

DBM 2104: Business Law

Tutor: Stephen Waweru

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TOPIC 6: LAW OF PERSON

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6. Law of persons

Laibuta Kibaya Imaana, *Principles of Commercial Law*, LawAfrica, 2006, pp 19-33

6.1 Natural persons

6.2 Nationality, citizenship and domicile

6.3 Artificial person

6.4 Unincorporated associations

6.5 Incorporate associations

6.6 Co-operative societies

6.0 Law of persons: Gen. Overview

Laibuta Kibaya Imaana, *Principles of Commercial Law*, LawAfrica, 2006, pp 19-33

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- Every legal relationship under consideration involves an individual(s), or business association whose legal status effectively shapes the for, nature and effect of the particular transaction
 - Validity of a busies transaction rest on the status of the parties and on their legal capacity to create a relationship attended by legal consequences.
 - Lack of capacity to contract as prescribed by statute generally renders a contract unenforceable
 - Law of person extends to substantive and procedural law (private and public law)
 - Public law incorporate municipal law and comprises of that law that deals with constitution and functions of central and local /devolved government, relationship btw indiv. and state and rel'ship btw indiv.
 - Pub Law includes; Constitutional, Administrative, Tax & Criminal Law.
 - Private law concerns itself with that body of rules that relagulate relationship btw individuals that are of no direct concern to the state.
 - It include Property, Family, Contract and Tort Law

6.1 Natural persons

- Human being: full legal capacity
- Potential subject to rules of law depending on their status
- They have right capacity that has bearing on his rights and freedom
- Legal Status: Husband , wife, father, guardant, infant, and employer
- Husband and wife: Legal consequence_ Duty to cohabit, Rt to maintaine, Rt to occupation, to matrimonial home, property right on divorce or succession.
- Father: Ensure due protection, maintenance, care and control of the infant.
- Employer has duties to hos employee: remuneration (labour statutes). Employer has reciprocal roles.

6.1.1 Infants and persons of unsound mind

- The legal standing of infant and persons of unsound of mind their general legal rights and duties in commercial transaction and in other legal relations, are closely guarded and regulated by statute.
- Though natural person the law regard them as incapable in certain case to create legally binding relations in business transactions
- Drunken person: when he enters into the contract, other than a contract for **necessaries**, is in such a state to know what he is doing, and particular when it appears that this was known to the other party, the contract is void altogether, and the drunk party cannot be compelled to perform it
- Though there is presumption that a natural person or legal person had capacity to contract, there are those due to age or legal status such as mental infirmity, are deprived of the capacity to contract and cannot be bound in contract other than that of necessities.
- Trading contract entered into by minor or person of unsound mind are either void or voidable and are not enforceable. See the Age of Majority Act (Cap 33)- 18 years. Other than the contract of necessities (S2 of the Act) (disability)
- Bankrupt: you can't enter into contractual obligation.

6.2 Nationality, citizenship & domicile

Nationality:

- The relationship between a person and a particulate state for which he is a citizen (Laibuta p. 20)
- The legal status of a nationality, or citizenship, entitles a person to enjoy certain legal rights, freedoms and privileges safeguarded by the law of the state of which 9s)he is a national
- The status may be acquired by birth, registration, or nationalization or may be lost by renunciation or deprivation in accordance with the Kenta Citizen ship Act (Chapt 170)

Fenwick

- Defines it as a bond which unites a person to a given state which constitutes his membership in the particular state, which gives him a claim to the protection of that state and which subjects him to the obligation created by the laws of that state.
- The basis of nationality is the membership of a particular community.

6.2 Nationality, citizenship & domicile

International importance of the nationality;

- Nationality is often determined by the state laws. It is a link through which an individual can enjoy the benefits of international law.
- Starke state its importance as under;
 - 1) Protection of rights of diplomatic agents
 - 2) Prevention of offences
 - 3) Loyalty to particular state
 - 4) State can refuse to extradite its own nationals
 - 5) Enemy character is determined on the basis of nationality
 - 6) Jurisdiction of state over their nationals

6.2 Nationality, citizenship & domicile

Modes of acquisition and loss of nationality;

A) Acquisition of nationality

1. **By birth;** That is nationality is conferred at birth by the fact either of birth within the state territory (jus soli) or by the descent from, one of its nationals (jus sanguinis). According to jus soli the birth occurs is the decisive factor and according to the jus sanguinis and the parentage.
2. **By naturalization;** It may take place by means of marriage, legitimization, option, domicile, or appointment as government officials and on the application. It is administrative fact of the state conferring citizenship upon alien.
3. **By registration of resumption;** Those individuals who were natural born subjects of the state but who lost their original nationality on account of some cause may get back it on fulfilling certain conditions.
4. **By descent;** It is on the basis of nationality of parents, this is also known as jus sanguinis. UK and USA also recognize this principle
5. **By subjugation;** After the conquest. When the part of a state is subjugated by another state the inhabitants of that state become the nationals of the later state.
6. **By cession;** When a part of the state is ceded, all nationals of the former state become nationals of the later state.

6.2 Nationality, citizenship & domicile

B) Loss of nationality

1. **By release;** For it, it is necessary to submit an application for the loss of nationality by release.
2. **By deprivation;** Some laws of the state, provides that if a national of its state seeks employment of government of another state without its permission, he will be deprived of his nationality
3. **Long residence abroad;** State laws of many states contain provisions in this connection that if a person resides for a long period abroad, his nationality ends
4. **By renunciation;** When a person acquires a nationality of more than one state, he have to renounce his nationality of one state.
5. **Substitution;** As to this principle, a person may get nationality of state in place of the nationality of another state, and whereby he loses his nationality of one state and acquires the other state.

6.2 Nationality, citizenship & domicile

Citizenship:

- The word citizenship is often used in municipal law.
- **Definition;** Generally the national who enjoys full political and civil rights is called a citizen. The state of being a native of a city and enjoying the freedom and privileges of the city, in which he resides.
- It is intimately connected with the civil rights.

Refer: To the constitutional status of a person. (Chapter 3 CITIZENSHIP COK)

Difference between nationality and citizenship:

- By nationality we mean that legal relationship which exists between the nation and the individual, on the other hand, citizenship denotes the relationship between the person and the state law
- By nationality the civil and natural rights of a person may come under international law and by citizenship it is the sole concern of the state law
- It is possible that all the citizens may possess the nationality of a particular state, but it is not possible that all the nationals may be the citizens of that particular state.
- Citizens possess full political rights in a state, but a national may not possess such rights

6.2 Nationality, citizenship & domicile

Citizenship:

Art. 12 Entitlements of citizens

(1) Every citizen is entitled to--

- (a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution; and
(b) a Kenyan passport and any document of registration or identification issued by the State to citizens.
- (2) A passport or other document referred to in clause (1) (b) may be denied, suspended or confiscated only in accordance with an Act of Parliament that satisfies the criteria referred to in Article 24.

Art. 13. Retention and acquisition of citizenship

(1) Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date.

(2) Citizenship may be acquired by birth or registration.

(3) Citizenship is not lost through marriage or the dissolution of marriage

6.2 Nationality, citizenship & domicile

Citizenship:

Art. 14. Citizenship by birth

- 1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen.
- (2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen.
- (3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendents of Kenyan citizens who are born outside Kenya.
- (4) A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.
- (5) A person who is a Kenyan citizen by birth and who has ceased to be a Kenyan citizen because the person acquired citizenship of another country, is entitled on application to regain Kenyan citizenship

6.2 Nationality, citizenship & domicile

Citizenship:

Art. 15. Citizenship by registration

- (1) A person who has been married to a citizen for a period of at least seven years is entitled on application to be registered as a citizen.
- (2) A person who has been lawfully resident in Kenya for a continuous period of at least seven years, and who satisfies the conditions prescribed by an Act of Parliament, may apply to be registered as a citizen.
- (3) A child who is not a citizen, but is adopted by a citizen, is entitled on application to be registered as a citizen.
- (4) Parliament shall enact legislation establishing conditions on which citizenship may be granted to individuals who are citizens of other countries.
- (5) This Article applies to a person as from the effective date, but any requirements that must be satisfied before the person is entitled to be registered as a citizen shall be regarded as having been satisfied irrespective of whether the person satisfied them before or after the effective date, or partially before, and partially after, the effective date

6.2 Nationality, citizenship & domicile

Citizenship:

- **Art. 16. Dual citizenship**

A citizen by birth does not lose citizenship by acquiring the citizenship of another country

- **Art. 17. Revocation of citizenship**

(1) If a person acquired citizenship by registration, revocable if

- (a) the person acquired the citizenship by fraud, false representation or concealment of any material fact;
- (b) the person has, during any war in which Kenya was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was knowingly carried on in such a manner as to assist an enemy in that war;
- (c) the person has, within five years after registration, been convicted of an offence and sentenced to imprisonment for a term of three years or longer; or
- (d) the person has, at any time after registration, been convicted of treason, or of an offence for which--

6.2 Nationality, citizenship & domicile

Citizenship:

Art. 17. Revocation of citizenship

(d) the person has, at any time after registration, been convicted of treason, or of an offence for which--

- (i) a penalty of at least seven years imprisonment may be imposed; or
- (ii) a more severe penalty may be imposed.
- (2) The citizenship of a person who was presumed to be a citizen by birth, as contemplated in Article 14(4), may be revoked if--
 - (a) the citizenship was acquired by fraud, false representation or concealment of any material fact by any person;
 - (b) the nationality or parentage of the person becomes known, and reveals that the person was a citizen of another country; or
 - (c) the age of the person becomes known, and reveals that the person was older than eight years when found in Kenya.

6.2 Nationality, citizenship & domicile

Domicile: Domicile is an attribute of nationality and denotes a person's place of residence. And, It is the relationship between the individual and locality, where he has his permanent home.

Difference between nationality and domicile

- Domicile denotes the residence of the person, while nationality denotes relationship of man with his nation.
- Consequently a person may acquire nationality through domicile.

Difference between domicile and citizenship:

- Citizenship has reference to the political status of a person and
- Domicile to his civil rights.

6.3 Artificial persons

- In law, a human person is called a *natural person* (sometimes also a *physical person*), and a non-human person is called a *juridical person* (sometimes also a *juridic, juristic, artificial, legal*, or ***fictitious person***, Latin: *persona ficta*).
- Juridical persons: Corporations, Firms (in some jurisdictions), and many Government agencies.
- Commonly (incorporating a business), legal personality is usually acquired by **registration with a government agency** set up for the purpose.
- In other cases it may be by **primary legislation (judiciary, IEBC etc)**:
- The **UN SDG 16 advocates for the provision of legal identity for all**, including **birth registration by 2030**.
- As legal personality is a **prerequisite to legal capacity**:
 - Ability of any legal person to amend – i.e. enter into, transfer, etc.
 - Rights and obligations
- A prerequisite for an international organization to be able to sign international treaties in its own name.

6.3.1 Legal persons

- In law, a **legal person** is any person or 'thing' (less ambiguously, any **legal entity**) that can do the things a human person is usually able to do in law – such as enter into contracts, sue and be sued, own property etc
- "*legal* person" is that some legal persons are **not people**:
companies and corporations are "persons" legally speaking: an legally do most of the things an ordinary person can do, but they are not people in a literal sense.
- There are therefore two kinds of legal entities:
 - **human and**
 - **non-human.**

6.4 Unincorporated Associations (UAs)

- An unincorporated association is defined as **an association of two or more persons formed for some religious, educational, charitable, social or other non-commercial purpose.**
- UAs are one vehicle for people to cooperate towards a common goal.
- The range of possible UAs is nearly limitless, but typical examples are:
 - An amateur football team who agree to hire a pitch once a week and split the cost.
 - Residents of a street who agree to pay into a collective fund for street sweeping, etc.
 - A [co-operative](#).
 - A [trade union](#).
 - A professional association.

6.4 Unincorporated associations (UAs)

- Most significant feature of an association is exactly that they are **unincorporated**: i.e., they lack **legal personality**.
- UAs are cheap and easy to form, requiring a bare minimum of formalities to bring them into existence.
- Indeed, the common law on contracts means they can even be formed without their members realising it.
- They are also **extremely flexible**, with examples of tiny associations of just a few people, and national organisations with thousands of members.
- Whether or not a group of people is an unincorporated association is not always clear. A summary definition is
 - a *group* of people
 - gathered for a *common purpose*
 - but *not for profit*
 - intending to create a *legally binding relationship* between themselves

6.4 UAs

- There is no statutory definition of an UA so it has fallen to judges to define them.
- In the leading case, *Conservative and Unionist Central Office v Burrell*, Lord Justice Lawton defined an UA as [T]wo or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will.“

6.4.1 UAs Essential elements

1. that there exist members of the association;
2. that there is a contract binding them
3. that they have a common purpose which is not business;
4. there must have been a moment in time when a number of persons came together to form the association although those persons need not be the present member
5. it is not a legal person.
6. Their legal basis is the general law of contract (including contracts of agency), which governs the agreements the members make with each other.
7. UAs are entirely private concerns.
8. Some may have structure and governance: **Constitution**; **Objects or purposes (suffer frustration of contract) (GSS)**; **Members (consent)**; **Committee** (trustees for the members, and have a fiduciary duty towards them); **The Chair (presides over meetings)**; **Other officers** (eg treasurer, secretary);
9. Liability (no legal personality: deal with specific member law of agency): Once liability of one or more persons is established, their liability is unlimited

6.4.1 UAs Essential elements

1. Legal difficulties: No legal personality, cant hold property (device mechanism)
2. **Nature of held rights:** (such as assets, are held by voluntary association) **Joint tenancy or tenants in common.** This has the result that the member can receive his or her own share (allowing for **severance** in the case of joint tenants) irrespective of the other members, in the same way that a joint owner of a business can do so. In *Bowman v Secular Society* this construction was even applied to a gift given to be applied for the general purposes of the association.
3. **On trust for the purposes of the association** (The second alternative is that the gift is to the trustees, or those officers who might properly be considered trustees, to be held on trust for the purposes of the association in a private purpose trust)
4. **Contract-holding** (The third alternative is that members hold the property as **beneficial owners**, but are bound by their contracts *inter se* as to their ability to take out their share.) See *Re Recher's Will Trusts* in relation to a gift to the Anti-Vivisection Society, although, on the facts, that society was considered no longer in existence and the gift failed for this reason.^[17] One statement of when such an absolute gift will be considered to have been made was given in *Re Lipinski's Will Trusts*

6.4.1 UAs Essential elements

1. Where the donee association is itself the beneficiary of the prescribed purpose ... the gift should be construed as an absolute one ... the more so where, if the purpose is carried out, the members can by appropriate action vest the resulting property in themselves, for here the trustees and the beneficiaries are the same persons. Stated in *Hanchett-Stamford v Attorney-General* [2008] EWHC 330 (Ch), where [Lewison J](#) stated: 'This "contract-holding" theory is now considered the dominant theory in the field
2. **In practice:** (circumstantial)
3. **Distribution of rights upon dissolution** (The distribution of rights in such a case depends upon how those rights are determined to be held) including *Bona Vacantia*
4. ***Bona vacantia*:** Before the Hanchett Stamford case, it was suggested that the assets of an association that dissolves in certain circumstances would be *bona vacantia* (vacant goods and is the name given to ownerless property, which by law passes to the Crown))
5. **Libel:** Lack of legal personality means an unincorporated association ordinarily has no standing to sue for libel

6.5 Incorporate associations (IAs)

- An IA is a registered legal entity that's usually established for recreational, cultural or charitable purposes. It must have at least 5 members and put all profits back into the association's activities. (Read Association Registration Act 2015 Laws of Kenya*)
- Benefits of incorporation
 - continue regardless of changes to membership
 - accept gifts, bequests and grants
 - buy and sell property
 - enter into enforceable contracts
 - sue or be sued
 - invest and borrow money
 - Incorporating your club is not compulsory. If you do incorporate, there are rules you must follow.

6.5 Incorporate associations (IAs)

How to register as an incorporated association

- Hold a meeting with members to vote on whether your organization wants to incorporate.
- You must get a majority of votes to authorize a person to incorporate the association and approve proposed rules that comply with the Associations
- Search the names; states the purpose/objectives
- Age of minority

Other things to consider: Membership requirements

- qualifications for membership
- quorums for meetings
- provisions for elections
- Profits and financial reporting
- Incorporated associations are non-profit organisations. This means profits can't be distributed to members for personal gain, but must be used to achieve the objectives of the association.
- Limited liability for members

6.5 Incorporate associations (IAs)

- Incorporated associations can own and fully control property. If the organisation is sued, members and officers of incorporated associations: are protected against personal responsibility for any debts or liabilities that the association incurs have personal liability limited to outstanding fees
- This is different to members or office-bearers of unincorporated associations, who can be sued or held personally liable for the debts of the organisation.
- Receiving bequests, gifts and funding
- An incorporated association can invest a bequest, or gift, given through a will. It can also borrow money and operate a bank account in its own name.
- It's sometimes easier for an incorporated association to get government funding because of the association's stable structure.

6.6 Co-operative societies

- Cooperative societies are **formed with the aim of helping their members**. This type of business organisation is formed mainly by weaker sections of the society in order to prevent any type of exploitation from the economically stronger sections of the society.
- Cooperatives are **people-centred enterprises owned, controlled and run by and for their members to realise their common economic, social, and cultural needs and aspirations**. Cooperatives bring people together in a democratic and equal way.
- **The SACCO Societies Regulatory Authority (SASRA)** is the government's principal agency responsible for the supervision and regulation of SACCO Societies in Kenya. It is established pursuant to the provisions the Sacco Societies Act, No. 14 of 2008.
- Read also see THE CO-OPERATIVE SOCIETIES (AMENDMENT) BILL, 2020 Laws of Kenya

6.6.1 Types of co-operative societies

- **Types of Cooperatives**
 - Farmers Cooperative Societies.
 - Producer / Marketing Cooperatives.
 - Credit Cooperative Societies.
 - Consumer Cooperative Societies.
 - Cooperative Housing Societies
 - Worker Cooperatives.
 - Housing Cooperatives.
 - Financial Cooperatives.

6.6.2 Principles of co-operative societies

- Open and Voluntary Membership. ...
- Democratic Member Control. ...
- Members' Economic Participation. ...
- Autonomy and Independence. ...
- Education, Training, and Information. ...
- Cooperation Among Cooperatives. ...
- Concern for Community.

6.6.4 Aims of co-operative societies

- The main aim is to **protect the economic interest of the people by eliminating the middlemen**. One of its major functions includes providing **loans at a low rate of interest to its members and weaker sections of society**. A cooperative society **works with the aim of self-help** basically for its members.
- **Cooperative Principles**
 - Open and Voluntary Membership. ...
 - Democratic Member Control. ...
 - Members' Economic Participation. ...
 - Autonomy and Independence. ...
 - Education, Training, and Information. ...
 - Cooperation Among Cooperatives. ...
 - Concern for Community.

6.6.3 Management of co-operative societies

- Cooperative management should be regarded as a team consisting of four elements — **members (owners), board of directors (elected), the manager (hired), and other responsible employees (paid)**. Each part of the team has its own distinctive duties and responsibilities **for performing management functions in a cooperative**
- **Advantages:** 1. Easy to Form 2. Open Membership 3. Democratic Management 4. Limited Liability 5. Stability 6. Economic 8. Low Management Cost 9. Mutual Co-Operation 10. No Speculation 11. Economic Advantages 12. Service Motive 13. Internal Financing 14. Income Tax Exemption 15. Durability 16. Cheaper Goods 17. State Patronage 28. Elimination of Middleman 19. Equality 20. Perpetual Existence 21. Scope for Self-Government.
- **Disadvantage:** 1. Limited Capital 2. Inefficient Management 3. Absence of Motivation 4. Differences and Factionalism among Members 5. Rigid Rules and Regulations 6. Lack of Competition 7. Cash Trading 8. Lack of Secrecy 9. Weightage to Personal Gains 10. Lack of Incentive and Initiative 11. Corruption 12. Limited Consideration 13. High Interest Rate 14. Undue Government Intervention 15. Differences of Opinion 16. Lack of Expertise 17. State Control 18. Lack of Loyalty 19. Lack of Understanding of Principle of Cooperative Societies 20. Lack of Universal Applicability.

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- The END

TOPIC 7: LAW OF TORT

Tutor: Stephen Waweru

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7. Law of tort

7.1 Nature of tort

7.2 General defences of tort

7.3 Negligence

7.4 Vicarious liability

7.6 Strict Liability

7.7 Defamation

7.8 Limitation of actions

7.0 Basic principles of tort

What is tort?

- It is a **civil wrong** in the sense that it is committed against an **individual** (which includes legal entities such as companies) **rather than the state**.
- The gist of tort law is that a **person** has **certain interests** which are **protected by law**.
- These interests can be **protected by a court awarding a sum of money, known as damages**, for infringement of a protected interest.
- Alternatively, **by the issuing of an injunction** - which is a court order, to the defendant to refrain from doing something.
- There are increasingly limited circumstances where the victim of a tort may avail himself of self-help

7.0.1 Basic principles of tort

- **The Four Elements of a Tort**
- The **accused had a duty**, in most personal injury cases, to act in a way that did not cause you to become injured.
- The accused **committed a breach of that duty**.
- An **injury occurred to you**.
- The breach of duty was the **proximate cause** of your injury.

7.0.2 The basic pattern in in tort?

- The paradigm tort consists of an **act or omission** by the defendant which causes damage to the claimant.
- The **damage** must be **caused by the fault of the defendant** and must be a kind of harm recognized as attracting legal liability
- Act (or omission) + causation + fault + protected interest + damage = liability

7.0.3 Variation in pattern in tort?

- There are certain torts which **do not require fault**. These are known as **torts of strict liability**
- In some cases the act or omission of the defendant may have caused damage to the claimant but the claimant may have no action as the interest affected may not be one protected by law. Lawyers refer to this as *damnum sine injuria* or harm without legal wrong
- There are also cases where **conduct is actionable even though no damage** has been caused. This is known as *injuria sine damno* and where a tort is actionable without proof of damage it is said to be actionable per se

7.0.4 The interests protected

- **Personal interest:** personal security;
 - Fear of being hit > tort of assault
 - Blow is struck > tort of battery
 - Freedom restricted (unlawfully) > sue for false imprisonment (intentional tort)
 - Personal injury is caused > action in tort of negligence
 - Psychiatric damage (witness traumatic event-Westgate; Dusi)
 - Consent to treatment and R2L* Law & morality (Kavonokio)*
- **Interest in property:** Nuisance > *Ryland v Fletcher*; Trespass to Land; interest in personal property > tort (trespass to goods and conversion); Cloth or care damage > action for damage in negligence
- **Economic interest:** Economic tort (ltd protection- tort and contract intersect): common law cautious in drawing line (btw (un)lawful business practice): Q ECC. loss (physical damage or 'pure ECC. loss')
- **Reputation and privacy:** untrue speech or writing > action in tort of defamation

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7.0.5 The Role of policy

- **Consideration:**
 - Duty of care;
 - Remoteness of damage;
 - Fault etc.
- **Questions to ask:**
 - Was there duty?
 - Was damage too remote?
 - Was defendant at fault?
- **Formal conceptualization (black letter law)**
- **2 Policy Factors:**
 - 1) Opening the floodgate of litigation:
 - 2) The Role of insurance (pay most damages in tort)

7.0.6 The Role of insurance

- **Without insurance:**
 - Tort system would cease to operate
 - Many people would afford to pay awarded damages
- **Insurance**
 - Property loss: 1st party insurance (insurable risk)
 - Damage to 3rd party: insurer indemnify the insured
 - 3rd party: must establish the insured liability
 - 1st & 3rd party insurance: personal injuries or death
- **1st insurance**
 - Life insurance
 - Personal accident insurance
 - Permanent health insurance
 - Formal conceptualization (black letter law)
- **M/V accidents: damager awsrđ (e.g. 5M etc.): M/V 3rd party insurance by law**
- **Professional indemnity (Advocates, doctors): sued for professional negligence**

7. 1 Negligence: causation & remoteness of damages

- **Negligence** is one of those torts in which **damages must be proved**.
- Once a **breach of duty** has been established, the **claimant must** therefore also show that the **breach has resulted in injury of damage** (the causation issue) and
- That the **injury or damage is sufficiently closely** connected to the breach (**the remoteness issue**).
- Where a **further event occurs after the breach of duty**, which contributes to the damage, this later even may amount to a ***novus actus interveniens***. ("new intervening act")
- It **breaks the chain of causation and renders** any new damage too remote from the defendant's breach of duty.

7.1.1 Causation

- Causation is **relevant to all torts in which proof of damage is essential**.
- Ordinarily the claimant must **prove that the damage suffered was caused by the defendant's breach** of duty and that it was **not too remote**.
- The former element is often referred to as **causation in fact** and the latter as **causation in law**.

7.1.1 Causation

- **Causation in fact:** whether as a matter of fact the damage was caused by the **breach of duty**.
- *“a person found dead on a railway crossing having been run over by a train that failed to sound a warning before using the crossing, all the elements of negligence are present.”*
- The railway company **owes a duty of care to persons using the crossing**.
- A breach of duty by not sounding a warning. The claimant has suffered damage.
- **But** no negligence action until it is established that the **train that ran over the claimant was the one that failed to sound a warning**

7.1.1.1 Causation: The basic rule (the “but for” test)

- If the **damage would not** have occurred **but for** the **defendant’s breach of duty**, then the **breach of duty is the cause** for the damage.
- It is **sufficient to show** that on a **balance of probabilities** the breach was the **cause of the damage**, or that it is **more likely than not** that the breach was a cause of the damage.
- In principle it is “an all or nothing question”.

7.1.1.1 Causation: The basic rule (the “but for” test)

- Several situation to consider

1. There may be doubt about the natural course of events would have been if the defendant had **behaved properly**. In *Barnett v Chelsea and Kensington Hospital Management Committee*, [1969] 1 QB 428. diagnosis and treatment could not have affective in preventing claimants husbands death. (vomiting) : Breach of duty (examination) was bot a cause of his death.
2. There may be doubt about how the defendant would subsequently have behaved if he had done **what he should have done in performance** of the duty (**omission to act**). In *Bolitho v City and Hackney Health Authority*. A young child, who had a history of respiratory problems [1998] AC 232. The doctor would nt have intubated there4 her negiligence faulure to attend didnt cause the death (boy).
3. There may be doubt about how the claimant **would subsequently have behaved** if the **defendant had done what should have been done**. Doctor (D) failed to warn the patient about the risk of treatment: would the patient have decided to have the treatment anyway. If so, the **failure to warn cannot be a cause of the damage** if one of the risk occurs. If Employers (D) may have failed to provide safety equipment for their employee: **would the deceased employee have used it if it had been provided?** If not, then the failure to provide it was not the cause of the injuries. See *McWilliams v Sir William Arrol* [1962] 1 All ER 623

7.1.1.2 Multiple causes

- Suppose that *David and Daniel Acting independently* at the same moment **shoot Conrad, who dies instantly: either shot would have been fatal.** Logically, each assailant could say that he was not the cause of death, because, even if he had not been there, **the other shot would still have killed Conrad.** On this reasoning neither defendants would be liable. **Such a result would be absurd.** In such a case the **court would hold that both David and Daniel were liable,** leaving them to contest the matter between themselves.

7.1.1.2 Multiple causes

- **McGhee v National Coal Board [1973]**
- **Facts:** McGhee was an employee the National Coal Board, and generally worked emptying pipe kilns. However, one day he cleaned out brick kilns. This work caused him to get very sweaty, and powdered brick caked on to his skin. He then biked home without washing, because there were no cleaning facilities provided by the employer, and developed dermatitis. The exact way that this disease develops was not known at the time, but it was proven that the washing immediately after coming out of the kiln would have at least lessened the risk of it developing. The Coal Board was successful at the lower courts, which McGhee appealed.
- **Issue:** When a defendant has been proved to have negligently contributed to the development of an injury, should they be liable if it can be shown that the plaintiff's actions also led to the development, and the exact cause is unknown?
- **Decision:** Appeal allowed
- **Reasoning:** Simon of Glaisdale sums up the reasons thusly: Where an injury is caused by two or more factors operating cumulatively, one or more of which is a breach of duty and one or more of which is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require the plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach of duty contributed substantially to causing the injury.
- **Ratio: Material increase in risk** was treated as equivalent to a material contribution to damage

7.1.1.2 Multiple causes

- ***Willsher v Essex Area Health Authority* [1988] 1 AC 1074** House of Lords
A premature baby was given too much oxygen by a junior doctor. The baby suffered from a condition affecting his retina which left him totally blind in one eye and partially sighted in the other. The condition could have been caused by the excess oxygen he had been exposed to or it could have been caused by four other factors unrelated to the oxygen, but related to the premature birth. The trial judge found the Health Authority liable. He applied *McGhee v NCB* but stated that *McGhee* had reversed the burden of proof where there was more than one possible causes. The Health Authority appealed.
Held:
 - Appeal allowed. The defendant was in breach of duty. A junior doctor owes the same standard of care as a qualified doctor. *McGhee* did not reverse the burden of proof which always remains on the claimant.

7.1.1.2 Multiple causes

- Where the **causes are successive** and the **breach of duty of the second defendant causes the same type** of damage as that of the first defendant, the “**but for**” test will be applied in the action **against the second defendant**.
- In *Performance Car Ltd v Abraham* [1962], the second defendant’s car negligently collided with the claimants car. The claimants claimed \$75 as the cost of respray, but, at the time of the accident, the car already required a re-spray as a result of a collision with the first defendant. The second defendant was not liable, as the need for the re-spray did not arise from his breach of duty.
- The practice in this type of the cases is for the court to determine and decide the extent to which the first defendant is legally responsible for the consequence of the second event.
- See *Webb v Barclays Bank plc* [2001] ; *Baker v Woloughby* [1970]

7.1.1.2.1 Multiple causes – concurrent

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- **1.4 Multiple causes - concurrent**
 - Where there exist **two or more causes**, which operate concurrently, it may be factually impossible to determine which one was the cause.
 - This has proved problematic not least because it is the claimant's responsibility to establish which one was **the cause**.
 - On general principles the burden of proving this is on the **balance of probabilities** i.e. the claimant has to **demonstrate that there is more than a 50% likelihood of the cause** being the breach of duty of the defendant.
 - Where there are **two causes** this means the burden of **proof is impossible to discharge leaving the claimant uncompensated** often for an obvious breach of duty. **Various formulations have arisen to circumvent the strict approach.**

7.1.1.2.1 Multiple causes – concurrent

- *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 House of Lords
- The claimant contracted pneumoconiosis by inhaling air which contained minute particles of silica during the course of his employment.
- The defendant was in breach of a statutory duty in failing to provide an extractor fan.
- Had they installed an extractor fan the number of particles of silica that the claimant was exposed to would have been reduced, however, there would still be some particles present.
- There were thus two possible causes: the guilty dust, which should not have been in the working environment and the innocent dust, which would have been present in any event.
- The trial judge held that where the duty arose by statute then it was for the defendant to show that his breach of duty (the guilty dust) did not cause the disease. As the defendant was unable to do this they were liable.
- The defendant appealed contending the burden of proof rests on the claimant.
- **Held:**
The burden of proof remains on the claimant.
- However, the claimant only had to demonstrate that the guilty dust had made a material contribution to the disease.
- He did not have to demonstrate on the balance of probabilities that the guilty dust was the sole cause of the disease.

7.1.1.2.2 *Novus actus interveniens* (New intervening act)

- Where there is a new intervening act this may **break the chain of causation** removing liability from the defendant.
- The legal test applicable will depend upon whether the new action was by a third party or an act of the claimant
- The defendant's breach of duty may be the cause of the claimant's damage in the sense that it satisfies the “**but for**” test, but some other factual cause intervening after the breach may be regarded as the sole cause of all or part of the claimants damage.
- The expression *novus actus interveniens* is often used to describe the “**second rule**” **cause**
- **Illustration:** *If A negligently Knocks down B, who is subsequently run over by C driving the car behind, C's action is unlikely to break the chain of causation, as this is a risk to which A's negligence exposed B. But what would be the position if C has then stolen B's wallet?*

7.1.1.2.2 *Novus actus interveniens* (New intervening act)

A novus actus interveniens may take one of the four forms

1. It may be a natural event:

- The courts are reluctant to find that an intervening natural event breaks the chain of causation because the claimant has no-one else to sue
- If the claimant is injured by the defendant's negligence and then suffers further harm when the ambulance taking him to hospital is struck by a falling tree, then the chain of causation is broken
- But where the defendant negligently starts a fire and strong winds fan the blaze, causing it to spread to the claimant's property, the winds do not break the chain of causation.

7.1.1.2.2 *Novus actus interveniens* (New intervening act)

A novus actus interveniens may take one of the four forms

2. *Novus actus interveniens* - Act of 3rd party

- Where the new act is of a third party, the test is whether the act was **foreseeable**. If the act of the third party was foreseeable, the defendant remains liable and the **chain of causation remains in tact**.
- If the act of a third party is not foreseeable this will **break the chain of causation** and the defendant is not liable for the actions of the third party:
Read *Baker v TE Hopkins & Son Ltd* [1959] 1 WLR 966.

3. Where the act of the third party was negligent,

- this is more likely to break the **chain of causation**: read *Knightley v Johns & Ors* [1982] 1 WLR 349

7.1.1.2.2 *Novus actus interveniens* (New intervening act)

A novus actus interveniens may take one of the four forms

4. *Novus actus interveniens* - Act of the claimant

- Where the new intervening act is that of the claimant, the test is whether the claimant acted **reasonably in the circumstances**.
- If the claimant's actions are deemed **reasonable** the **chain of causation** remains intact and the defendant is liable for the actions of the claimant.
- If, however, the claimant's actions are **unreasonable in the circumstances** the **chain of causation is broken** and the defendant is not liable for the actions of the claimant: See *McKew v Holland* [1969] 3 All ER 1621

7.1.2 Remoteness of damage

- **Illustration:**

- *Carol travels to work in Nairobi: the only convenient way is by train from her local station in syokimau. One day she finds that a train has been derailed outside the station and blocked the line. She therefore has to return home. During the morning an intruder breaks in and shoots her in the leg. It would be natural for her to say , ‘I was absent from work yesterday because my train was derailed.’ But it would not be natural for her to say, ‘I was shot in the leg yesterday because my train was derailed.’ Yet it is true that, if there had been no derailment, she would not have been at home and would not have been shot. There is however a feeling that the link between the shooting and the derailment is not close enough. The shooting is too remote a consequences of the derailment.*

7.1.2 Remoteness of damage

- Even where the defendant's breach of duty is a cause in fact of the claimant's damage, damages may be denied for some or all of the claimant's injuries on the grounds that the breach of duty was not the legal cause of that damage.
- In this case the damage in question is said to be too remote.
- The remoteness issue limits the extent of the defendant's liability.
- Remoteness of damage relates to the requirement that the damage must be of a foreseeable type.
- In negligence claims, once the claimant has established that the defendant owes them a duty of care and is in breach of that duty which has caused damage, they must also demonstrate that the damage was not too remote.
- Remoteness of damage must also be applied to claims under the Occupiers Liability Acts and also to nuisance claims.
- Remoteness of damage is often viewed as an additional mechanism of controlling tortious liability.
- Not every loss will be recoverable in tort law. Originally a defendant was liable for all losses which were a direct consequence of the defendant's breach of duty: ***Re Polemis & Furness Withy & Company Ltd.*** [1921] 3 KB 560 (plunk of wood and sparks)

7.1.3 The Egg skull rule: “think skull” rule

- A final aspect of remoteness of damage is the **egg shell (or thin) skull rule**.
- This means a **defendant must take their victim as they find them**.
- If the victim is **particularly vulnerable or has a pre-existing condition** resulting in them suffering greater injury than would be expected in an ordinary person, the **defendant remains responsible for the full extent of the injury**:

***Smith v Leech Brain* [1962] 2 QB 405:** A negligent inflicted burn on the lips caused an employee to develop cancer.

- The employee had a **pre-malignant condition giving him a predisposition to develop the disease**. The defendant was liable for the damage resulting from the claimant's death even though death itself was not foreseeable.
- It is clear that this rule survives The “Wagon Mound” and will extend to situations where negligently inflicted injury is exacerbated by medical treatment to which the claimant is allergic, as in *Robinson v Post Office* [1974].
- The rule also applies in nervous shock cases. See *Page v Smith* [1995].

Summary

- The standard approach to determining causation between breach of duty and damage is the “**but for**” test- but for the defendant’s negligence, would the claimant have suffered the damage?
- Where there are several possible causes, **the burden lies on the claimant to prove on the balance of probabilities** that it was the defendant’s act which caused the harm.
- In certain limited circumstances the law might allow that where the claimant cannot prove which of several event caused the damage, **it will be sufficient to show that the behaviour of the defendant materially increased the risk of harm.**
- The law is **reluctant to compensate for “loss of chance”** of recovery in physical injury cases. If the claimant cannot establish that the defendant’s negligent act was more than 50 per cent likely to have, caused the harm, he will receive no damages at all.
- Where there are **multiple successive causes** the court will apply the ‘but for’ test to each potential defendant or each potential cause.

Summary

- The **negligent or deliberate act of a third person** might break the chain of **causation between the defendant's act and the damage**.
- Whether the **defendant will be liable for the act of the third party** will depend on **foreseeability** of the act of the third party.
- Where the act of the third party is a **deliberate act**, the court will also look at the **degree of control** the defendant had over the third party.
- The test of remoteness in most torts is a test of **a reasonable foreseeability**; what damage should a reasonable person in the position of the defendant have foreseen as a result of his negligent act?
- The test of **remoteness for some old torts, such as trespass, is the "direct consequences"** test: the defendant is liable for all the direct consequences of his act.
- Where the claimant suffers extra, unforeseeable damage because of a particular sensitivity to harm on the part of the claimant, the **"thin skull"** rule will apply- the defendant must take the victim as he finds him.
- **Issues of policy will play a part in the determination of remoteness** of damage and, increasingly, policy has begun to determine the approach to factual causation.

7. 2 Strict liability

- An **exception** to the fault principle.
- Is a liability without **fault and** no need to prove fault on the defendant's part.
- Once the plaintiff (P) is proved to have suffered damage from the defendant's (D) wrongful act, the D is liable notwithstanding whether there may have been no fault on his part.
- A **specific instance of strict liability is afforded by the Rule in *Rylands v. Fletcher*:**
- However it does not mean that wrongdoer or tortfeasor has no defense at all.
- Certain defenses may be available in some specific circumstances in case of strict liability.

7. 2 Strict liability

- We may also distinguish between **absolute liability** and **strict liability**.
- Where there is **absolute liability**, a particular wrong is **actionable without proof** of fault on the part of the tortfeasor and in addition there is **no defence whatsoever** to the action.
- Where there is **strict liability**, a particular wrong is **actionable without proof** of fault but some defences may be also available.
- Strict liability may be considered in the following cases:-
 - i. The Rule in *Rylands v. Fletcher*, (1866)
 - ii. Liability for Fire, and
 - iii. Liability for Animals.

7. 2 Strict liability

- **The Rule in Rylands v. Fletcher, (1866)**
- The following statement is commonly called the Rule in *Rylands v. Fletcher*.
- “The person who, for his own purposes,
- brings on his land and collects and keeps there anything likely to do mischief if it escapes,
- must keep it in at his peril and, if he does not do so,
- is prima facie answerable for all the damage which is the natural consequence of its escape”.
- This is the rule of strict liability and negligence in this case is irrelevant

7.2 Strict liability

- **The Rule in Rylands v. Fletcher, (1866)**
- It should be observed that the **Rule** refers to “anything likely to do mischief.”
- Although in *Rylands v. Fletcher* it was **water which escaped**,
- the Rule equally applies in other instances involving the escape of **obnoxious fumes**,
- **poisonous leaves on the branch of a tree, bees from a bee-farm, electricity etc.**

7.2.1 Limits of the rule (strict liability)

The application of the Rule in *Rylands v. Fletcher* is not automatic. The following conditions must be satisfied before the rule can apply:-

- The defendant brought something onto his land.
 - Non-natural use of the land.
 - Something likely to do mischief.
 - Escape
 - Foreseeability.

7.2.2 Defences in *Rylands v. Fletcher*

- The case of *Rylands v. Fletcher* itself suggested three defences available to a defendant in an action brought against him under this Rule:
- **Plaintiff's Fault:** Where the escape in question resulted from some fault on the part of the plaintiff, this may be pleaded by the defendant as a defence to an action brought against him by the plaintiff under the Rule. For in this case the plaintiff has himself brought about his own suffering.
- **Act of God:** Act of God is also defence to an action brought under the Rule, i.e., the act occurred as a result of natural forces.
- **Act of Stranger:** Where the escape is caused by the intervention of person over whom the defendant has no control and whose intervention was not foreseeable, particularly where the stranger's act was deliberate or intentional. See *Rickards v. Lothian* (1913)
- In addition to above defences, some general defences like “*volenti non fit injuria*”, (to a willing person injury is not done)
- **statutory authority** are also available in this rule.

7.2.3 The Rule in *Rylands v. Fletcher* can also apply in the following cases:

- The liability for fire
- The liability for animals
- **The liability for fire due to negligence is actionable in tort.** It is also a case of strict liability. Similarly, if a fire starts without negligence but is spreads due to negligence of a person then that person will be liable for damages caused by the spread of the fire.
- **The liability for animals may arise in both nuisance and negligence.** An occupier of land is liable for damage done by his cattle if they trespass on the land of his neighbours and thereby cause damage. Similarly, a person who keeps dangerous animals like lions, leopards, dogs etc. is liable strictly for any injury by such animals, even in the absence of negligence.

7.3 Causation and Remoteness

- **Damage** is an essential ingredient of the tort. Until the claimant has suffered damage there is no action.
- The claimant **must prove that the damage suffered was caused by the defendant's act (omission)** and that it was not too remote.
- The former element is often referred to as **causation in fact** and the latter as **causation in law**.
- **Causation in fact** is concerned with the question of whether as a **matter of fact** the damage was caused by the act (omission). *If a person is found dead on a railway crossing having been run over by a train, and a train has failed to sound a warning before using the crossing, all the elements of negligence are present. The railway company owes a duty of care to persons using the crossing. There is a breach of duty by not sounding a warning. The claimant has suffered damage.*

7.3 Causation and Remoteness

- But there is no negligence action until it is established that the train that ran over the claimant was the one that failed to sound a warning.
- **Remoteness of damage arises where causation in fact is established but the damage is not regarded as having been legally caused by the act (omission).**
- A cut-off point where the defendant ceases to be liable is established and beyond this point the damage is said to be "**too remote**".
- The rules for assessing remoteness of damage often **operate to limit the overall extent of the tortfeasor's liability to the claimant.**
- Where a further event occurs after the breach of duty which **contributes to the damage**, this later event may amount to a ***novus actus interveniens***: It breaks the chain of causation and renders any new damage too remote.

7.3.1 Causation

1. **The "but for" test:** An act (omission) is a cause of harm if that harm would not have occurred "but for" that act (omission). In *Barnett v Chelsea and Kensington Hospital Management Committee* [1969], (husband vomiting)
2. **Multiple causes:** Where it is uncertain that the defendant's act (omission) has caused the damage, what degree of probability of harm must be established by the claimant? *In cases of traumatic harm, such as injuries caused by a car, the mere presence of the car on the road and the evidence of impact between car and the human being can be treated as proof of cause of the pedestrian's injuries.* The claimant faces greater difficulty when there are multiple possible causes of the damage sustained. See. *McGhee v National Coal Board* [1973] (Black Klins)

7.3.1 Causation

3. Loss of Chance: English courts have shown a reluctance to evaluate loss of a chance in tort actions, although it has been more easily accepted in breach of contract cases. The facts of *Hotson v East Berkshire Area Health Authority* [1987] (boy fell from the tree)

4. Multiple successive causes: Where the causes are successive and the breach of duty of the second defendant causes the same type of damage as that of the first defendant, the "but for" test will be applied in the action against the second defendant. In *Performance Cars Ltd v Abraham* [1962], (car respray

5. Novus actus interveniens: The defendant's breach of duty may be a cause of the claimant's damage in the sense that it satisfies the "but for" test, but some other factual cause intervening after the breach may be regarded as the sole cause of all or part of the claimant's damage. The expression *novus actus interveniens* is often used to describe this "second" cause

7.3.1 Causation

Novus actus interveniens

- *If A negligently knocks down B, who is subsequently run over by C driving the car behind, C's action is unlikely to break the chain of causation, as this is a risk to which A's negligence exposed B. But what would the position be if C had then stolen B's wallet?*
- *The law in this area can hardly be described as clear and the courts' policy objectives may frequently be obscured by formalistic reasoning. **Home Office v Dorset Yacht Co Ltd** [1970],*

A novus actus interveniens may take one of four forms.

(continued)

7.3.1.1 *A novus actus interveniens* may take 1 of 4 forms.

1. It may be a natural event

- The courts are **reluctant to find that an intervening natural event breaks the chain of causation because the claimant (c) has no one else to sue if the D is exonerated, but where the natural event causes damage simply because the D's breach of duty has placed the C or his property in a position where that damage can be caused, the chain of causation is broken**, unless the natural event was likely to happen.
- If C is injured by the D's negligence and then suffers further harm when the ambulance taking him to hospital is struck by a **falling tree**, then the chain of causation is broken, but where the D negligently starts a fire and strong winds fan the blaze, causing it to spread to the claimant's property, the **winds do not break the chain of causation**.

7.3.1.1 *A novus actus interveniens*

2. It may be the non-deliberate act of a third party

- An example of a negligent intervening act can be seen in *Knightly v Johns* [1982].
- D had negligently caused a traffic accident at the exit of a tunnel.
- A police officer managing the accident scene sent the C policeman on his motorbike against the traffic in the tunnel to close the other end of the tunnel.
- The policeman was then injured in a second accident and sued the first driver, who argued that the negligence of the managing police officer in sending the **policeman against the traffic had broken the chain of causation between the original negligence and the harm.**
- The COA: to determine whether a non-deliberate act amounted to a *novus actus interveniens*, 2Qs needed to be asked.
 - 1) Was the whole sequence of events a natural and probable consequence of the defendant's negligence such that the consequence was reasonably foreseeable to the defendant and not just a possibility.
 - 2) Could the action of the intervening person be categorised as legally negligent, as negligent conduct was more likely to break the chain of causation than conduct which is not negligent.
- On the facts, D could not reasonably have foreseen that the police officer would require the policeman to take the risk of riding against the traffic as a consequence of the accident. Thus, the actions of the police officer broke the chain of causation.

7.3.1.1 *A novus actus interveniens*

3. It may be the deliberate act of a third party

- Where the D's duty is to guard the claimant or his property against damage from a 3rd, the 3rd party act will not break the chain of causation. In ***Stansbie v Troman* [1948]** the D decorator was told to lock the door when he went out. He failed to do so and the C's jewelry was stolen. The thief's action did not break the chain of causation.
- See also ***Smith v Littlewoods Organisation Ltd* [1987]**, in which the owner of an empty building failed to keep it secure. Debris accumulated and vandals started a fire which spread and damaged neighbouring properties. The HoLs held that there was no specific duty to prevent damage from fire resulting from vandalism on these facts, because the owner had not known of the vandalism in the area nor of previous attempts to light fires.
- Two of the Law Lords stated that liability in negligence for harm caused by 3rd parties could only arise in 3 special circumstances:
 1. where a special relationship existed between claimant and defendant;
 2. where the defendant created the source of the damage and it was reasonably foreseeable that third parties would extend the risk; or
 3. where the defendant knows or ought to know that a third party is creating a danger on his property and fails to take reasonable steps to bring it to an end.

7.3.1.1 *A novus actus interveniens*

4. It may be the act of the claimant himself

- Where the claimant's lack of care for his own safety and the defendant's breach of duty are regarded as causes of the harm suffered, this is normally a question of contributory negligence but there are circumstances where the C's conduct may exonerate the defendant regarding the injuries suffered in the second event.
- The test is whether **the C has acted reasonably.**
- In *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969], as a result of the D's negligence the C sometimes lost control of his injured leg.
- The C attempted to descend a steep staircase with no hand rail while holding his young daughter by the hand. **His leg gave way and, after pushing his child back,** he jumped to avoid **falling and broke his ankle.** The C's decision to descend the staircase was the moment **when he acted unreasonably.**
- The risk which he took was unnecessary. This decision should not be confused with the later choice which he made when he decided to jump.
- In the agony of the moment such a choice might have been reasonable

7.3.2 Remoteness of damage

- Even where the D's breach of duty is a cause in fact of the C's damage, damages may be denied on the grounds that the breach of duty was not the legal cause of some of the damage suffered.
 - In these cases the damage in Q is said to be too remote.
 - Policy issues are at work in this area as the court will not wish to impose an unfair or unduly heavy burden on the defendant or his insurers.
1. *Re "Polemis"*
 2. The *"Wagon Mound"*
 3. Extent of the harm suffered
 4. The "thin skull" rule

7.3.2.1 *Re "Polemis"*

- At one stage it was sufficient that physical damage was a direct consequence of the D's breach of duty.
- This test was laid down in *Re "Polemis"* [1921].
- A plank was negligently dropped into the hold of a ship.
- Petrol vapour in the hold was ignited by a spark caused when the plank was dropped.
- The ship was destroyed in the ensuing fire: "Once the act is negligent, the fact that its exact operation was not foreseen is immaterial."
- This test was very generous to the C, but, conversely, the scope of potential tortious liability in negligence was very narrow at the time, b4 *Donoghue v Stevenson* [1932].

7.3.2.2 The “*Wagon Mound*”

- The direct consequence test was considered and rejected by the Privy Council in *The "Wagon Mound"* (No.1) [1961].
- The D negligently discharged fuel oil into Sydney Harbour.
- Sometime later the oil spread to the C's wharf, where welding operations were in progress.
- A spark from a welding torch ignited the oil and caused considerable fire damage to the wharf.
- The oil also caused fouling to the wharf.
- The trial judge found that it was not foreseeable that fuel oil on water would catch fire, but that some foreseeable damage in the form of fouling was caused.
- It followed that there was a duty of care and a breach of that duty, but the Privy Council held that the D was not liable for the fire damage.
- It applied a test for remoteness of damage of whether the type of damage suffered was a reasonably foreseeable consequence of the D's breach of duty.
- As it was not foreseeable that the oil would catch fire on water, the fire damage was an unforeseeable type. The opinion of experts
- Their Lordships expressed the opinion that *Re "Polemis"* should no longer be considered as good law (in the context of a negligence claim) because it was not consistent with ideas of "justice or morality that for an act of negligence, however slight or venial ... the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct' ".

1.7.3.3 Extent of the harm suffered

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- Provided that the kind of damage is foreseeable, it does not matter that it is more extensive than could have been foreseen.
 - In *Vacwell Engineering Co v BDH Chemicals Ltd* [1971], the D supplied a chemical but negligently failed to warn that it was liable to explode on contact with water.
 - When the chemical was placed in water there was a violent explosion which resulted in extensive damage.
 - The D was liable even though the extent of the damage was unforeseeable.

1.7.3.4 The "thin skull" rule

- This rule is one aspect of the more general principle that the D must take his victim as he finds him. The name of the rule - "**egg-shell skull**" or "**thin skull**" - does not denote one type of physical weakness only; it is a graphic title to indicate a C who suffers to a far greater extent than a person without the physical xst would do.
- Thus, a small bruise might create serious risk to the health or life of a hemophiliac, whereas in another person the ill-effects of a bruise would be over in a matter of hours or days.
- In *Smith v Leech Brain* [1962], a negligently inflicted burn on the lip caused an employee to develop cancer. The employee had a pre-malignant condition giving him a predisposition to develop the disease. The D were liable for the damage resulting from the C's death even though death itself was not foreseeable. It is clear that this m]e survives
- The "Wagon Mound" and will extend to situations where negligently inflicted injury is exacerbated by medical] treatment to which the claimant is allergic

Remoteness: some other torts

- It is now established that the reasonable foreseeability of type of damage test applies to nuisance: **The "Wagon Mound" (No.2) [1967]** and to the rule in *Rylands v Fletcher* [1868].
- Where the defendant intends to do harm, he should be more extensively liable than where he is merely negligent. So, in deceit cases, the defendant is liable for all the damage flowing from his fraud: *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996].
- Where foreseeability of harm is not an element in establishing liability, the *Re "Polemis"* direct consequence test of remoteness of damage is still valuable and widely used.

Causation and remoteness: policy issues

- Issues of causation and remoteness raise difficult questions which are decided by the courts on a mixture of legal principle and policy.
- One illustration is where the claimant suffers injuries as a result of the D's breach of duty and he becomes depressed and commits suicide.
- The Q is whether the court wishes to compensate the estate or Ds of a suicide.
- There are a number of ways in which they can approach this.
 - Was the suicide caused by the breach of duty?
 - Was the death too remote a consequence of the breach?
 - Was the suicide a *novus actus interveniens* of the claimant?
 - Could the deceased be regarded as being contributory negligent in taking his own life?.

Summary

- The standard approach to determining causation between breach of duty and damage is the "but for" test - but for the defendant's negligence, would the claimant have suffered the damage? This test is sometimes called "factual causation".
- Where there are several possible causes, the burden lies on the claimant to prove on the balance of probabilities that it was the defendant's act which caused the harm.
- In certain limited circumstances the law might allow that where the claimant cannot prove which of several events caused the damage, it will be sufficient to show that the behaviour of the defendant materially increased the risk of harm. The circumstances most likely to give rise to the "material increase in risk" approach are where the parties are in an employer/employee relationship and the damage is non-traumatic, or in cases of failure to warn of medical risk.
- The law is reluctant to compensate for "loss of chance" of recovery in physical injury cases. If the claimant cannot establish that the defendant's negligent act was more than 50 per cent likely to have caused the harm, he will receive no damages at all.

Summary

- Where there are multiple successive causes, the court will apply the "but for" test to each potential defendant or each potential cause.
- The negligent or deliberate act of a third person might break the chain of causation between the defendant's act and the damage. Whether the defendant will be liable for the act of the third party will depend on the foreseeability of the act of the third party. Where the act of the third party is a deliberate act, the court will also look at the degree of control the defendant had over the third party.
- The test for remoteness of damage is to determine what of the damage suffered should be attributed to the defendant. It would not always be fair, just and reasonable to attribute to the defendant all the damage suffered, when some of that damage would have been completely unexpected. Remoteness is sometimes known as "legal causation".

Summary

- The test for remoteness in most torts is a test of reasonable foreseeability: what damage should a reasonable person in the position of the defendant have foreseen as a result of his negligent act?
- The test of remoteness for some old torts, such as trespass, is the "direct consequences" test: the defendant is liable for all the direct consequences of his act.
- Where the claimant suffers extra, unforeseeable damage because of a particular sensitivity to harm on the part of the claimant, the "thin skull" rule will apply - the defendant must take his victim as he finds him.
- Issues of policy will play a part in the determination of remoteness of damage and, increasingly, policy has begun to determine the approach to factual causation

7.4 Vicarious & employer's liability

- Every person is obviously liable for his own wrongful acts. Liability in this case is personal.
- In certain circumstances, however, a person may assume responsibility for torts or wrongful acts committed by another person, e.g. an employer may be held responsible for the torts of his employee.
- Liability in this latter case is categorized as vicarious liability. **So it is the liability of one person on the behalf of the other person.**
- There must be **Master/Servant relationship** between the parties concerned.
- The **Servant must have been acting in the course of his employment** at the material time.
- This explains why employers often find themselves being sued for torts committed by their employees.

7.4 Vicarious & employer's liability

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- *Century Insurance Co. v. N.I. Road Transport Board, (1942)*
 - The driver of a petrol tanker, whilst transferring petrol from the lorry to an underground tank, struck a match to light a cigarette.
 - He threw the lighted match on the floor, and this resulted in a fire and an explosion that caused considerable damage.
 - Held: The driver's employers were liable for his negligence in the discharge of his duties.
 - Cases like the one given above are straightforward and present no problem in determining whether the wrongdoer is or is not a servant.
 - Sometimes, however, it is difficult to tell whether a particular person is a servant.

7.4.1 Vicarious & employer's liability: Who is a servant(S)?

- A person employed **under a contract of service** and acts on the orders of his master (M).
- The M controls the manner in which the S work is done.
- But an independent contractor is employed under a **contract for services** and himself determines the manner in which the work in question is done: He does not act on the orders of his employer and is his own master as regards the execution of the work he is employed to do.
- Thus, if A owns a vehicle and employs B to drive it for him, B is A's servant; but where A is not the owner of the vehicle and engages B (the owner or driver) on special hire to drive him to some place(s), B is not a servant but an independent contractor.

7.4.1 Vicarious & employer's liability: Who is a servant(S)?

- Again where A engages B to build a house for him, and A himself directs the manner in which the work is to be done, supervising the work to ensure that his directions are complied with, B is a servant;
- but where A engages B, a professional builder and relies on his expertise and refrains from interfering with the construction work, B is in this case an independent contractor.
- The distinction between a S and an independent contractor is important because an employer is liable for the wrongful acts of his employee only if the latter is his servant; he is not liable where the employee is an independent contractor. An independent contractor is personally liable for his own wrongful acts.

7.4.1.1 Vicarious & employer's liability: Course of Employment

- An act is said to have been done by a servant in the course of employment where it is proved to have been authorized or sanctioned by his M.
- Thus, where the M authorizes his S to do a wrongful act or where the S is authorized to do a particular act in a proper manner, but does it in a wrongful and unauthorized manner, the M is still responsible for the consequences of the act.
- What is important is the fact that the act was authorized by the M. Once the M's authority is proved it is considered as the responsibility of the master and he is declared as liable for this tort.
- Indeed, the fact that the M has expressly prohibited a particular act is of no consequence at all, as long as the servant has the M's general authority to act in the matter in Q.

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- Indeed, the fact that the M has expressly prohibited a particular act is of no consequence at all, as long as the servant has the M's general authority to act in the matter in Q. See: *Limpus v. London General Omnibus Co.*, (1862) ; *Rose v. Plenty*, (1976); *Beard v. London General Omnibus*, (1900); *Storey v. Ashton*, (1869)

7.4.1.2 Vicarious liability in practice

- Besides Employer/Employee relationship (including Government/Servant relationship) there are certain other instances in which the principle of vicarious liability applies.
- **Law of agency:** a Principle is liable for torts committed by his Agent, where such torts are committed in the course of the Agent's duties.
- **Parent/Child relationship**, too, may give rise to vicarious liability on the part of the Parent. But a parent or guardian is generally not liable for torts committed by his child **unless he has been negligent in permitting his child to use a dangerous thing** or in failing to exercise proper control and supervision of the child: See *Newton v. Edgerloy*, (1959)
- A father allowed his 12-year old son to use a **shotgun**. He ordered the son never to use it in the presence of **other children but failed to ensure that his order was obeyed**. While the son was using the shot-gun, he injured the plaintiff.
- Held: The father was vicariously liable for the son's tort.
- **Also since a corporation is an artificial person**, most of its tortious liability is of a vicarious nature.

7.4.1.3 Liability for independent contracts

- An employer is not liable for the torts of an independent contractor or of any servant employed by the contractor.
- This rule has been based on the fact that the employer **does not have strict right of control over the method used by the contractor.**
- But there are some exceptions to this rule. It means an employer will be still liable for the actions of an **independent contractor in the following cases:**
 - (a) Where the employer **retains his control on the contractor.**
 - (b) Where contract made is itself **a tort e.g. a nuisance.**
 - (c) Where the **Rule in *Rylands v. Fletcher*, (1866)** applies

7.4.2.1 Who is an employer

- An employer is vicariously liable for torts committed by an employee in the course of his employment. The expressions "**employer**" and "**employee**" will be used here instead of the traditional terms "**master**" and "**servant**".
- If a C wishes to take advantage of the principle, **he must show that a tort was committed by a person who was an employee** (as opposed to an independent contractor) and that the tort was committed **in the course of the tortfeasor's employment**.
- **Vicarious liability is strict in the sense that the employer need not be guilty of personal fault.** Vicarious liability should therefore be contrasted with the personal duty of care which the employer owes to the claimant who is one of his employees
- The imposition of vicarious liability is based on the **employer's greater ability to pay.** **The employer can pass his costs on to the customers** in the form of higher prices and in any case is likely to be insured.
- The risk-creating activity arises from the pursuit of the employer's business interests and that the doctrine may **have the effect of encouraging the employer to effect accident prevention procedures.**
- Since the employer acquires a benefit from the work of his employees (usually some financial gain), the employer should also bear the burden of accidents which arise out of that work.

7.4.2.2 Who is an employee

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- Traditionally, a distinction was drawn between a **contract of service** made with an employee and a **contract for services** made with an independent contractor, but this **does not explain how a judge will determine which is which**.
 - An integration test has been suggested under which a person is an employee if his work is an integral part of the business. It is therefore possible to distinguish between a **chauffeur (employee)** and a **taxi driver (independent contractor)**; a staff reporter (employee) and a **freelance journalist (independent contractor)**. Even this test does not solve all problems and more complex criteria have been suggested.

7.4.2.2 Who is an employee

- In *Ready Mixed Concrete v Ministry of Pensions and National Insurance [1968]* the following criteria were put forward:
 1. the employee should agree that, in consideration of a wage or some other remuneration, he will provide his own work and skill in the performance of some task for his employer;
 2. the employee agrees expressly or impliedly to be subject to his employer's control;
 3. the other provisions of the contract should be consistent with it being a contract of service or employment.
- In this way the court can look at all the aspects of the contract and the relationship which may have a bearing on the decision, including the economic reality of the situation.

7.4.2.2 Who is an employee

- In the end the court will take a pragmatic approach to the employment relationship.
- In *Hawley v Luminar Leisure plc [2006]* the defendant was the owner of a nightclub and he used a security services company to provide doormen for the club.
- The D, however, exercised detailed control not only over what the doormen were to do but how they were to do it.
- A doorman assaulted the C and the D was found by the CoA to be the employer for the purposes of vicarious liability.

7.4.2.2 Who is an employee

- **Changes in patterns of employment and social trends may also be relevant.** The questions of control, integration and economic reality must be asked in the context of responsibility for the overall safety of the worker. A builder/ roofer who had traded as a "one-man firm" for 10 years was nonetheless an employee of the defendants at the critical time of his accident. In answer to the question "Whose business was it?", the Court of Appeal decided that it was the employer's: *Lane v Shire Roofing [1995]*.
- It has now been **decided that no employment or apprenticeship contract is formed between a pupil barrister and the pupil master:** *Edmonds v Lawson [2000]*. As a consequence, the pupil has no duty to "work" and cannot claim the minimum wage.
- Where an **employee is lent to another employer, it may be necessary to determine who is the employee's employer for the purposes of vicarious liability.** A term in a contract is not decisive and the burden is on the permanent employer to show that he had divested himself of control. Where labour only is lent it is easier to infer that the hirer is the employer.

7.4.2.2 Who is an employee

- ~~Where labour and plant are lent it is more difficult to rebut the~~ presumption that the permanent employer retains control. In *Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd [1947]*, Lord Porter gave his view as to the most satisfactory test in this context:
- " to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it."

7.4.2.3 Tort committed by employee

- Vicarious liability is a means whereby, in appropriate circumstances, one person is made liable for the tort committed by another person. It is sometimes easy to overlook the pre-requisite that a tort must have been committed by an employee of the D for the question of vicarious liability to arise.
- In *Ministry of Defence [2007]* the C, a serving member of the RAF, was raped in her room by G, who had been invited back to the C's accommodation block by a mutual friend.
- Both G and the friend were also members of the RAF and all three of them had been drinking together at a nightclub. The C sought to establish that the first defendants should be vicariously liable for her friend's failure to escort G off the premises.
- The trial judge found no vicarious liability and also no breach of any personal duty of care owed by the first defendants to the C regarding the standard of locks at the accommodation block or failure to enforce the rules relating to male visitors leaving the premises.
- Those in residence at the accommodation blocks were adults and not children. The C's friend did not owe a duty of care to the claimant and there was no tort for which the Ministry of Defence could be "vicariously" liable.
- This essential principle, that an employer is vicariously liable for the tort of an employee committed in the course of his employment, was affirmed by the HoLs in *Generale Bank Nederland NY v Export Credits Guarantee Department [1999]*.

7.4.2.4 Course of employment

- The employer will only be responsible for torts committed in the course of employment by the employee. This is a question of fact but the courts have often used Salmond's definition that an act is in the course of employment if it is either:
 1. a wrongful act authorised by the employer; or
 2. a wrongful and unauthorised mode of doing some act authorized by the employer. (When an employee is outside the course of employment he is said to be on a "frolic of his own".)
- It is possible for an employer to be liable for an act which he has prohibited if the prohibition applies to the way in which the job is done rather than the scope of the job itself. An employer of a bus driver was liable when the driver raced other buses contrary to instructions: *Limpus v London General Omnibus Co* [1862].

7.4.2.5 Employer and independent contractor – non-delegable duties

- In principle, an employer is not liable for the torts of his independent contractor. There are some situations, however, in which the employer remains primarily responsible even though the incident in question was caused by the act of an independent contractor.
- The employer will be primarily, as distinct from vicariously, liable where the employer has a **non-delegable duty which cannot be discharged by an independent contractor**, for example, the employer's duty of care to his own employees.
- Such a non-delegable duty might arise where the employer hires an independent contractor to undertake a task which is inherently dangerous. This was made clear in *Honeywill and Stein v Larkin Bros [1934]* and confirmed in *Bottomley v Todmorden Cricket Club [2003]*, where the owner of the cricket club was held liable for the negligence of independent contractors putting on a pyrotechnics display at the club. A non-delegable duty will also arise where an independent contractor has been hired to undertake a task on or adjoining a highway which puts at risk persons in a public place

7.4.2.6 Principal and agent

- The employer is vicariously liable for the torts of his employees committed in the course of employment because of the relationship between employer and employee, out of which the incident involving a third party arises.
- Another special type of relationship recognized by law is that between principal and agent.
- There are some situations where liability for the torts of an agent will be attributed to the principal for whom the agent is acting. The following two cases can be compared in this context. In the first, ***Ormrod v Crosville Motor Services Ltd [1953]***, Denning LJ stated:
 - *"The owner [of a car] is ... liable the driver is his agent, that is to say, the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes ... The law puts an especial responsibility on the owner of a vehicle who allows it out of the road in the charge of someone else no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver."*

Summary

- The main application of vicarious liability in tort law is in relation to liability of employers for tortious acts of employees. An employer is liable for tortious acts of employees committed in the course of employment.
- Whether the claimant is an employee will be determined by looking at:
 - how much control the employer had over the worker;
 - the extent to which the worker was part of the employer's organisation;
 - other practical information, such as the contract and method of payment.
- Whether the employee is acting in the course of employment will be determined by looking at:
 - what the employee was employed to do;
 - whether the employee was doing generally what he was employed to do at the time of the tortious act;
 - whether the employer benefited from the employee's tortious act;
 - the degree of connection between the employment and the act;
 - whether the employer had prohibited the tortious act and the nature of that prohibition;
 - whether the employee was on a "frolic of his own".

Summary

- In certain circumstances an employer might be held primarily liable for the tort of an independent contractor. This will be the case where there is a "non-delegable" duty owed by the employer. This will be particularly so when:
 - the employer is a hospital and the claimant is injured by the negligence of someone working in the hospital;
 - the employer has employed the independent contractor to carry out a task that was particularly dangerous;
 - the employer has employed the contractor to work on or adjoining a public highway;
 - statute imposes a non-delegable duty.

7.5 Vicarious liability: Employer's liability

- The employer's liability in **tort for the safety** of his employees may take one of three forms:
 - The employer may be vicariously liable for the **tort of an employee which leads to the claimant employee** (or a third party) **being injured**.
 - Liability here is strict in the sense that the employer need not be personally negligent. (See 7.4 .)
 - The employer may be in breach of a statutory duty and the C employee suffers injury as a result.
 - The employer may be in breach of the personal duty of care which he owes to the employee. Liability here is in negligence. See **5.2** for the essential distinction between an employee and an independent contractor.
- The same tests are applicable in the current context, since the duty of care arises from the contract of employment itself.

7.5 Vicarious liability: Employer's liability

- Consider a building site of which X is the occupier.
- Those workmen who are employees of X can sue for breach of personal duty of care which X owes to them, but other workers, who are independent contractors, or employees of Z, cannot take advantage of the personal duty of care owed by X to his **own** employees.
- These other workers may, however, be able to argue vicarious liability if it is one of X's employees who causes an accident.
- X may, in addition, incur liability as occupier of the site and Z will have a duty of care to his **own** employees.

7.5.1 Employer's personal duty of care

(read attached notes)

1. Duty to take reasonable care for the safety of employees
2. Duty to non-employees?
3. Duty does not extend to pure economic loss
4. Duty in relation to work stress
5. Competent staff
6. Plant and appliances
7. Premises
8. Safe system of work

7.5.2 Breach, causation and remoteness

- Performance of the duty of an employer to an employee is **discharged by the exercise of due care and skill**.
- Breach of duty is determined by reference to what the **reasonable employer, of that type and in that line of work, would be expected to do to keep the employee safe.**\
- Causation and remoteness of damage are determined in the same way as for negligence.

7.5.3 Defences

- **Both *volenti non fit injuria* and contributory negligence** can be raised by the employer in his defence.
- The courts are, however, conscious of the dulling effect on a worker of repetitive **tasks in noisy conditions and the lapses** which can occur when the routine of work is too familiar.
- **Proportions of contributory negligence will usually be low.**
- ***Volenti* is rarely successful in this context and consent to a risk should not be inferred from the apparent** willingness of the employee to continue in the job.
- Many pressures, including economic ones, **influence a worker to keep a job, however inherently dangerous** it may be: *Smith v Baker [1891]*.

Summary

1. An employer owes a particular duty to take care for the safety and welfare of employees.
2. The duties of an employer to an employee are recognised at common law as:
 - the duty to provide a safe place of work;
 - the duty to provide competent fellow employees;
 - the duty to provide safe appliances and equipment;
 - the duty to provide a safe system of work.
3. The duty may include a duty to protect against psychiatric harm resulting from occupational stress. The employer is required to do all that a reasonably prudent employer, taking positive care for the safety and well-being of his employees, would do to monitor and protect against occupational stress.
4. Where the claimant is arguing that the employer has breached the duty to provide a safe place of work, competent employees and a safe system of work, the standard of care will be that of the reasonable employer in that line of business.
5. Where the claimant is arguing a breach of the duty to provide safe appliances and equipment, statute has imposed strict liability provided that the equipment was negligently manufactured.
6. The defences to negligence will apply, although the court will take into account the balance of power between the parties when applying the defences.

7. 6 General defences of tort

- A person sued in tort has at his disposal certain defences, some of which are restricted to particular torts (e.g. contributory negligence is a defence only to the tort of negligence), while others are of a general nature.
- The following general defences are available to a defendant in every action for tort where they are appropriate:-
 - (i) **Volenti non fit Injuria: Agreement; Knowledge; voluntariness;**
 - (ii) **Inevitable Accident.**
 - (iii) **Act of God**
 - (iv) **Necessity**
 - (v) **Self-defence**
 - (vi) **Mistake**
 - (vii) **Statutory Authority**
 - (viii) **Exemption Clauses (or Disclaimers)**
 - (ix) **contributory negligence: fault of C; Causation; apportionment**
 - (x) **Ex tunc causa**

7. 6 Capacity

- The general rule is that any person **may sue or be sued in tort**.
- All persons are subject to **the same laws**.
- However, some **special rules apply in certain circumstances** which either restrict, forbid or qualify the right to sue or be sued.
- It means certain **persons cannot sue, while some other persons cannot be sued**.
- Capacity: capacity of parties or persons to sue or to be sued in law of torts.

1. **Government:**
2. **Infants and minors:**
3. **Husband and wife:**
4. **President:**
5. **Head of States and Diplomats**

6. **Corporation**
7. **Trade Unions (TUs)**
8. **Persons of unsound mind:**
9. **Aliens and non citizens**

7.6 Capacity

The Government:

- The Government Proceedings Act (Cap 40) makes the Government subject to liabilities in tort as if it were a private person of full age and capacity.
- Section 4 (1) of this Act provides that the Government is liable:
 - (a) in respect of torts committed by its servants or agents;
 - (b) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and
 - (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.
- The Government is also liable for statutory torts i.e. torts arising from breach of a duty imposed by statute.
- However, the Government is not liable for any thing done or omitted to be done by any person while discharging any responsibilities of a judicial process (Sec: 4(5)).
- The Government is not also liable for torts committed by public officers who are appointed and paid by local authorities, or members of public corporations like Kenya Railways, Maize and Produce Board of Kenya etc.

7.6 Capacity

Infants and Minors:

- As a **general rule minority is no defence in tort.**
- Infants can sue and be sued in the same way as any other person.
- However, the age of an infant may be relevant in some torts where **intentions, malice, or negligence** of the wrongdoer are the main cause of the tort.
- In the case of negligence, the infant may **not have reached the stage of mental development** where it could be said that he should be found legally responsible for his negligent acts.
- A child may be **also guilty of negligence if old enough to take precautions for his own safety.**
- In ***AG v. Vinod, (1971) E.A.***, a child aged 8½ years was held partly to blame for an accident.
- An infant may not be liable in tort in a case which is a breach of contract.
- Similarly, an infant will be liable in tort if this tort is **independent of a contract.**
- ***See Jennings v. Randall, (1799)***
- An infant hired a mare for riding (**not necessary**).
- He injured the animal by **overriding her** and was sued in tort for damage.
- **Held:** The infant was not liable in tort for negligence since this act was mainly a breach of contract.

7.6 Capacity

Husband and Wife:

- The position of husbands and wives in tort is covered by two English statutes. These are: the Married Women's Property Act 1882 and the Law Reform (Married Women and Tortfeasors) Act, 1935.
- The former Act is a statute of general application in Kenya
- A married **woman is liable in tort and may sue or be sued in tort in the same way as though she were a female sole** (i.e. a single or unmarried woman).
- A wife can sue **her husband in tort for the protection and security of her property**.
- In Kenya, a husband is still **liable for his wife's torts**.
- **Both husband and wife have the capacity to sue and be sued in tort.**
- At common law a **husband could not sue his wife in tort, and a wife could not sue her husband in tort except for the protection of her own property.**

7.6 Capacity

The President

- Art. 143 of COK 2010 stipulates that enjoys protection from legal proceeding
- Art. 143 (1) **Criminal proceedings**
- Art. 143 (2) **Civil Proceedings**
- Art. 143 (4) **Limits that immunity**: Shall not extend to **a crime for which the President may be prosecuted under any treaty to which Kenya is party** and which prohibits such immunity (ICC_President Uhuru _ Crime Against humanity).
- President enjoy protection: No civil or criminal proceedings can be instituted against him while in office

Heads of State and Diplomats:

- The Heads of foreign states, diplomats of foreign missions and certain other persons connected to them are **immune from the jurisdiction of the local courts**.
- Their immunity is provided by the **Vienna Convention on Diplomatic Relations, signed in 1961**, refer "**The Privileges & Immunities Act (Cap. 179)**".
- The **accredited diplomats and their staff families enjoy immunity from the criminal and (subject to specified exceptions)** from the civil and administrative jurisdiction of the local courts.
- The immunity **does not extend to Kenyans who are employed by diplomatic missions**.
- Reps of the **UN Organization** & its specialized agencies **can also claim diplomatic immunity**.
- **Although the diplomats and their staff cannot be sued under the law of tort** but it is always open to the **Ministry of Foreign Affairs to declare a diplomat 'persona non grata'**, thereby requiring his removal from Kenya.

7.6 Capacity

Corporations

- The corporations can sue and be sued in their own names: liable to actions in tort.
- A corporation is also liable for torts committed by its servants and agents.
- But if a servant of a corporation commits a tort which is '**ultra vires**' (beyond the powers) then the corporation is not liable for some torts of personal nature e.g. personal defamation, battery etc.

Trade Unions:

- The TUs have capacity to sue in tort but actions against them in tort are limited.
- Section 23 of the Trade Unions Act (Cap. 223) provides that **no action shall be brought against a trade union for torts committed by its members** of officials in respect of any act done in contemplation or in furtherance of a trade dispute.
- For example, if a trade union calls a strike, it **cannot be sued by an employer for the tort of inducing a breach of contract.**
- A trade union can be sued for breach of contract. The members and officials of a trade union can be sued for actions in tort committed in their personal capacity.

Persons of Unsound Mind:

- These are generally liable in tort unless an intent is a necessary element and their condition is such that they could not have formed such intent.
- In ***Morriss v. Marsden, (1952)***. D took a room at a Brighton hotel. While there he attacked the manager of the hotel (plaintiff).
- It was established that D was suffering from disease of the mind at the time of the attack; that he knew the nature and quality of his act, but he did not know that what he was doing was wrong.
- **Held:** That as D knew the nature and quality of his act he was liable in tort for the assault and battery.
- It was immaterial that he did not know that what he was doing was wrong. .

7.6 Capacity

Aliens or Non-Citizens

- An alien is under no disability and can sue and be sued.
- However, an enemy alien cannot sue, but if sued can defend himself.

Judicial Officers

- Judicial officers are protected from civil liability for any act done or ordered by them in the discharge of their judicial functions.
- Thus, where a judge or magistrate utters words which tend to reflect on a person's reputation, or orders a party's property to be attached in satisfaction of a judgment-debt, no action can respectively be brought against him for trespass.
- Besides judicial officers, officers of the court are also protected against civil liability for acts done in pursuance of a judicial order or warrant.
- A court broker cannot be sued for attaching property under a warrant duly issued by court, as long as he acts within the powers conferred on him by the warrant.
- The protection to judicial officers and officers of court is afforded by the Judicature Act (Cap. 8) Section 6.

7.6 Capacity

Artificial legal persons

- **Corporations**
- A corporation (an artificial legal person), for example, a limited company, may be vicariously liable in tort for the actions of its members or employees.
- It can also commence actions in its own name.
- A corporation, although an artificial as opposed to a real person, may even have torts attributed to it which require some mental element; for example, malice of an employee acting in the course of his employment will render the corporate employer vicariously liable in a tort such as injurious falsehood.
- The circumstances in which a director of a company may be personally liable for the economic loss suffered by a claimant who relied upon advice given by a company are set out in *Williams v Natural Life Health Foods Ltd [1998]*.
- Such individual liability can only arise if the director had assumed personal responsibility for the advice provided by the company to the C and the C had reasonably relied upon that assumption of responsibility.
- In Williams there were no personal dealings between the director and the claimants; no communication (verbal or by conduct) which would have indicated that the director was taking personal responsibility.
- Not all torts are capable of being committed against a corporation e.g., it could hardly be falsely imprisoned - but many other torts can be committed against the corporation's property, for example, in negligence, nuisance, etc.
- Even defamation can be committed against a company if the defamation relates to the company rather than its members or employees personally.

7.6 Capacity

Limited Liability Partnerships

- A limited liability partnership (LLP) may be set up by two or more persons who are prepared to undertake registration formalities in order to be associated for the purpose of carrying on business with a view to profit.
- In return, they secure limited liability, except for their own tortious acts.
- Such a partnership is set up under the Limited Liability Partnerships Act 2000.
- The UP is a separate legal entity and actions are taken against the partnership.

Unincorporated bodies

- **Partnerships**
- A partnership is not a distinct legal person separate from the partners and so actions by or against a partnership must be in the names of the partners, although the partners may sue or be sued in the name of the firm. Partners are jointly and severally liable for the torts of the other partners: **Partnership Act 1890**.
- **6.4.3.2 Other bodies**
- It is far from clear what capacity entities such as trade unions or clubs have to sue or be sued. It may be possible to sue members individually responsible - eg, a governing body or committee - and make them personally liable. Rules of court provide for the possibility of a representation order, whereby certain members only of a body are allowed to take or defend proceedings in the interests of the whole membership.

7.6.1 Capacity to sue

- Apart from procedural requirements, for example, that a minor must sue by his "litigation friend", there is no distinction between an adult and a minor for the purposes of commencing an action.
- The **Congenital Disabilities (Civil Liability) Act 1976 (CD(CL)A 1976)** provides that a child born alive and disabled may have a right of action in respect of torts committed upon it whilst it was 'in the womb'.
- Born is defined in **s4(2)** as being born alive, that is, the moment when a child first has a life separate from its mother and disabled as being born with any deformity, disease or abnormality, including predisposition ... to physical or mental defect in the future.

7.6.2 Capacity to be sued

- (1) There is **no defence of infancy as such in tort**. A negligent driver of 17 will be held as liable as a driver who is a year older. In the case of torts involving negligence (and particularly in the case of contributory negligence), the judges have held that the proper standard of care to be expected from a child is what a reasonable child of that age would be capable of achieving (**Mullin v Richards [1998]**).
- (2) **A parent is not, as such, liable for the torts of his child unless he is liable under some separate principle**, for example, if the parent was also the employer of the child or if a parent authorised the commission of a tort by the minor.
- **In the general law of negligence, a parent, or person standing in the position of a parent, may be personally liable if there was a failure to control the child properly** - for example, by giving the child a dangerous thing such as an air rifle, or failing to supervise him properly, or allowing a small child to wander on a busy road so that he causes an accident.
- In such circumstances the tort is that of the parent and is quite separate from any tort which the child may have committed.

7.6.2 Capacity to be sued

Joint and several tortfeasors

- No special rule applies if two or more people cause one claimant different injuries. The claimant may sue each tortfeasor separately for the injury each has caused.
- Where two breaches of duty or other tortious acts cause one single injury the position is more complex.
- The basic position is that the claimant can sue all or any of them and each individual is wholly liable for the full extent of the harm although the claimant can, of course, only recover his loss once.
- **Example:** At an unmarked crossing, cars negligently driven by A, B and C collide. X, a pedestrian on the pavement, is injured. X may sue either A, B or C, or may issue one writ against all three. If judgment is given against all of them for, say, £10,000, X may recover this whole amount from any of A, B and C, leaving the person he chose to sue to obtain any appropriate contribution to this sum from the others.
- The importance of this rule in practice is obvious: if only one of several Ds is solvent, the claimant can enforce judgment against him alone and thus the rule favours the claimant. In the above example, the court would go on to establish the relative contributions of each defendant to the accident, for example, A - 40 per cent, B - 30 per cent, C - 30 per cent. If X chose to pursue A for the whole of the £10,000, A, having paid X, would be entitled to contributions of £3,000 each from B and C.

7.6.2 Capacity to be sued

The Civil Liability (Contribution) Act 1978

- The **Civil Liability (Contribution) Act 1978 (CL(C)A 1978)** substantially repeals the **Law Reform (Married Women and Tortfeasors) Act 1935** which first provided for contribution between joint tortfeasors .
- **s.1** provides that any person liable in respect of any damage suffered by another may recover a just and equitable contribution, such contribution being fixed by reference to his respective responsibility for the tort. So, the court will decide on the Ds' respective degree of blame for the tort and apportion percentage liability in precisely the same way that liability is apportioned between C & D, where an issue of contributory negligence arises.
- Laws LJ identified three possible sub-divisions of concurrent torts:
- "(1) where the injury in question would not have occurred but for the two torts, for example, two people acting independently shoot at X, who dies of his injuries, but neither gunshot in itself" would have led to his death;
- (2) where either tort could have resulted in the injury suffered by the claimant, for example. two people acting independently shoot at X, who dies of his injuries, and either shot would have been enough to kill him;
- (3) (a) each tortfeasor caused some part of the damage; but (b) neither caused the whole; and (c) some part (but not all) of the damage would therefore have been occasioned to the claimant. It is if only one tort - either of them - had been committed but on the evidence it is impossible to identify with any precision what part or element of the damage had been caused by which D."

7.6. Capacity to be sued

- **Contribution of the claimant**
- The courts are often required to consider the allocation of responsibility between multiple defendants and a claimant who has been contributory negligent. Such a situation arose in **Fitzgerald v Lane [1988]**.
- The claimant attempted to cross the road at a pelican crossing when the lights were red for pedestrians and green for the traffic.
- He was hit by the car of D1 and thrown into the path of D2. The House of Lords identified the correct approach to this problem.
- First, the claimant's contributory negligence should be assessed against the totality of both D1's and D2's conduct (i.e. apply the provisions of the Law Reform (Contributory Negligence) Act 1945) and, second, consider the proportionate blame of the separate tortfeasors.
- On the facts of the case, the claimant was 50 per cent to blame and the two defendants were required to contribute equally to the remaining 50 per cent of the claimant's losses.

7.6.3 Summary

- (1) The Crown is now generally liable for the torts of its employees.
- (2) Foreign sovereigns cannot be sued in English courts unless immunity has been waived.
- (3) In some circumstances there is immunity from suit in tort, in particular in relation to the giving of evidence in court.
- (4) A corporation may be liable in tort in relation to most torts and can sue in tort.
- (5) A partnership cannot be sued or sue in tort, but can be sued or sue in the names of individual partners.
- (6) A minor can sue and be sued in tort, though to sue in tort the minor must sue through a "litigation friend".
- (7) A child can sue under statute for injuries which occurred in utero, provided that the child is born alive. The child can sue for injuries inflicted on its parents which resulted in damage to the child. The child can sue its father. The child can sue its mother only in relation to road traffic accidents.
- (8) If several people are responsible for the claimant's damage, the claimant can sue all or any of the tortfeasors, and each individual tortfeasor can be found liable for the full extent of the harm.
- (9) One tortfeasor made liable for the full extent of the claimant's harm can sue, under statute, for a contribution to the damages from the other tortfeasors.
- (10) In such a case the claimant may also be required to bear a portion of the damages if he is found to be contributory negligent.

7.8 Remedies

- Remedies are of two kinds.
- **Judicial remedies** are orders made by a judge, such as an award of damages or an injunction.
- **Extra-judicial remedies** are those in which the claimant takes some form of self-help, such as abatement of a nuisance.

7.8.1 Types of damages

1. Non-compensatory damages: Non-compensatory damages may take one of three forms.

(1) Nominal or contemptuous damages

- Nominal damages are awarded to recognise that a legal right has been violated but the claimant has suffered no loss. A small sum of money is awarded. Such an award might be recovered in an action for trespass to land where the trespasser has caused no damage to the claimant's land. Contemptuous damages are awarded to demonstrate the opinion of the jury that the claimant should not have brought the action at all. They consist of the lowest coin of the realm and are usually awarded only in libel actions. An example can be found in *Grobelaar v News Group Newspapers (No.2) [2002]* (see 19.2) where a sum of £1 was awarded in an award substituted by the House of Lords for the original jury award.

(2) Aggravated damages

- Where compensatory damages do not sufficiently reflect the manner in which the tort was committed, the court may make an award of aggravated damages.
- Commission of a tort in an insulting, malicious, insolent or high-handed way may warrant aggravated damages, particularly where little compensable physical or psychiatric harm has been suffered, or where the defendant committed the tort to make a profit. For example, in *Appleton v Garrett [1996]*, the defendant dentist advised his patients that they needed significant dental work. The work was, in fact, unnecessary and was recommended for the financial benefit of the defendant. Aggravated damages are most frequently awarded in libel actions (e.g. *John v Mirror Group Newspapers [1996]*).

7.8.1 Types of damages

1. Non-compensatory damages: Non-compensatory damages may take one of three forms.

- **(3) Exemplary damages**
- Exemplary damages are awarded to punish the defendant for his conduct and to deter such behaviour in the future. They are awarded **in addition** to compensatory damages. The circumstances in which exemplary damages may be awarded are set out in the speech of Lord Devlin in ***Rookes v Barnard [1964]***. Since the principle of punishing the defendant is inconsistent with the aims of the civil law of tort, such damages can only be awarded for certain torts and in very limited types of case, as follows:
 - (a) For oppressive, arbitrary or unconstitutional action by persons holding public positions, for example, Government departments, the police, or local authority employees.
 - (b) Where the defendant's conduct has been calculated to make a profit for himself which will exceed any compensation which he will be ordered to pay. This could occur in a defamation action where the publisher hopes to take advantage of the publicity that a trial will bring
 - (c) Where a statute permits the award. Exemplary damages were claimed in ***AB v South West Water Services Ltd [1993]*** by those who suffered as a result of drinking and using the contaminated water in Camelford.

7.8.1 Types of damages

2. Compensatory damages

- Compensatory damages are to compensate the claimant for actual harm done and are appropriate in torts that require actual damage.
- Damages may be either general or special.
- (1) **General damages** are those which do not need to be specifically pleaded and can be argued for at the trial. They are those which are presumed to follow from the tort: for example, in an action for personal injury based on negligence, general damages include damages for pain and suffering, loss of amenity, future loss of earnings, etc.
- (2) **Special damages** consist of financial loss of specific amounts, such as loss of earnings up to trial, damage to a vehicle, cost of private medical treatment, etc. These losses must be pleaded and proved by the claimant.

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Purpose of compensatory damages

- The purpose of an award of compensatory damages is, as far as money can do so, to place the claimant in the position he was in before the tort was committed. The interest of the claimant protected is the reliance interest.

7.8.2 Non-pecuniary loss

- A claimant may be entitled to compensation for personal injuries.
- The House of Lords has been given an opportunity to consider the meaning of "bodily injury" as used in **Art 17 Warsaw Convention on International Carriage by Air 1929: King v Bristow Helicopters Ltd; Morris v KLM Royal Dutch Airlines [2002]**. In **King** the claimant suffered as a consequence of a sudden loss of height of the helicopter in which he was travelling. The helicopter crashed back onto the helideck and King suffered minor post-traumatic stress disorder symptoms which led to a peptic ulcer. Morris was travelling as an unaccompanied minor on a flight during which she woke to find that the man sitting next to her had placed his hand on her thigh. She was distressed at the time and suffered a single episode of clinical depression on her return home.

Pain, suffering and loss of amenity

- Damages may be recoverable for suffering attributable to the injury itself or any consequences of the injury. Factors which the courts will take into account will include:
 - length of hospitalisation;
 - number of surgical treatments;
 - type of treatments;
 - permanent disability;
 - diminution in quality of life;
 - diminution in length of life;
 - loss of childbirth or marriage prospects;
 - cosmetic injury;
 - psychological or emotional harm .
- The size of the award will be determined in accordance with the guidelines laid down by the Judicial Studies Board.

7.8.3 Pecuniary loss

- In personal injury actions where the claimant suffers serious injury as a result of the defendant's negligence, pecuniary loss will constitute a large element of the claim.
- **8.4.1 Loss of earnings**
- The claimant's loss of earnings before the trial must be pleaded as special damages and he will recover his net loss.
- Future loss of earnings is recoverable as general damages. The court starts with the claimant's net annual loss (the multiplicand) and deducts from the gross income, which the claimant expected to earn, income tax, social security contributions, etc.
- **Example:** a 30-year-old man who is totally unfit for work. Net annual loss £10,000. Multiplier of 15. Damages for future loss of earnings = £150,000.

The lost years

- If the claimant suffers a reduction in his "working" life expectancy as a result of the tort, then the difference between pre-accident and post-accident life expectancy is known as the "lost years". This head of damage was first recognised by the House of Lords in *Pickett v British Rail Engineering [1980]*, but the principle involved is not without its critics).

7.8.3 Pecuniary loss

Future medical care and attention

- The claimant is entitled to recover all expenses reasonably incurred as a result of the treatment of his injuries. The claimant has a free choice as to whether to be treated privately or not. If the claimant is spared living expenses by virtue of being cared for at public expense in a hospital or similar institution, a deduction will be made to avoid over-compensation.

Deductions

- As regards accidents occurring **after** January 1989, almost all social security benefits will be deducted in full by the defendant from the damages and paid to the Department for Work and Pensions (DWP) (**s.22 and Sch. 4 Social Security Act 1989** now contained in **Part IV Social Security Administration Act 1992**).

Interest on damages for personal injury

- A judgment debt carries interest until it is paid.
- No interest is given on general damages for loss of future earnings; other general damages attract interest at 2 per cent from the date of service of the writ to the date of judgment (or payment, if earlier). For special damages, that is, financial losses up to the date of trial, the rate is half the short-term interest rate.
- **Death**
- Where the defendant in an action dies, the cause of action generally survives against his estate. Where the claimant dies, his action generally survives for the benefit of his estate and a new action is created for his dependants.

7.8.3 Pecuniary loss

Death

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- **Dependents**

- Any dependent may claim; a detailed list of dependents is provided by **s.1(3) FAA 1976**. It includes past and present spouses, civil partners, ascendants (parents, grandparents) and descendants, illegitimate children, relationships by affinity and consanguinity. Actions are normally brought by spouses, parents or children. **FAA 1976** allows an action by a cohabitee where the parties had lived together as man and wife for two years immediately preceding the date of death.
- **Financial dependence**
- The action is essentially one for the loss of a breadwinner. It is a new action given to the dependents, not a survival of the deceased's action. The dependents must, however, show that the deceased had a right of action.
- **Pure economic loss**
- The basis of the action is that the dependents receive compensation for their economic losses. The main head of damages is pecuniary losses suffered from the date of death. These are assessed in two stages: first, from the date of death to the trial, on the basis of the deceased's earnings, less the amount he would have spent on himself; second, from the date of the trial into the future. (For example, the deceased was a 30-year-old man, married with two children, with a net income of £10,000 per annum with no promotion prospects)

7.8.3 Pecuniary loss

- **Bereavement**
- Certain dependants have a claim for damages for bereavement. A fixed sum is reference to the Retail Price Index. The first such increase has raised the current figure of £10,000 to £11,800 where the cause of action arises after 31 December 2007: the **Damages for Bereavement (Variation of Sum (England and Wales) Order 2007**.
- **One action only**
- **s.2(3) FAA 1976** states that: *No more than one action shall lie for and in respect of the same subject matter of complaint.* A potential injustice, which might have been created by the application of this provision, was avoided in ***Catchia v Faluyi [2002]***.
- **Provisional damages**
- Since 1970, awards for personal injuries have been itemised to facilitate the assessment of interest. A single "lump sum" remains the most common method of receiving damages but there is now the possibility of an award of "provisional damages" under s32A Supreme Court Act 1981. This provision provides the opportunity to assess the damages at two separate stages if:
 - ... *there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.*

7.8.3 Pecuniary loss

- **Periodical payments**
- Traditionally, damages have been awarded in the form of a single lump sum. On 1 April 2005, **s2(1) DA 1996** came into force to enable the court to order an award in the form of periodical payments. Each party in a claim for damages for personal injury may state whether periodical payments or a lump sum is more appropriate for all or part of the award of damages.
- **Consequential economic loss**
- If the claimant's property is damaged or destroyed by the tort of the defendant, the costs of reasonable repair or replacement provide an obvious measure of loss. When the property in question is land, the fall in market value of the land provides a measure for damages. Several cases have considered the application of these general rules to the calculation of compensatory damages following reliance on a negligent valuation of real property

7.8.4 Injunctions

- An injunction is an order of the court requiring the defendant to do some act or refrain from doing some act.
- Injunctions are either mandatory, requiring the defendant to do some positive act, such as pull down a building or erect a fence, or prohibitory, requiring the defendant to refrain from some continuing act (e.g. a nuisance) or not to repeat it (e.g. a defamation).
- Injunctions may be either final or interlocutory.
- (1) Final injunctions are those awarded at the end of the trial] as one of the remedies obtained by the successful party.
- (2) Interim injunctions are those awarded pending the trial of the action in order to prevent harm where damages alone, if the claimant were successful, would not be an adequate remedy. The court should consider whether the balance of convenience favours the grant of an injunction: **American Cyanamid Co v Ethicon Ltd [1975]**.reliance on a negligent valuation of real property

7.8.4 Injunctions

- **Specific restitution**
- Where a defendant has unlawfully taken the claimant's goods and is found liable in conversion, the court has a discretionary power to award the specific restitution of the article in addition to damages. This discretion is unlikely to be exercised where the article in question is an ordinary article of no special value; in such a case damages alone will adequately compensate (see 18.6).

7.8.6 Miscellaneous other remedies

- (1) An aggrieved person may in certain instances avail himself of self-help, although it is true to say that the law does not generally favour this.
- (2) Self-defence.
- (3) Re-entry on land.
- (4) Recovery of chattels. A person may use reasonable force to re-take any chattel of his which is unlawfully taken or kept from him. If the wrongfully taken goods are on the land of some third party, who was not responsible for the taking in question, there is no clear answer as to whether the rightful owner may go on to the land to recover them. It is suggested that there is such a right if the article got there by accident or by the criminal act of the wrongdoer.
- (5) Abatement of nuisance.
- (6) *Distress damage feasant*.

Summary

- (1) A claimant in tort may be awarded the following types of damages:
 - nominal or contemptuous damages;
 - aggravated damages;
 - exemplary damages;
 - compensatory damages.

- (2) The common law has placed limits on the circumstances in which
 - aggravated and contemptuous damages can be awarded.
- (3) Compensatory damages for personal injury consist of the following awards:
 - the award for pain, suffering and loss of amenity;
 - the award for loss of earnings, calculated on the basis of a multiplicand representing lost annual net earnings and a multiplier representing the number of years of earnings lost;
 - the award for future medical care and attention, calculated on the projected
 - annual costs of care as a multiplicand and a multiplier representing the number of years of care required;
 - special damages, representing the financial loss between accident and date of trial;
 - interest.

Summary

(4) Deductions will be made to recoup some of the sums paid to the claimant in benefits.

(5) Compensatory damages for death will consist of:

- a claim by the beneficiaries of the victim's estate, on behalf of the victim, for funeral expenses, property damage suffered in the accident and any pain and suffering the victim suffered between accident and death;
- a statutory claim by the dependants in their own right for their loss of dependency. This will be calculated on a multiplicand and multiplier basis;
- a claim of £11,800 for bereavement by a spouse or civil partner of the victim or by the parents of a minor child killed in an accident.

(6) In relation to continuing torts such as nuisance, trespass and harassment, the claimant may seek an injunction to prevent future commission of the tort.

(7) In certain circumstances the claimant may exercise other remedies such as self defence, abatement or re-entry on land.

7.9 Defamation

- Defamation is a tort which protects the claimant's **reputation**.
- As such, it does not directly protect claimants from intrusion into their private life, but against wrongful attacks to their reputation.
- This has a number of consequences.
- First, although abuse in private may be hurtful, defamation will only occur when a third party knows of the allegations – that is, when the claim has been published.
- Further, it is irrelevant that the defendant did not intend to harm the claimant – this will not prevent the claimant's reputation being harmed, although it may, as we shall see, provide the defendant with a defence.
- We must also now look at defamation in the light of the Constitution of Kenya, 2010 and, in particular, Article 33 which deals with freedom of expression.
- Paragraph 3 of Article 33 expressly states that the exercise of freedom of expression must be weighed against the need to protect the reputation or rights of others.
- The law of defamation must therefore strike a balance between protecting claimants against untrue statements which attack their reputation and the freedom of the defendant to express his or her views.
- This becomes particularly significant in relation to the press. Students must therefore be aware of the fundamental human rights issues arising from this particular tort

7.9.1 Libel and slander

- This becomes particularly significant in relation to the press. Students must therefore be aware of the fundamental human rights issues arising from this particular tort
- Defamation is a tort which protects the claimant against attacks to his or her reputation. This may occur in a number of ways.
- The attacks may be spoken, written, indicated by gestures or conduct or even expressed in sign language or in code.
- The law divides these modes of communication into libel and slander. Libel generally takes permanent form, while slander is temporary.
- This is a relatively crude distinction, but remains part of Kenyan law. On this basis, text or a photograph in a newspaper will amount to libel.
- Shouting insults in the classroom will be deemed to be slander.
- Slander, due to its temporary nature, is considered to be less serious. Whereas the courts will presume that harm occurs as a result of libel – it is actionable per se – the claimant must prove that the slander resulted in special damage; for example, as a result of the slander, his or her business lost money. Equally the loss must not be too remote: *Lynch v Knight* (1861) 9 HLC 577. Libel, unlike slander, is also a crime, although few prosecutions are made.

7.9.1 Libel and slander

- **Innuendo**
- Defamation is not confined to direct attacks on the claimant's reputation. To protect the claimant's reputation, defamation must also include implied or veiled attacks, which are generally known as 'innuendo'. There are two types of innuendo: true (or legal) and false (or popular).
- A true innuendo is a statement where the attack is truly hidden in the absence of special facts and circumstances, which the claimant must show are known by some of the people to whom the statement is published. *Tolley v J.S. Fry & Sons Ltd* [1931] AC 333 is an example of this. Here, a famous amateur golfer alleged that a caricature of him had appeared without his knowledge or consent in an advertisement for Fry's Chocolate. This, in itself, was not defamatory. However, Tolley claimed that for people who knew of his amateur status it would imply that, contrary to acceptable amateur conduct, he had accepted money. The House of Lords held the advertisement to be capable of bearing the meaning alleged. People knowing of Tolley's amateur status might think less of him and therefore his reputation would be diminished.
- **Publication**
- The tort of defamation seeks to protect the claimant's reputation. Statements will only harm the reputation if third parties are aware of them. Publication, that is communication of the
- This is obviously satisfied by the printing of an article in a newspaper or book or shouting a remark in front of other people, provided the words are intelligible to the third party. Problems arise; however, when the defendant alleges that he or she did not intend to publish the statement and that it was meant to be a private remark between the claimant and defendant.

7.9.2 Defences

1. Justification or truth (section 14)

- Defamatory statements are presumed to be untrue, unless the defendant proves otherwise. Truth (or justification) is thus seen as a defence. It is irrelevant that the defendant's intention was malicious (contrast fair comment and qualified privilege).

2. Fair comment (section 15)

- This defence serves to protect defendants who seek to criticise claimants, provided they act fairly, honestly and base their comments on true facts. It clearly supports freedom of expression, but within a controlled environment.
 - Fair comment has three requirements:
 - the statement must be in the public interest
 - it must be a comment on true facts
 - it must be honest and fair.

3. Privilege: There are two types of privilege in English law: absolute and qualified

- **Absolute privilege**
- . Absolute is the stronger form of privilege and applies on occasions where the need to protect freedom of speech is so important as to create an absolute defence to any action for defamation, irrespective of the motives or words of the author.
- **Qualified privilege**
- This is a weaker form of privilege. It will only apply on occasions where it is desirable that freedom of speech should be protected, but not where the author is activated by malice: see *Horrocks v Lowe* [1975] AC135.

7.9.2 Defences

- **Qualified privilege at common law:** The courts look for two requirements:
 - That X had a duty or interest in communicating the information to Y. This may be legal, moral or social.
 - Y has a corresponding interest in receiving the information in question.

4. **Innocent dissemination**

- This defence is found in section 13, Defamation Act Cap 36. It is now a defence to show that:
 - the defendant is not the author, editor or commercial publisher of the statement
 - the defendant took reasonable care in relation to the publication
 - The defendant did not know, nor had no reason to believe, that what he or she did caused or contributed to the publication of a defamatory statement.

5. **Unintentional defamation**

- Sections 13 of the Defamation Act Cap 36 establish a procedure whereby a person who inadvertently defames another can publish an apology and correction and pay an agreed sum of compensation to the claimant. This is not, therefore, in strict terms a defence –indeed to (s.13 (1) (a)) – but a form of settlement avoiding the potentially huge costs of defamation litigation.

7.9.2 Defences

5. Unintentional defamation

- Under section 13, the defendant must be prepared:
 - to admit that he or she was wrong (or partly wrong)
 - to offer in writing to make a suitable correction and apology
 - to publish the correction and apology in a manner that is reasonable and practicable in the circumstances
 - To pay the claimant such compensation (if any) and such costs as may be agreed or determined to be payable.

6. Consent

- It is a defence if the claimant has expressly or impliedly consented to the publication of the defamatory matter: *Cookson v Harewood* [1932] 2 KB 478n; *Chapman v Lord Ellesmere* [1932] 2 KB 431.

7.9.3 Remedies

- There are two main remedies:
- **damages** and **injunctive relief**.
- They may include an **award for aggravated damages** (where the defendant's conduct has led to additional mental distress) and exemplary damages (where the defendant deliberately sets out to profit at the expense of the claimant's reputation).
- Attention should also be drawn to Article 33 of the COK 2010 which ask the courts to have particular regard to freedom of expression when considering whether to grant a remedy which might affect this right.

LAW OF CONTRACT

TOPIC 8

8. Law of contract

8.1 Definition of contract

8.2 Classification of contracts

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8.7 Remedies for breach of a contract

8.8 Limitation of actions

Topic Objectives

- Definition of a contract
- Functions/benefits of a contract
- Classification of contracts
- Formation of a contract
- Discharge of contract
- Remedies for breach of a contract
- Limitation of Actions Act

What is a contract?

- Uber – Uber users
- Landlord – tenant
- Bank – customer
- Cellphone user – telecommunication company





Egypt v. Ethiopia

<https://bit.ly/2UWZ3Lu>

The biggest differences between the two countries are over the duration of filling up the dam on the **Blue Nile, which supplies nearly 80 per cent of Egypt's water.**

Ethiopia says it will take two to three years to fill the dam before the natural flow resumes, while Egypt is pushing for gradual filling of between seven and 10 years.

...



Pre-nuptial agreement

“The second claim is that Dr. Dre tore up the prenuptial agreement declaring it null and void. Andre acknowledged to me that he felt ashamed he had pressured me into signing a premarital agreement and he tore up multiple copies of the agreement in front of me,” she wrote. “Since the day he tore up the agreements we both understood that there was no premarital agreement, and that it was null and void.”



In 2020, Osaka surpassed Serena Williams as the world's highest-paid female athlete, according to Forbes, which estimates that the 23-year-old earns some US\$34 million from endorsement deals with the likes of Nike, Mastercard and Nissin, among others.

Creative credit

A Russian man, after deciding he wasn't happy with the terms of a credit card offer he received in the mail, took it upon himself to rewrite the contract to include zero percent interest, no fees, and no credit limit. His added clauses also promised penalties to the bank should it fail to hold up its end of the agreement or attempt to cancel the contract. He signed it, and the bank did too, not noticing the amendments. When the bank filed a lawsuit against the for unpaid balance and related fees, the court ruled in the man's favor, requiring him only to pay the balance on the card, not the extra fees.

<https://www.onelegal.com/blog/fantastic-clauses-hidden-in-contracts-and-eulas/>

Consideration clause

- When one antivirus software company wanted to see just how many people would pay attention to their EULA, they hid in the text the promise of a \$1,000 reward for the first person who actually read the statement in their terms. PC Pitstop waited four months and facilitated more than 3,000 downloads before someone finally wrote in after noticing the clause and claimed their reward.

<https://www.onelegal.com/blog/fantastic-clauses-hidden-in-contracts-and-eulas/>

Definition of a contract

A legally binding agreement.

Nature

- Agreement between parties ... meeting of minds.
- Legal.
- Binding.
- Compliance with the Law of Contract Act.

Definition of a contract

- a **promise made or set of promises** a **breach** of which the **law** provides a **remedy** and the **performance** of which the **law** recognizes as a **duty** or an **obligation**.
- **all contracts are agreements, all agreements are not contracts.**

Benefits of a contract

- **Identity** of parties ... natural/artificial
- **Purpose** or **objective**
- **Rights** and **duties** of parties are defined – *expectations*
- **Terms** of engagement are defined
- **Duration** of the engagement
- Provision of **dispute resolution mechanism**
- **Governing laws** are identified

Scenarios

1. If you are buying land, what do you think will be important to be included in the contract?
2. How about a diamond ring from an individual in South Africa?
3. How about in an employment contract?

Classification of contracts

- Express and implied contracts
- Unilateral, bilateral and multilateral contracts

Elements of a contract

- Contractual capacity of parties
- Offer
- Acceptance
- Consideration
- Intention to create legal relations
- Legality
- Possibility of performance
- Formalities

1. Contractual capacity

Persons who are competent to contract:

- ✓ A natural or artificial person.
- ✓ A sane adult.

Contractual capacity

- i. Adults – have full legal capacity.
- ii. Legal/Corporate persons – full legal capacity.

Qualified contractual capacity

- i. Minors.
- ii. Persons of unsound mind and drunken persons.
- iii. Aliens or non citizens.

Minors

- A contract made by minors may be **binding or void/not binding**.
- Binding - ***Contract for the supply of necessities.***
- Under the **Sale of Goods Act** “necessaries” are defined as “*goods suitable to the condition in life of a particular infant or minor, and to his actual requirements at the time of the sale and delivery*”.

Minors

Nash v. Inman (1908)

A tailor supplied an infant with eleven (11) fancy waistcoats but the infant failed to pay. The infant was a university undergraduate. His father gave evidence that the infant was adequately supplied with proper clothes according to his station in life.

Held: The clothes were **NOT** necessities and the infant **was not liable** to pay for them.

Insanity

A contract entered into by a person of unsound mind is **voidable** at his option by establishing that:

- He was too insane to understand his acts and;
- The other party was aware of his mental condition.
- By avoiding the contract, the party pleading insanity escapes liability on it.

Drunk persons



Drunk persons

Mathews v Baxter (1873) Baxter, while drunk, agreed at an auction to purchase a property. Once sobriety returned he decided that he wished to affirm the contract that had been made by him while drunk. Sometime later he had a change of mind and he sought to rescind the contract, arguing that he lacked capacity to enter the contract by reason of intoxication. The court held that because Baxter had confirmed the contract it was no longer open to him to avoid the contract on the grounds of intoxication. This was despite the fact that he had made out the necessary element of this defence.

2. Offer

- **An invitation to enter into a contract.**
- Issued by an offeror.
- Can be oral, written or implied from conduct of an offeror.
- Must be communicated to the **offeree**.

3. Acceptance

- An acceptance is an approval of the terms of an offer.
- Can be oral, written or implied.
- Must be communicated to the offeror within the stipulated time.
- Silence doesn't amount to acceptance.

Agreement

Offer

Acceptance



4. Consideration

- The “price”.

“an act or promise offered by the one party and accepted by the other party as price for that others promise.”

Patterson J. in *Thomas v. Thomas* “consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or detriment to the plaintiff but at all events it must be moving from the plaintiff.”

Consideration

- Parties have the freedom to agree on the amount or form of consideration.
- It need not be **adequate** that is measuring up to the worth of goods in the transaction or subject of the contract.

Consideration

- Must be legal.
- Real/Valuable.

5. Legal relationship

Parties to a contract must have intention to create a legal contract.

Social agreements

Mrs. Balfour v. Mr. Balfour (1919)

The plaintiff and defendant were husband and wife. The husband, a civil servant in Ceylon, was on leave and he decided to travel home to England with his wife. Towards the end of the leave the wife got sick and she had to remain in England while the husband returned to Ceylon. The husband promised her 30 pounds per month for maintenance while she recovered in England. Later, when the husband defaulted, the wife sued him over his unfulfilled promise.

Held: The husband's promise **did not give rise to legal relations and so the wife's action could not be maintained.**

6. Legality

- Legal/lawful

Illegal contracts

1. Contracts to commit a crime, tort or fraud.
2. Contracts that are prejudicial to the administration of justice.
3. Contracts liable to corrupt public life.

Illegal contracts

4. Contracts that are prejudicial to public safety.
5. Contracts to defraud the revenue.
6. Contracts that are sexually immoral.
7. Contracts that are prejudicial to the country's foreign relations.

7. Possibility of performance

- The promises made by the parties in a contract should be things or actions they can do. Not impossible acts or promises.

8. Formalities

- Section 3(3) of the Law of Contract Act
- In writing
- Signatures
- Witnessing
- Stamp duty
- Hire purchase, sale of land, guarantee contracts ..

Discharge of Contract



Discharge of Contract

1. Discharge by performance.
2. Discharge by agreement.
3. Discharge by frustration.
4. Discharge by breach.
5. Discharge by operation of law.

Discharge by Performance

Actual performance e.g.

- A completed Uber/ Bolt trip.
- A successful purchase from a shop.

Discharge by agreement

Where executory, parties can part ways amicably.

e.g.

<https://www.capitalfm.co.ke/sports/2020/02/16/evert-on-to-terminate-sportpesa-contract/>

Discharge by frustration

1. Destruction of subject matter.

Taylor v. Caldwell (1862)

A music-hall that had been hired was accidentally destroyed by fire before the concerts started.

2. Death or physical incapacity of a party in an employment contract.

3. Circumstances beyond the control of parties that make it impossible for the parties e.g. coup, pandemic.

Discharge by breach

Occurs when a party fails to perform his or her respective obligations.

<https://bit.ly/3paNJbl>

<https://bit.ly/2Z5Mn7n>

Discharge by operation of law

- **Lapse of time** - if a contract is made for a specific period.
- **Death** - the death of either party to a contract discharges the contract where personal services are involved.

Discharge by operation of law

- **Substitution** - If a contract is substituted with another contract then the previous contract is discharged.
- **Bankruptcy** - when a person becomes bankrupt, all his rights and obligations pass to his trustee in bankruptcy. But a trustee is not liable on contracts of personal services to be rendered by the bankrupt.

Remedies for breach

- Damages

<https://www.businessdailyafrica.com/bd/news/counties/dealer-seekssh150m-from-nokia-for-contract-breach-2482388>

- Injunction
- Specific performance
- Rescission/termination of a contract

Limitations of Action Act

An aggrieved party has six (6) years to file a court case from the date of breach of a contract

<https://www.businessdailyafrica.com/bd/corporate/companies/how-sk-macharia-escaped-repaying-sh453m-in-loan-2284640>

END

Sale of goods

Topic 9

9. Sale of goods

Law of Kenya CHAPTER 31

SALE OF GOODS ACT

[*Date of commencement: 1st October, 1931.*] Rev. 2021

9.1 Nature of the contract

9.2 Formalities of the contract

9.3 Terms of the contract

9.4 Implied terms by statute

9.5 Rights and duties of the parties

9.6 Auction sales

9.7 International contracts of sale: FAS, FOB, CIF, FCA, CPT, CIP, DAT, DAP, DDP, CFR, DAF, DDU, Ex-works and Ex-ship

9.0 What is a good?

(SOGA s.2)

-
- **“goods”** includes all chattels personal other than things in action and money, and all emblements, industrial growing crops and things attached to or
 - forming part of the land which are agreed to be severed before sale or under the contract of sale;
 - **Chattel** (in general use) a personal possession. [an item of property other than freehold land, including tangible goods (*chattels personal*) and leasehold interests (*chattels real*).]
 - **“sale”** includes a bargain and sale as well as a sale and delivery;
 - **“specific goods”** means goods identified and agreed upon at the time a contract of sale is made;
 - **“property”** means the general property in goods, and not merely a special property;

9.1 Formation of the contract

(SOGA PII)

- Contract for sale
- Formalities of the contract
- Subject matter of contract
- Price
- Conditions and warranties
- Sale by sample

9.1.1 Contract of Sale

S. 3 SOGA

A) Sale and agreement to sell

- (1) The seller **transfers or agrees to transfer the property** in goods to the buyer for a **money consideration, called the price.**
- (2) between one part **owner and another.**
- (3) may be **absolute or conditional.**
- (4) Where under a contract of sale the **property in the goods is transferred** from the seller to the buyer the **contract is called a sale**; but, where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, **the contract is called an agreement to sell.**
- (5) An agreement to sell becomes a sale when the **time elapses or the conditions are fulfilled** subject to which the property in the goods is to be transferred.

9.1.1 Contract of Sale

B) Capacity to buy and sell

- (1) Regulated by Law of contract
- (2) Incompetent: Infant or minor, mentally incapacity, drunkard: Goods of Necessities; must pay a reasonable price therefor.
- (3) Necessaries: Goods suitable to the condition in life of the infant or minor or other person, and to his actual requirements at the time of the sale and delivery. (S4)

C) Contract of sale, how made

- writing (either with or without seal)
- or by word of mouth, or
- partly in writing and partly by word of mouth,
- May be implied from the conduct of the parties: (S5)
- Enforceability (200/=) or more (2punds)

9.1.2 Subject matter of contract

(SOGA PII)

S.7. Existing or future goods

- (1) The goods which form the subject of a contract of sale may be either existing **goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller** after the making of the contract of sale.
- (2) There may be a contract for the sale of goods the **acquisition of which by the seller depends upon a contingency** which may or may not happen.
- (3) Where by a **contract of sale the seller purports to effect a present sale of future goods**, the **contract operates as an agreement to sell the goods**.

S.8. Sale of perished goods

- Where there is a contract for the sale of **specific goods, and the goods without the knowledge of the seller** have perished at the time when the contract is made, **the contract is void**.

S.9. Goods perished after agreement to sell

- Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the **agreement is thereby avoided**.

9.1.3 The Price

(SOGA PII)

S.10. Ascertainment of price

- (1) The price in a contract of sale may be **fixed by the contract**, or may be left **to be fixed in a manner thereby agreed**, or may be determined by **the course of dealing between the parties**.
- (2) or the buyer must **pay a reasonable price** (fact dependent on the circumstances of each particular case).

S.11. Agreement to sell at valuation

- (1) If valuation of a third party, and the **third party cannot or does not** make a valuation, the **agreement is avoided**:
- If the goods or any part thereof have **been delivered to and appropriated by the buyer** he **must pay a reasonable price therefor**.
- (2) Where the 3rd party is prevented from making the **valuation by the fault of the seller or buyer**, the **party not at fault may maintain an action for damages** against the party at fault.

9.1.4 Condition and warranties

(SOGA PII)

S.12. Stipulations as to time

- (1) Unless a different intention appears from the terms of the contract, **stipulations as to time of payment are not deemed to be of the essence** of a contract of sale.
- (3) In a contract of sale, “**month**” means *prima facie* calendar month.

S.13. When condition to be treated as warranty

- (1) Where a contract of sale is subject to **any condition to be fulfilled by the seller**, the buyer may **waive the condition**, or may **elect to treat the breach of condition as a breach of warranty** and not as a ground for treating the contract as repudiated.

S.14. Condition and warranties implied in contracts of sale

- (a) **A right to sell the goods**, when the property is to pass;
- (b) The buyer shall have and **enjoy quiet possession of the goods**;
- (c) The goods shall be **free from any charge or encumbrance**

S.15. Conditions implied by description

- An **implied condition that the goods shall correspond with the description**; and,
- **if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.**

9.1.4 Condition and warranties

(SOGA PII)

S.16. No implied warranty as to fitness, except in certain cases

Exception:

- Where the **buyer need to rely on the seller's skill or judgment,**
- There is **an implied condition that the goods shall be reasonably fit for that purpose:**
- There is **implied merchantable quality:**

9.1.5 Sale by sample

SOGA PII)

S.17. Sale by sample

- (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
- (2) In the case of a contract for sale by sample there is—
- (a) an **implied condition that the bulk shall correspond with the sample** in quality;
- (b) an implied condition that the **buyer shall have a reasonable opportunity of comparing** the bulk with the sample;
- (c) an implied condition that the goods shall be **free from any defect rendering them unmerchantable** which would not be apparent on reasonable examination of sample.

9.1.5 Sale by sample

SOGA PII)

S.17. Sale by sample

- (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
- (2) In the case of a contract for sale by sample there is—
 - (a) an **implied condition that the bulk shall correspond with the sample** in quality;
 - (b) an implied condition that the **buyer shall have a reasonable opportunity of comparing** the bulk with the sample;
 - (c) an implied condition that the goods shall be **free from any defect rendering them unmerchantable** which would not be apparent on reasonable examination of sample.

9.2 Effects of the contract

(SOGA PIII)

Transfer of property as between seller and buyer

S.18. Property in unascertained goods

- Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

S.22. Risk prima facie passes with property

- Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not:

Transfer of title

9.3 Performance of the contract

(SOGA PIV)

S.28. Duties of seller and buyer:

- It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

S.29. Payment and delivery concurrent conditions:

- the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods

S.30. Rules as to delivery:

- the place of delivery is the seller's place of business, if he has one, and if not, his residence:
- he seller is bound to send them within a reasonable time.
- there is no delivery by seller to buyer unless and until the third person acknowledges to the buyer that he holds the goods on his behalf
- Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour
- the expenses of and incidental to putting the
- goods into a deliverable state must be borne by the seller

9.3 Performance of the contract

(SOGA PIV)

S.31. Delivery of wrong quantity or description.

- **Less Qty:** the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.
- **Large Qty:** the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole; and if the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.
- **Mixed with goods of a different description** not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

S.32. Delivery by instalments.

- Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.
- delivered by stated instalments and to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

9.3 Performance of the contract

(SOGA PIV)

S.33. Delivery to carrier as buyer's agent.

- for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer
- the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case;
- and if the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.
- where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during sea transit.

9.3 Performance of the contract

(SOGA PIV)

S.34. Risk where goods delivered elsewhere than at place of sale.

- the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

S.35. Buyer's right of examining the goods.

- reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.
- **Seller:** to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

S.36. Acceptance.

- The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or
- when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller,
- or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

9.3 Performance of the contract

(SOGA PIV)

S.37. Buyer is not bound to return rejected goods.

- where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept
- them

S.38. Liability of buyer for neglecting or refusing delivery of goods.

- When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after the request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods:
- Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

9.4 Rights of UP seller against the good (SOGA PV)

S.39 Unpaid seller : when the whole of the price has not been paid or tendered;
bill of exchange or other negotiable instrument dishonored

S.40. Rights of unpaid seller

- (1) notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—
 - (a) a lien on the goods or right to retain them for the price while he is in possession of them;
 - (b) in case of the insolvency of the buyer, a right of stopping the goods *intransitu* after he has parted with the possession of them;
 - (c) a right of resale as limited by this Act.
- (2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

9.4 Rights of UP seller against the good (SOGA PV)

Unpaid (UP)

S. 41 Seller's Lien:

- (1) the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases—
- (a) where the goods have been sold without any stipulation as to credit;
- (b) where the goods have been sold on credit, but the term of credit has expired;
- (c) where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

S.42 Lien after part delivery

- Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder unless the part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

9.4 Rights of UP seller against the good (SOGA PV)

S.43. Termination of lien

- (1) The unpaid seller of goods loses his lien or right of retention thereon—
- (a) when he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) when the buyer or his agent lawfully obtains possession of the goods;
- (c) by waiver thereof.
- (2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transit

S.44. Right of stoppage in transitu

- when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

9.4 Rights of UP seller against the good (SOGA PV)

S.46. Mode of stoppage in transit

- (1) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are; and the notice may be given either to the person in actual possession of the goods or to his principal; and in the latter case the notice, to be effectual,
- (2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller; and the expenses of redelivery must be borne by the seller.

9.5 Actions for breach of contract

(SOGA PVI)

- **Remedies of the seller**

S.49 Action for price

- (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.
- (2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay the price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

S.50 Action for non acceptance

- (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
- (3) Where there is an available market for the goods in question, the measure
- of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

9.5 Actions for breach of contract

(SOGA PVT)

- **Remedies of the buyer**

S.51. Action for non-delivery

- (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non delivery.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

S.52 Rights to specific performance

- (1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.
- (2) The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

9.5 Actions for breach of contract

(SOGA PVT)

S.53 Remedies for breach of contract

- (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of the breach of warranty entitled to reject the goods; but he may—
 - (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
 - (b) maintain an action against the seller for damages for the breach of warranty.
- (2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.
- (3) In the case of breach of warranty of quality, the loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.
- (4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

S.54 Interest and special damages

- Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

9.6 Supplementary

(PVII)

s55. Variation, etc., of implied rights.

- 56. Reasonable time.
- 57. Rights, etc., enforceable by action.
- 58. Auction sales.
- 59. Savings.