

# LAW OF TORTS

It is a civil wrong other than breach of contract.

## Differences Between A Tort and A Contract

Tort	Contract
1. The duty is fixed by law	The duty is fixed by the parties to the contract.
2. The duty is own to persons generally.	The duty is own to the parties to the contract.
1. Negligence 2. Trespass 3. Nuisance 4. Defamation 5. Malice	Specific Torts

### 1. Negligence

- This is where a person owes legal duty of care to another, breaches that causing the person loss or damage.
- Is the omission to do something which a reasonable person would do or committing something which a reasonable man would not do.

### Elements / Essentials of Negligence

1. Legal duty of care
2. Breach of duty
3. Damages / loss.

### Legal Duty of Care.

As a general rule every person owes his neighbour a legal duty of care.

A neighbour in law → is a person who is directly affected by the acts of other eg Parent child relationship

Doctor patient relationship  
Teacher student relationship

Where professionals and experts are involved the duty of care is to the standards of reasonable competent professional. This is called Standard of care.

### Breach Of Duty

The plaintiff must proof that the defendant acted negligently breaching his legal duty of care.

He must proof that there were certain omissions & commissions.

In certain circumstances negligence can be proved without evidence. These cases are called Res Ipsa Loquitur - meaning it speaks for themselves

### Requirement for Res Ipsa Loquitur.

1. Where negligence is obvious.
2. There is absence of explanation - ie plaintiff has no evidence

3. Such a thing does not ordinarily occur when proper care is taken.

**Effects of Res Ipsa Loquitur**  
Shifts the burden of proof from the plaintiff to defendant  
Provides prima facie against evidence against the defendant.

**# Negligence** is actionable upon proof of damage/loss.  
The loss must be traceable to the defendant's breach of legal duty.

### Defences to Negligence.

1. **Contributory negligence** - This is where the plaintiff is also to claim for the loss or damage eg A patient who did not seek medical on time, passengers who are being driven by a drunkard person and they were aware.  
effects of contribution is that reduces the amount recoverable by the plaintiff.

2. **Volenti non fit injuria** - means voluntary assumption of risk. This where the plaintiff with full knowledge voluntarily agrees to take the same risk.

For it to apply following are conditions:

The plaintiff must have full knowledge of the risk.

The plaintiff must agree to take the risk.

3. **Statutory authority** - If the conduct complained is authorised by an act of parliament, it can be used as a defence.

### Strict liability; The rule of Ryland vs. Fletcher.

This is when a non-natural user of land accumulates a thing and the thing escapes causing damage.

The legal principles involved are:

1. Non-natural user of land.
2. Accumulation.
3. Thing - Water, gases, wild animals etc.
4. Escaping.
5. Damage - Actionable upon proof of injury.

### Defences to rule in Ryland vs. Fletcher.

Statutory authority - act of parliament

Act of God.

Act of stranger / 3rd party.

Consent of the plaintiff, ie where the plaintiff was benefiting from accumulation.

Contributory negligence.

### Vicarious Liability.

This is when one is held liable because of the act of others.

It arises in the following circumstances:

The principal can be held liable because of the act of the agent

An employer can be held liable because of the act of employees

Partners can be held liable because of the act of a partner.  
NB However the general rule of liability of an employer is that he cannot be held liable for the acts of an independent contractor.

### Exceptions

1. When an employer

1. When the employer has authorized the commission of the tort.
2. When the employer has agreed to be held liable.
3. Tort of strict liability.
4. Negligence - employer proof to <sup>be</sup> negligence.
5. Where the duty of care is wide.

### Occupiers Liability

This is the liability an occupier of premises has on the visitors to the premises.

### Legal Principle relating to occupiers liability

→ An occupier owes a common duty of care to the visitor by ensuring that the premises are reasonably safe.

→ The occupier can reduce his liability by warning signs concerning any damages on her premises.

→ The occupier's liability can also be reduced if the visitor contributes to his own injury.

→ At common law occupier's liability is to the following;

- A person who contracts with the occupier eg a guest in a hotel.
- The invitee a customer in a hotel.
- A licensee eg who enters in occupier's premises with permission.

### Trespasser

### 2. Trespass

Is an unauthorized entry into someone's property or an act that causes to another person.

There are 3 types of trespass

Trespass to land

Trespass to person

Trespass to goods

### ① Trespass to land

It occurs in 3 ways.

1. Wrongful entry on the plaintiff's land eg grazing.
2. Remaining on the land i.e. to the person who had been initially authorized to be on the land & the authorization had been cancelled if he remains on the land, he can be sued of trespass.

3. By placing things on the land.

## Defences for Trespass to Land

1. Necessity e.g. To fetch water to stop fire <sup>extra agricultural research made</sup>
2. Statutory authority e.g. a government body <sup>soil</sup> can enter into a person's land to take away <sup>soil</sup> for research
3. Prescription - i.e. when one acquires land by possession if one <sup>has remained on land for more than 12 yrs</sup> he acquires that land by prescription.
4. Consent of the plaintiff.

## Remedies for Trespass to Land

1. Damages → compensation.
2. Injunction - To be stopped.
3. Specific performance.
4. Ejection/eviction - chased away.

Defences of Trespass to Land  
 Necessity  
 Statutory authority  
 Prescription  
 Consent of the plaintiff.

## Trespass to Person

It occurs in three ways:

- Assault - Intention threat to use force against another person without lawful justification.
- Battery
- False imprisonment.

It is intentional threat to use force against another person without lawful justification.

1. A display or show of force.
2. Pointing of a loaded gun.
3. Inrauling in a threatening manner.

## Battery

It is the actual use of force to another person without lawful justification e.g. heating a person.

## Rules of determining assault/Battery

1. Threat to use force / Actual use of force.
2. Both are actionable per se - actionable without proof of injury.
3. It should be directed to the plaintiff.

## Defences

1. Accident - It was an accident.
2. Self defence - defendant was depending himself.
3. Judicial authority - authority from court.
4. Parental authority - authority from a parent.

## False Imprisonment

It is an authorised restraint of a person either directly or intentionally. Has the following rules:

1. Should be direct

2. It is intentional
3. Knowledge of the plaintiff
4. Restraint must be complete.
5. Actionable per se.

### Defences of False Imprisonment

1. Judicial Authority
2. Parental authority

### Remedies

Herbeaus corpus.  
Damages

### Trespass to Goods

To protect goods, common law has develop 3 torts namely:  
Debt in-

1. Detinue
2. Trespass to goods
3. Conversion

#### 1. Detinue

It is unlawful detention of goods. The plaintiff must proof that he had immediate right to possession and the defendant retained the goods even after the plaintiff demanded their return.

#### 2. Trespass to Goods

Is intentional or negligence interference of goods in possession to the plaintiff. Occurs in the following ways:

1. Taking a chattel out of the possession of another.
2. Moving a chattel-goods
3. Contact with a chattel.
4. Directing a missile to a chattel.

Defence:  
Plaintiff consent  
Necessity

#### 3. Conversion

It is dealing with goods inconsistent with the rights to possession. This is when the defendant is given the goods with the consent of the plaintiff but deals with the goods in a way that is inconsistent with the agreement.

#### Acts of conversion:

1. Disposing the chattel or goods.
2. Destroying the goods.
3. Receiving the goods without the owners consent.

### 3. Nuisance

It is the tort committed if someone is wrongly disturbed in the use and enjoyment of his land.

#### Types of Nuisance.

##### 1. Private nuisance.

It is committed when a person's private rights in his land are wrongfully disturbed. e.g. Allowing dangerous things e.g. hair, allowing a weak structure to hang above plaintiff's land, allowing smoke, noise, gas or fumes all constitute nuisance.

##### 2. Public nuisance / Common nuisance.

It affects the comfort and convenience of the members of the public. e.g. obstruction of the highway, music festival, releasing dangerous substances to the air or water.

##### 3. Continuing nuisance.

This is when a nuisance is done for a long time and not on a single event. For nuisance to be actionable it must be a continuing nuisance. Nuisance is actionable per se.

#### Defenses to Nuisance.

1. Statutory authority / Public benefit as an act of parliament.
2. Prescription - This is a right to continue a nuisance acquired after 20 years.
3. De minimis non curat lex (Triviality) - minor, less effect - i.e. when no maximum damage suffered is trivial, minor or negligible.
4. Reasonable use of property.

#### Remedies

1. Injunction
2. Damages - compensation

### 4. Defamation.

It is publication of false statement which lowers the person's reputation in the estimation of the right thinking members of the society.

#### Elements of Defamation.

1. The statement must be false.
2. It must be defamatory - i.e. it causes ridicule or lowers the reputation of an individual among the right thinking members of society.
3. The statement must refer to the plaintiff.
4. The statement must be made public.

#### Types of Defamation.

Libel

Slander

1. Libel Defamation  
is permanent form of defamation as published or broadcast electronically.

2. Slander Defamation.

is non-permanent form of defamation usually by word of mouth.

### Differences Between Libel and Slander

Libel	Slander
1. Permanent	1. Transient
2. Actionable per se.	2. Actionable upon proof of damage/injury
3. It is both a civil & criminal wrong.	3. It is only a civil wrong.

→ Though Slander is actionable upon proof of damage there are 4 cases of Slander that are actionable per se. These are:

1. Imputation of a criminal offence
2. Imputation of a contagious or infectious disease.
3. Imputation of unfitness, dishonesty or incompetence in any office, profession or calling
4. Imputation of unchastity, uncharity or adultery of any woman or girl.

### Defences of Defamation

1. Truth - To ascertain truth of information one must have evidence to justify.
2. Fair comment - means must fulfill the following conditions:
  1. Public interest
  2. Comment must be honest & without any malice.
3. Absolute privilege - It is a privilege given to judges & members of Parliament.
4. Qualified privilege - This is limited in scope & applies to journalists when they use the reports of parliament & judiciary fairly.
5. Public interest -
6. Plaintiff's consent - Agreed himself to be published.

### Remedies

1. Damages
2. Apology
3. Right of reply
4. Injunction

### Elements of Defamation

5. Malice  
is presence of improper motives.  
It is common in defamation

### Limitation of Action

Taking action must be within a specific period specified by the law.  
This is because delay defeats equity.  
Duration of within which causes of action must be enforced in Kenya are

The following:

### Cause of Action:

1. Breach of Contract
2. Recovery of rent
3. Negligence
4. Assault
5. Battery
6. Defamation.

### PERIOD OF LIMITATION

### Years:

- 6 yrs.
- 6 yrs.
- 3 yrs.
- 3 yrs.
- 3 yrs.
- 1 yr.

### Principles of Tort

1. **Damnum sine injuria** - Damage without legal injury. - This where a person puts out a college and charges 1000 for a unit and another put a college at the same place and charge 6000 for the same unit, then the student move to the college.
2. **Injuria sine damnum** - This is where legal rights are violated without damage. Eg A returning officer during voting wrongfully refused to allow the plaintiff who was a qualified voter. The person who the plaintiff wanted to vote won the elections so no loss was suffered. The court however held that his rights were violated & therefore he was suppose to paid damages.
3. **Fault principle** - Determined in 3 ways:
  1. Intention or not by accident.
  2. Recklessness - carelessness
  3. Negligence.

### General Defences in Tort

1. Statutory Authority
2. Plaintiff's consent
3. Necessity
4. Volenti non fit injuria
5. Self defence
6. Mistake
7. Inevitable accident
8. Act of God
9. Act of stranger.