourse against Aliyu, the television station, and the local newspaper.

2. A person giving advice must take care that it is not negligent. What are the elements of negligent mis statement?

7.0 REFERENCES/FURTHER READINGS

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MODULE 4

Unit 1 Contract: Classification and Formation

Unit 2 Contract: Intention and Consideration
Unit 3 Contract: Construction of the Terms of a Contract
Unit 4 Contract: Validity/Enforceability and Discharge
Unit 5 Principle and Agent

UNIT 1 CONTRACT: CLASSIFICATION AND FORMATION

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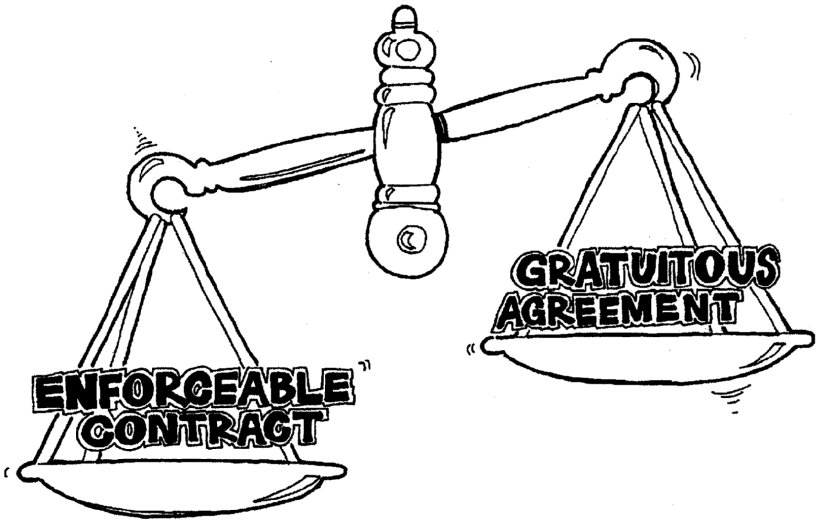
1.0 INTRODUCTION

Contracts are entered into by each of us on a daily basis. Some of the contracts are longstanding, for example a contract of employment; some are of very short duration such as the purchase of a piece of fruit or a meal but they all have the same features of a contract.

One very common mistake people make when speaking of contracts is to assume that a contract means in law a written contract. They assume that if the agreement is not in writing no legal rights flow. This is quite wrong. Most legally binding contracts arise orally and they are no less enforceable than written ones. Of course it is an easier task to prove a written contract because you can point to the particular clauses which favour you and allow the words to speak for themselves. On the other hand, with oral contracts the court has to rely on the recollection of conversations by the parties which may well vary on a particular point. The difficulties with oral contracts are more a matter of proof than of the substantive law.

Quite frequently you find there is a halfway house between a written and an oral contract. Part of the contract may be in writing or evidenced in writing. The best example is a receipt for the purchase of goods which will contain some of the terms of the contract (such as the price, description of the goods, etc.) but the balance of the terms will have been agreed orally.



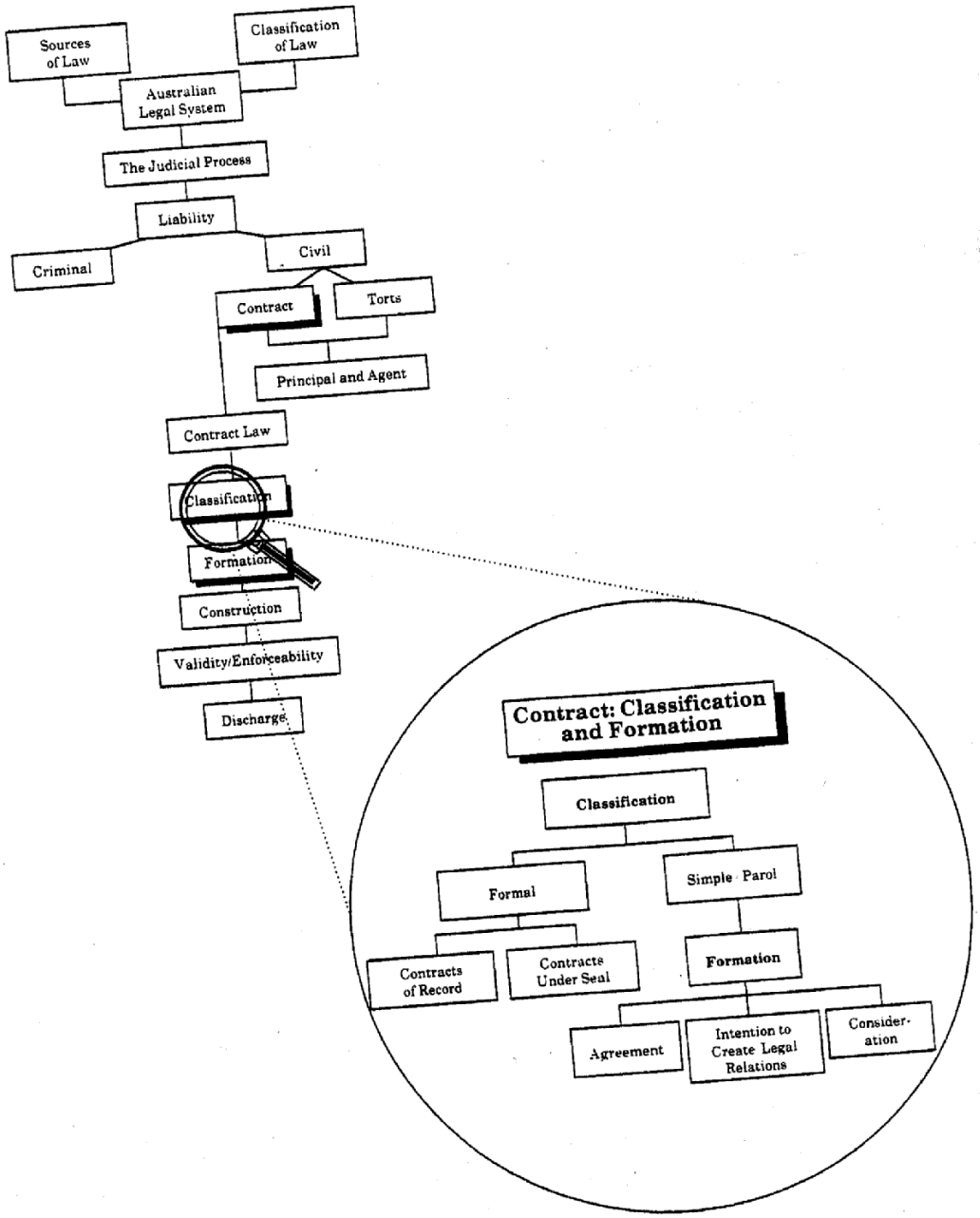
2.0 OBJECTIVES

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

- list the classification of contracts, using example
- distinguish between a contract under seal and a simple contract
- list the three basic elements for the formation of a simple contract
- apply the rules relating to offer, termination of an offer and acceptance logically and thoroughly in order to determine whether an agreement has been reached.

3.0 MAIN CONTENT

3.1 Overview of Contract



3.1.1 Definition of Contract

Most definitions of contract usually refer to four elements:

- An agreement
- By two or more parties containing
- Promises by each party
- Which are intended to be enforceable at law.

3.2 Background to the Development of the Law of Contract

Historically, there have been two main factors which have had a substantial impact on the modern law of contract.

3.2.1 The Notion of Agreement

The Courts have always been very concerned with the notion that agreement is fundamental to the law of contract. To have a binding contract there must exist between the parties a concurrence of intentions or a meeting of minds.

You might think that the need for the presence of agreement in a contract is self-evident. However, in some jurisdictions, the courts do not place such weight on the need to find a consensus between the parties.

Perhaps what is more important for our purposes is the fact that when courts are attempting to assess if there is a meeting of minds, little or no weight is placed on what a party says was in his/her mind when the alleged contract was formed. Rather, the emphasis is placed on the objective evidence such as the letters between the parties written at the time and the surrounding circumstances generally. Notice the same distinction between objective and subjective evidence or tests as we discussed in relation to negligence.

3.2.2 Laissez Faire

The economic philosophy of *laissez faire* with its strong emphasis on individualism and enterprise had a profound influence on the law of contract. This influence is apparent in three ways:

- The courts considered that the parties to a contract had complete freedom to lay down their own terms. It was not considered the function of courts to consider whether those terms were fair to the parties. To use a modern expression the courts did not see themselves as ‘consumer protection watch dogs’. Of course in the 19th century, when the laissez faire doctrine was most influential and before the huge increases in large corporations, it was much more reasonable to expect the parties to a contract to be on an equal footing.

This policy of non-interference by the courts has meant that the initiatives towards consumer protection have all been statutory ones, coming (by common agreement) not before time.

- Once formed, the contract in the eyes of the law was sacred and should be upheld at all cost. This notion arose from the common law

idea that the contract was the basis of the operations of the business world. People in business must be confident that the courts will uphold the agreement reached between the parties.

A contract should represent a bargain in the sense that both parties should receive something out of it. If one party was giving all and receiving nothing the agreement was not a contract. Contracts some systems where frequently a gratuitous promise solemnly made is enforceable at law. This aspect of the law of contract is examined at some length under the heading 'consideration'.

3.3 Classification of Contract

As a result of the historical development of the common law in this area, particularly the writs available under the old pre-Judicature Act forms of action, contract have been classified as follows:

3.3.1 Formal Contracts

These are not contracts in the real sense because they do not necessarily arise out of an agreement and they may also lack consideration. They are enforceable only because they follow a prescribed form. Formal contracts are of two types:

(a) Contracts of Record

These are **judgments** and **recognizance** (bond), which are entered in the records of the court and ipso facto enforceable. They are not particularly relevant to this course.

(b) Contracts under Seal

These are more important as they are often used in important commercial transactions, for example, to document loan agreements and mortgages. A contract is classified as being a contract under seal, or a deed, because of the form in which it is expressed. In the past it may have actually been 'signed, sealed and delivered' using parchment and sealing wax. However, now a contract is a deed if it follows the formal requirements set out in statute. Some important distinctions between a contract under seal and a simple contract are that the former does not require consideration for validity, merely the appropriate form, and an action arising under a deed in Nigeria is not barred by the Limitations of Actions Act until after twelve years, whereas actions under simple contracts are barred after six years. The notion of 'consideration' is discussed in detail later in this module. For the moment it can be equated with money's worth.

Promises or undertakings made under seal or by deed are often referred to as covenants, as opposed to terms within a simple contract.

3.3.2 Simple Contract

All those contracts which are not formal are known as simple contracts. They rely for their validity, amongst other things, on the presence of consideration and accordingly their form is generally irrelevant. Most simple contracts are verbal, eg the purchase of lunch at a take-away food bar, but others are required to be in writing or evidenced in writing, eg contracts for the sale of land.

Unless specific reference is made to contracts under seal, the balance of this study book when mentioning contracts, refers to simple contracts only.