THE LAW OF TORTS

INTRODUCTION
The word *tort* is of French origin and is equivalent of the English word *wrong*, and the Roman law term *delict*. It is derived from the Latin word *tortum*, which means twisted or crooked. It implies conduct that is twisted or crooked. It is commonly used to mean a breach of duty amounting to a civil wrong.

Of the various attempts to define tort, Salmond’s definition is rather popular. Salmond defines tort as a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.

A tort arises due to a person’s duty to others in generally which is created by one law or the other. A person who commits a tort is known as a tortfeasor, or a wrongdoer. Where they are more than one, they are called joint tortfeasor. Their wrongdoing is called tortuous act and they are liable to be sued jointly and severally.

The principle aim of the Law of tort is compensation of victims or their dependants. Grants of exemplary damages in certain cases will show that deterrence of wrong doers is also another aim of the law of tort.

OBJECTIVES OF LAW OF TORTS

i. To determine rights between parties to a dispute.

ii. To prevent the continuation or repetition of harm e.g. by giving orders of injunction.

iii. To protect certain rights recognized by law e.g. a person’s reputation or good name.

iv. To restore property to its rightful owner e.g. where property is wrongfully taken away from its rightful owner.

CONSTITUENTS OF TORT

The law of tort is fashioned as an instrument for making people adhere to standards of reasonable behavior and respect the rights and interests of one another. A protected interest gives rise to a legal right, which in turn gives rise to a corresponding legal duty. An act, which infringes a legal right, is wrongful act but not every wrongful act is a tort. To constitute a tort or civil injury therefore:

1. There must be a wrongful act or omission.
2. The wrongful act or omission must give rise to legal damage or actual damage and:

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3. The wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages. The wrongful act or omission may however not necessarily cause actual damage to the plaintiff in order to be actionable. Certain civil wrongs are actionable even though no damage may have been suffered by the plaintiff.

1. Wrongful act.
The act complained of should, under the circumstances be legally wrongful as regards the party complaining, i.e. it must prejudicially affect him in some legal right. This must be an act or an omission. Merely that it will, however directly, do him harm in his interest is not enough. The act being wrongful in law is called *actus reus*. An act which prima facie appears to be innocent may become tortuous if it invades the legal right of another person e.g. the erection in one’s own land, of anything, which obstructs light to a neighbors’ house. Liability for a tort arises therefore when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

2. Damage.
The sum of money awarded by court to compensate damage is called *damages*. Damage means the loss or harm caused or presumed to be suffered by a person as a result of some wrongful act of another. Legal damage is not the same as actual damage. Every infringement of the plaintiff’s private right or unauthorized interference with his property gives rise to legal damage. There must be violation of a legal right in cases of tort. Every absolute right, injury or wrong i.e. tortuous act is complete the moment the right is violated irrespective of whether it is accompanied by and actual damage. In case of qualified right, the injury or wrong is not complete unless the violation of the right results in actual or special damage. Every injury, thus imports damage, though may not have cost the victim a penny, but simply by hindering the right, as an action for a slanderous word, though a man does not lose a penny by speaking them yet he shall have an action. Likewise a man shall have an action against him who rides over his ground, though it does him no damage, for it is an invasion of his property and the other trespasser has no right to come there. The real significance of legal damage is illustrated by two maxims namely: *Injuria sine damno* and *Damnum sine injuria*. Damnum is meant damage in the substantial sense of money, loss of comfort, service, health or the like. By injuria is meant a tortuous act.

*Injuria sine damno.*
This is the infringement of and absolute private right without any actual loss or damage. The phrase simply means *Injury without damage*. The person whose right is infringed has a cause of action e.g. right to property and liberty are actionable *per-se* i.e. without proof of actual damage.
Example: Refusal to register a voter was held as and injury per-se even when the favorite candidate won the election - Ashby Vs. White (1703). This rule is based on the old maxim of law ‘Ubi jus ibi remedium’ which means that where there is a right, there is a remedy.

**Damnum sine injuria**
This is the occasioning of actual and substantial loss without infringement of any right. The phrase simply means Damage without injury. No action lies. Mere loss of money or moneys’ worthy does not constitute a tort. There are many acts, which though harmful are not wrongful, and give no right of action. Thus Damnum may be absque injuria i.e. damage without injury.

**Example:** In the case of Mayor & Bradford Corporation Vs. Pickles (1895), Pickles was annoyed by the refusal of Bradford Corporation to purchase his land for their water undertaking. Out of spite, he sank a shaft on his land, which had the effect of discoloring and diminishing the water of the Corporation, which percolated through his land. The House of Lords held that the action of Pickles was lawful and no matter how ill his motive might be he had a right to act on his land in any manner that so pleases him.

In the case of Mogul Steamship Co. Vs. Me-Gregory (1892). Certain ship owners combined together. In order to drive a ship-owner out of trade by offering cheap freight charges to customers who would deal with them. The plaintiff who was driven out of business sued the ship-owner, for loss caused to him by their act. The court held that a trader who is ruined by legitimate competition of his rivals could not get damages in tort.

3. **Remedy.**
The essential remedy for a tort is action for damages, but there are other remedies also e.g. injunction, specific performance, restitution etc. Further, damages claimable in tort action are unliquidated damages. The law of tort is said to be a founded of the maxim- *Ubi jus ibi remedium* i.e. there is no wrong without a remedy.

**Other elements of tort**
In certain cases, the following may form part of requirements for a wrong to be tortuous.

1. **Voluntary and involuntary acts:** acts and omissions may be voluntary or involuntary. An involuntary act does not give rise to liability in tort.
2. **Mental elements:** Plaintiff may be required to show some fault on the part of the defendant. Fault here means failure to live up to some ideal standard of conduct set by law. To determine fault, the following may be proved:-
a) **Malice**: In the popular sense, *malice* means ill-will or spite. In Law, it means i) intentional doing of a wrongful act and, ii) improper motive. Thus a wrongful act done out of malice is an act done wrongfully and without reasonable and probable cause, dictated by anger or vindictive malice.

b) **Intention**: i.e. where a person does a wrongful act knowing the possible consequences likely to arise, he is said to have intended that act, and is therefore at fault.

c) **Recklessness**: i.e. where a person does an act *without caring* what its consequences might be, he is at fault.

d) **Negligence**: i.e. where the circumstances are such that a person ought to have foreseen consequences of his act and avoided it altogether, he would be at fault if he bothers not.

e) **Motive**: Motive is the ulterior objective or purpose of doing an act and differs from intention. Intention relates to the immediate objective of an act while motive relates to the ulterior objective. Motive also refers to some personal benefit or satisfaction which the actor desires whereas intention need not be so related to the actor. An act which does no amount to legal injury cannot be actionable because it is done with a bad motive it is the act, not the motive for the act that must be regarded. If the act apart from motive gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element. The exceptional cases where motive is relevant as an ingredient are torts of malicious prosecution, malicious abuse of process and malicious falsehood.

3. **Malfeasance, misfeasance and non-feasance**: 'Malfeasance' refers to the commission of a wrongful act which is actionable per se and do not require proof of intention or motive. 'Misfeasance' is applicable to improper performance of some lawful act, for example, where there is negligence. 'Non-feasance' refers to the omission to perform some act where there is an obligation to perform it. Non-feasance of a gratuitous undertaking does not impose liability, but misfeasance does.

**MOTIVE AND MALICE.**

Motive means the reason behind the act of the defendant. When motive is colored with ill will, it becomes malice. Malice means desire or ill will to cause damage to someone.

As a general rule motive is irrelevant in determining liability in tort. A good or bad intention is not a defense in tort.

*Case: Bradford Corporation V s. Pickles (1895):* The general irrelevance of motive and malice is clearly analyzed in this case. Pickles was annoyed by the refusal of Bradford Corporation (plaintiff) to purchase his land for their water project. Out of Malice he sank a shaft in his land, which had the effect of discoloring and diminishing the water of the corporation, which percolated through his land. The corporation applied for an injunction to restrain Pickles from collecting the underground water.
The court held that an injunction could not be granted as Pickles had a right to drain from his land underground water not running in a defined channel. Therefore, the fact that Pickles was malicious in his conduct is immaterial. Malice in itself is not a tort even though in some cases, it may constitute an essential element of a tort, for example, malicious prosecution.

**Distinctions between Contract and Tort**
1. In a contract the parties fix the duties themselves whereas in tort, the law fixes the duties.
2. A contract stipulates that only the parties to the contract can sue and be sued on it (privity of contract) while in tort, privity is not needed in order to sue or be sued.
3. In the case of contract, the duty is owed to a definite person(s) while in tort, the duty is owed to the community at large i.e. duty in-rem.
4. In contract remedy may be in the form of liquidated or unliquidated damages whereas in tort, remedies are always unliquidated.

**Distinctions between Tort and Crime**
1. In tort, the action is brought in the court by the injured party to obtain compensation whereas in crime, proceedings are conducted by the state.
2. The aim of litigation in torts is to compensate the injured party while in crime; the offender is punished by the state in the interest of the society.
3. A tort is an infringement of the civil rights belonging to individuals while a crime is a breach of public rights and duties, which affect the whole community.
4. Parties involved in criminal cases are the Prosecution verses the Accused person while in Torts, the parties are the Plaintiff versus the Defendant.

**GENERAL DEFENSES IN TORT**

Generally, a plaintiff has to prove his case in a court of law and if he does so successfully, judgment is passed against the defendant. The defendant on the other hand may defend the case against himself successfully, thus making the plaintiff's action fail. There are some general defences which may be taken to tortuous liability.

1. **Volenti Non fit Injuria**
The general rule is that a person cannot complain for harm done to him if he consented to run the risk of it. For example a boxer, foot baler, cricketer, etc cannot seek remedy where they are injured while in the game to which they consented to be involved. Where a defendant pleads this defense, he is in effect saying that the plaintiff consented to the act, which he is now complaining of. It must be proved that the plaintiff was aware of the nature and extent of the risk involved.
Case: Khimji Vs Tanga Mombasa Transport Co. Ltd (1962), The plaintiffs were the personal representatives of a deceased who met his death while traveling as a passenger in the defendant’s bus. The bus reached a place where road was flooded and it was risky to cross. The driver was reluctant to continue the journey but some of the passengers, including the deceased, insisted that the journey should be continued. The driver eventually yielded and continued with some of the passengers, including the deceased. The bus got drowned together with all the passengers aboard. The deceased’s dead body was found the following day. It was held that the plaintiff’s action against the defendants could not be maintained because the deceased knew the risk involved and assumed it voluntarily and so the defense of Volenti non fit injuria rightly applied.

There are however some limitations to the application of the maxim of volenti non fit injuria:-

First, no unlawful act can be legalized by consent, leave or license.

Secondly, the maxim has no validity against an action based on breach of statutory duty.

Thirdly, the maxim does not apply in rescue cases such as where the plaintiff has, under an exigency caused by the defendant’s wrongful misconduct, consciously and deliberately faced a risk, even of death to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection as in a member of his family, or is a mere stranger to whom he owes no such special duty.

Fourthly, the maxim does not apply to cases of negligence.

Lastly, this maxim does not apply where the act of the plaintiff relied upon to establish the defense under the maxim the very act which the defendant was under a duty to prevent.

2. Inevitable Accident.

This means an accident, which cannot be prevented by the exercise of ordinary care, caution or skill of an ordinary man. It occurs where there is no negligence on the part of the defendant because the law of torts is based on the fault principle; an injury arising out of an inevitable accident is not actionable in tort.

Case: Stanley Vs. Powell (1891) In this case, the plaintiff was employed to carry cartridge for a shooting party when they had gone pheasant-shooting. A member of the party fired at a distance but the bullet, after hitting a tree, rebounded into the plaintiff’s eye. The plaintiff sued. It was held that the defendant was not liable in the light of the circumstance of inevitable accident.

Lord Dunedin stated observed, "People must guard against reasonable probabilities, but they are not under duty to guard against fantastic possibilities"(Fardon vs. Harcourt-Rivington,(1932)48 TLR,215). Inevitable accident however is not a defense in strict liability case by the rule in Ryland Vs. Fletcher’
3. **Vis Major (ACT OF GOD)**

This is also an inevitable accident caused by natural forces unconnected with human beings e.g. earthquake, floods, thunderstorm, etc.

**Case:** *Nichols V s. Marshland* (1876): The defendant has a number of artificial lakes on his land. Unprecedented rain such as had never been witnessed in living memory caused the banks of the lakes to burst and the escaping water carried away four bridges belonging to the plaintiff. It was held that the plaintiff’s bridges were swept by act of God and the defendant was not liable.

In another case (*Ryde Vs. Bushnell* (1967): Sir Charles Newbold observed, "Nothing can be said to be an act of God unless it is an occurrence due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the result avoided".

4. **Necessity:**

Where intentional damage is done so as to prevent greater damage, the defense of necessity can be raised. Sometimes a person may find himself in a position whereby he is forced to interfere with rights of another person so as to prevent harm to himself or his property.

In the case of *Cope Vs. Sharpe* (1912): The defendant committed certain acts of trespass on the plaintiff’s land in order to prevent fire from spreading to his master’s land. The fire never in fact caused the damage and would not have done so even if the defendant had not taken the precautions he took. But the danger of the fire spreading to the master’s land was real and imminent. It was held that the defendant was not liable as the risk to his master’s property was real and imminent and a reasonable person in his position would have done what the defendant did.

The general rule is that a person should not unduly interfere with the person or property of another. It is only in exceptional cases of imminent danger that the defense of necessity may be upheld. It is based on the principle that the welfare of the people is the supreme law. Whether the defense of necessity would extend to inflicting injuries to the person is debatable.

In the case of *Esso Petroleum Ltd. Vs. Southport Corporation* (1956) it was held that the safety of human beings belongs to a different scale of value from the safety of property. These two are beyond comparison and the necessity for saving life has all times been considered, as a proper ground for inflicting such damage as may be necessary upon another’s property.

5. **Self Defense**

Everyone has a right to defend his person, property and family from unlawful harm. A person who is attacked does not owe his attacker a duty to escape. Everyone whose life is threatened is entitled to defend himself and may use force in doing so. The force used must be reasonable and proportionate to that of the attacker. Normally, no verbal provocation can justify a blow.
An occupier of property may defend it where his right or interest therein is wrongfully interfered with. However, in protecting one’s property, he cannot do an act which is injurious to his neighbour; neither can he adopt a course which may have defect of diverting the mischief from his own land to the land of another person which would otherwise have been protected. A trespasser may be lawfully ejected using reasonable force. Thus a man must use force as is reasonably necessary and the means of defense must be related to the harm, which would otherwise be suffered. It is therefore sound to take reasonable steps to protect his property e.g. by keeping fierce dog, broken glass on a boundary wall etc.

6. **Mistake**
The general rule is that a mistake is no defense in tort, be it a mistake of law or of fact. Mistake of fact, however, maybe relevant as a defense to any tort in some exceptional circumstances e.g. malicious prosecution, false imprisonment and deceit. Thus where a police officer arrests a person about to commit a crime but the person arrested turns out to be innocent the police officer is not liable. Mistake however, cannot be a defense in actions for defamation.

7. **Statutory Authority**
When the commission of what would otherwise be a tort, is authorized by a statute the injured person is remediless, unless so far as the legislature has thought it proper to provide compensation to him. The statutory authority extends not merely to the act authorized by the statute but to all inevitable consequences of that act. But the powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done, the person must do so in good faith and must not exceed the powers granted by the statute otherwise he will be liable.

In the Case of *Vaugham Vs. Taffvale Railway Co.* (1860), A railway company was authorized by statute to run a railway, which traversed the plaintiff’s land. Sparks from the engine set fire to the plaintiff’s woods. It was held that the railway company was not liable. It had taken all known care to prevented emission of sparks. The running of locomotives was statutorily authorized.

8. **Novus Actus Interveniens.**
This is when a chain of events results from a tort so that the loss suffered is not within the scope of those that would naturally occur from the first tort. To refer to a *novus actus interveniens* is in fact merely another way of saying that the loss was not reasonably foreseeable.

This however, does not become an excuse if:

a). An act done in the agony of the moment created by the defendants tort. E.g. If you threw a lighted firework into a crowded market place. Several people threw the firework from their vicinity until it explodes on another’s face. *Scott Vs. Shepherd* (1773)

b). Where the intervening act is a rescue.
9 Contributory negligence

The defendant may rely upon this defense if the plaintiff is also to blame for his suffering. The defendant must prove that:

- The plaintiff exposed himself to the risk by his act or omission.
- The plaintiff was at fault or negligent.
- The plaintiff’s negligence or fault contributed to his suffering. This defense does not absolve the defendant from liability. It merely apportions compensation of damages between the parties who contributed to the loss. This defense is not available if the plaintiff is a child of tender age.

TRESPASS

Trespass as a wrong has a very wide application. It could mean unlawful presence in another’s closure or land or premises, offence to the body of a person or even mean wrongful taking of goods or chattels.

To constitute the wrong of trespass, neither force nor unlawful intention nor actual damage nor breaking of an enclosure is necessary.

Every invasion of private property, be it ever so minor is a trespass.

Trespass may take any of the following three forms:

a) Trespass to land.
b) Trespass to person, and;
c) Trespass to goods.

TRESPASS TO LAND

Trespass to land may be committed by any of the following acts: -

a). Entering upon the land or property of the plaintiff
b). Continuing to remain in such land or property on expiry of license i.e. Permission to be in it.
c). Doing an act affecting the sole possession of the plaintiff, in each case without justification.
d) By throwing objects into another’s land.
e) By using the right of entry for purposes other than for which it was allowed.

Generally, trespass to land is a civil wrong. However it may give rise to criminal proceeding:

For example: Under the Trespass Act (Cap 294), a trespasser can be prosecuted for a criminal offence if he enters on somebody’s land with intent to steal goods or commit any other offence.

It is important to note that trespass to land is actionable per se, that is, without proof of special damage. In other words, it is not a defense that no damage has been caused by the trespass.
Following are explanations to the elements of trespass:

1. Entry as an essence to constitute a trespass. A man is not liable for involuntary entry but intentional entry, even though made under mistake. E.g. if in mowing in his own land a man inadvertently allows his blade to cut through into his neighbors' field, he is guilty of trespass. Public streets including pavements e.t.c are primarily dedicated for public use for the purpose of passage and cannot be used as though it is private residence. Thus an excess of ordinary user of highway amount to trespass.

2. If a person who has lawfully entered on the land of another remains there, after his right of entry has ceased he shall then be committing trespass. Every interference with the land if another e.g. throwing stones over a neighbors land is deemed to be constructive entry amounting to trespass, much as driving a nail into another walls, planting trees on his land e.t.c These are actionable per-se whereas private nuisance is actionable only with proof of damage.

The owner of land is entitled to the column of air space above the surface ad- infinitum for ordinary use and enjoyment, and anything down to the center of the earth.

In principle, every continuance of a trespass is afresh trespass and an action may be brought of it. An action may be brought for the original trespass in placing an encumbrance on the land and another action for continuing the structure being so erected. It therefore follows that a recovery of damage in the first action by way of accord and satisfaction does not operated as purchase of the right to continue in the injury. Trespass by a man's cattle, sheep, poultry etc is dealt with similar to trespass committed by the owner personally.

**Remedies for Trespass to land.**

1. Defense of property: He may have to use force till he gets possession but not unnecessary amount of force of violence. This is called remedy of ejection.

2. Expulsion of trespasser especially in case of continued trespass.

3. Distress damage feasant: He may seize and retain them impounded as a pledge for the redress of the injury sustained.

4. Damages: This means recovery of monetary compensation from the defendant.

5. Injunction: This may be obtained to ward off a threatened trespass or to prevent a continuing trespass.

6. Action for recovery of Land: In case the plaintiff is wrongfully dispossessed of his land he can sue for the recovery of the land from the defendant.
Defenses against Trespass on land.
i. Statutory authority: Where the law allows entry upon land.
ii. Entry by license: Where entry is authorized by land owner, unless authority is abused.
iii. Adverse possession: Where land has been peacefully possessed for over 12 years without disturbance.
iv. Act of Necessity: Example is entry to put off fire for public safety is justifiable.
v. By order of court of law: This may be in execution of court order e.g. by court brokers.
vi. Self defense: a trespasser may be excused as having been done in self defense or in the defense of a person’s goods, chattels or animals.
vii. Re-entry on land: A person wrongfully dispossessed of land may re-take possession of it if it’s possible for him to do so peacefully and without the use of force. In this case, he will not be liable for trespass to land.
viii. Re-taking of goods and chattels: if person unlawfully takes the goods and chattels of another upon his own land, he impliedly licenses the owner of the goods to enter his land for the purpose of recaption.

TRESPASS TO PERSON
Any direct interference with the person (body) of another is actionable in the absence of any lawful justification. Trespass to person includes assault, battery and false imprisonment.

Assault
Assault means conduct or threat to apply violence on the person of the plaintiff in circumstances that may create apprehension that the latter is in real danger. It is committed when a person threatens to use force against the person of another thus putting the other person in fear of immediate danger.

Examples: Shaking of fist, pointing a gun menacingly at another, letting go a dog fiercely etc.
It is important to note that not every threat amounts to assault. There must be the means of carrying out the threat and the capacity to effect the threat. The person threatened must be put in fear of immediate danger. An assault is a tort as well as a crime. The intention as well as the act makes assault. Mere words do not amount to assault unless it gives the user’s gesture such a meaning as may amount to assault.

Battery
Battery means the actual application (use) of force against the person of another without lawful justification. It is immaterial whether the force is applied directly or indirectly to the person. But there must be actual bodily contact between the plaintiff and the defendant.

Examples: - striking of another person or touching another person in a rude manner, pouring water on or spitting on another person.
Assault and battery is actionable per-se (damage does not have to be proved).

**False Imprisonment**
False imprisonment means total restraint or deprivation of the liberty of a person without lawful justification. The duration of the time of detention is immaterial. False imprisonment may be committed even without the plaintiff’s knowledge e.g. by locking him up in his bedroom while he is asleep and then reopening the door before he has awoken. In such a case the plaintiff may still sue, (Meering vs. Graham-white Aviation Co. Ltd (1919)122 L.T.44).

It is not however necessary that the person’s body should be touched. A person is not only liable for false imprisonment when he directly arrests or detains the plaintiff, but also when he actively promotes or causes the arrest or detention of the person.

**Defenses to assault battery & false imprisonment**

a). **Volenti non-fit injuria**: A person who has voluntarily consented to come into actual bodily contact with another e.g. in sports, etc cannot later complain against another person who touches him in the course of playing the game.

b). **Private defense**: A person is within his legal rights to defend himself, his property or his family. But he must use reasonable force in doing so.

c). **Legal authority**: A police officer has statutory authority to arrest a person in the preservation of public peace. Here reasonable force may be used to effect such arrest.

d). **Forceful entry**: The rightful owner of property is entitled to use reasonable force to prevent forcible entry on his land or to repossess his land or goods, which are wrongfully in the possession of another.

e). **Parental authority**: People such as parents, teachers, etc can inflict reasonable punishment for the correction and benefit of the children. Thus a parent exercising parental authority can chastise or even lock-up a child reasonably without being guilty of assault, battery or false imprisonment, nor would a school-teacher.

**TRESPASS TO GOODS**
A person can sue for trespass to goods where there is wrongful interference with goods, which are in his possession. Such interference includes wrongful conversion, actual taking of or a direct and immediate injury to the goods. The tort of trespass to goods is meant to protect personal property.

To constitute the tort of trespass to goods, the plaintiff must show:

1. That at the time of trespass, he had the possession of the goods.
2. That his possession had been wrongfully interfered with or disturbed.
Trespass to goods are of three categories namely:

1. Trespass to chattels.
2. Goods Detenue and;
3. Conversion.

**Trespass to Chattels**

It means interference with goods, which are in the actual or constructive possession of the plaintiff. It may involve:

- Removal of goods from one place to another,
- Using the goods or;
- Destroying or damaging the goods wrongfully.

For an action to be sustainable:

- The trespass must be direct.
- The plaintiff must be in possession of the chattel at the time of the interference.
- The tort is actionable per-se.

**Detenue**

This means wrongful withholding or detention of goods from the person entitled to their immediate possession.

*For example:* If A lends his book to Band B refuses to return it to A, A is said to have committed the tort of Detenue.

**Conversion**

This means dealing with goods in a manner that is inconsistent with the right of the person in possession of them. This tort protects a person's interest in dominion and control of goods. The plaintiff must be in possession or have the right to immediate possession.

*For example:* If A intentionally sells B's goods to C without any authority from B, A is guilty of conversion.

Acts of conversion may be committed when property is wrongfully taken, parted with, sold, retained, destroyed or the lawful owner's right is denied.

**Defenses to trespass to goods.**

Limited defenses are available to a defendant against a wrong to goods. The defendant, however, can claim the right of lien. He may also claim other general defenses like statutory or judicial authority.

**Remedies to trespass to goods.**

i. *Recaption:* The plaintiff can recapture his goods that have been wrongfully taken away from him provided he uses reasonable force.

ii. *Order for specific restitution:* The court may also order for specific restitution of the goods where damages is not adequate a remedy.

iii. *Damages:* The plaintiff is entitled to claim the full value of the goods and damages for any inconvenience suffered by him.
OCCUPIERS LIABILITY

At common law, an occupier owns a common duty of care to his invites or invitee while within their premises and is generally liable for any injury to them or damage to their goods by reason of condition to their premises. The law relating to occupiers liability in Kenya is contained in the Occupiers Liability Act Cap 34 laws of Kenya. The object of the Act was to amend the law relating to liability of occupiers and to others for injury or damages resulting persons or goods lawfully on any land or other property. Under the Act, an occupier owes a common duty of care to all invitees and their goods. However the common duty of care may be modified or restricted by agreement. The Act abolishes the old distinction between licensees and invitees, and now calls such persons visitors. This however does not include trespassers.

Under Section 3(2) of the Act, common law duty of care means “a duty to take such care in all the circumstances of the case as is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose in which he is invited or permitted to be there”.

The court will consider the following in determining if there was this common law duty of care:

- Whether the invitee is a child, the occupier must be prepared to take children to be less careful than adults.
- Whether the invitee was exercising his calling under the Act, an occupier may expect that a person in exercise of his calling will appreciate and guard against any special risk ordinarily incidental to the calling if the occupier permits him to do so.

The occupier is not liable where the accident occurs through the defective work of an independent contractor provided he can establish that the contractor was efficient as far as he was able and that he had inspected the work done.

Defenses

- An occupier may escape liability if the injury or damage is occasioned by danger of which the occupier had warned the invitee.
- The occupier may escape liability in respect of any damages caused to the invitee if occasioned by the fault of an independent contractor.
- The common duty of care does not impose on an occupier any obligation in respect of risks willingly accepted by the invitee.
- The occupier owes no common duty of care to trespassers and is not liable for any injury or damage they may suffer while in his premises.
NEGLIGENCE

According to Judge Alderson, negligence means the breach of a duty caused by the omission to do something, which a reasonable man would do, or doing of something, which a prudent and reasonable man would not do. Negligence consist of neglect to use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect, the person has suffered injury to his person or property.

The plaintiff suing under tort of negligence must prove that:

1. The defendant owed him a duty of care,

The circumstances must be such that the defendant knew or reasonably ought to have known that acting negligently would injure the plaintiff. A road user owes other users a legal duty of care. An inviter owes his invitees a legal duty of care. A manufacturer of products owes a legal duty of care to consumers. As a general rule, every person owes his neighbor a legal duty of care. The neighbor principle was enunciated by Lord Atkin in his dictum celebrated case of Donohue Vs Stevenson (1932), a man bought a bottle of ginger beer from a retail shop. The man gave the bottle to his girlfriend who became ill after drinking the contents. The bottle contained the decomposed remains of a snail. The bottle was opaque so that the substance could not be discovered until the lady was refilling her glass. The consumer sued the manufacturer for negligence. Lord Atkin in his ruling said “the law that you are to love your neighbor becomes in law that your must not injure your neighbors...who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question”

In the Case of Dulieu Vs. White & Sons (1901), the plaintiff, a pregnant woman, was sitting behind the counter of her husband's bar when suddenly a horse was driven into the bar. Fearing her personal safety, she suffered nervous shock and gave birth to a premature baby. In the circumstances, the court held that the plaintiff was entitled to recover in negligence.

The standard of care expected of the defendant is that of a reasonable man. This is a man of ordinary prudence. A reasonable person is an objective stand created by law for all circumstances. Where professionals or experts are involved, the standard of care is that of a reasonably competent expert in that field.

There are some circumstances however where not even a reasonable person could have foreseen the plaintiff suffering any loss, in which case, there is no liability upon the person who has committed the injurious act.
In the landmark case of *Bourhill Vs. Young* (1943), the plaintiff (a pregnant woman) heard the noise of a road accident some distance away and walked to the scene. On reaching there, she suffered nervous shock and subsequently miscarried. In the circumstances, the Court held that the plaintiff could not recover in negligence because the injury she suffered or the manner in which it was caused which was not foreseeable. Had the plaintiff not walked to the scene of the accident, she would not have suffered the injury complained of. Such injury was legally termed as remote.

2. There has been a breach of that legal duty of care.
The plaintiff has to prove that there was a duty imposed by common law, statute or otherwise, upon the defendant and that the defendant was in breach of this duty.
However, at certain times, negligence is presumed without proof of breach of duty by the plaintiff. This is in the case of *res ipsa loquitur*.

**RES IPSA LOQUITOR**
As a general rule, the burden of proving negligence lies with the plaintiff. He must prove that the defendant owed him a duty of care, that the defendant has breached that duty and that he has suffered damage.
However, in certain cases, the plaintiff’s burden of proof is relieved by the doctrine of *res ipsa loquitur*. Where it is applicable *Res ipsa Loquitur* means that ‘thing or facts speaks for themselves’.
This for example, occurs where an accident happens in circumstances in which it ought not to have occurred e.g. a car traveling on a straight road in clear weather and good visibility suddenly swerves off the road and overturns, where a barrel of flour suddenly drops from a warehouse, etc. Such an accident ought not to have occurred except for the negligence of the defendant.
*Res ipsa loquitur* is a rule of evidence and not of law. It merely assists the plaintiff in proving negligence against the defendant. Before it can be relied upon, three conditions must be satisfied, namely:

a) The thing inflicting the injury must have been under the control of the defendant or someone whom he controls.
b) The event must be such that it could not have happened without negligence and;
c) There must be no evidence or explanation as to why or how the event occurred, as the accident is such as in the ordinary course of things does not happen if those who have the duty use proper care.

In the case of *Bryne Vs. Boadle* (1863), a barrel of flour fell from a warehouse onto the defendant onto the plaintiff injuring him in the street while he was passing through.
In the circumstances, the Court held that the plaintiff was not required to show how the accident took place because on the facts, negligence could be presumed and the rule of *res ipsa loquitur* applied.

**Effect of Res ipsa loquitur rule**

1. It provides *prima facie evidence* of negligence on the part of the defendant.
2. It *shifts the burden of proof* form the plaintiff to the defendant.
3. The plaintiff has suffered *injury to his person or property*.

Plaintiff has to prove that if it were not of the defendant’s act he would not have suffered loss or damage.

There must be a traceable link between the act and the loss, otherwise it would be considered remote and so, irrecoverable. If the plaintiff act is traceable to an independent intervening act (*novus actus*), the defendant is not liable.

3. **Damage:** For the plaintiff to succeed in claim of Negligence, he must prove that he suffered harm, loss or prejudice, unless this is presumed as in the case of *Injuria sine damnum*. No damage, no negligence.

**Defenses to Negligence**

1. Contributory negligence: This defense is available to the defendant in circumstances in which the plaintiff is also to blame for his suffering. The effect of this defense is to reduce the amount recoverable by the plaintiff as damages by the extent of his contribution. Liability is apportioned between the parties. In earlier law, a person who had contributed to his injury due to his own negligence could not maintain an action in regard to such injury but this was altered in Kenya by the Law Reform Act (Cap 26). This law now enables the plaintiff to recover damages even in case of contributory negligence. However, the damages to be recovered are to be reduced to such an extent by the court, taking into consideration that the plaintiff contributed to his injury. Contributory negligence does not apply in case of children and they can recover full damages even in case of their contributory negligence.

2. *Volenti non fit injuria:* This is the doctrine of voluntary assumption of risk.

3. Statutory authority: The defendant must prove in this defense that he acted in accordance with the provisions of the Act.
VICARIOUS LIABILITY

Vicarious liability means the liability of one person for the torts committed by another person. The general rule is that every person is liable for his own wrongful act. However, in certain cases a person may be made liable for wrongful acts committed by another person.

For example: An employer may be held liable for the tort of his employees. Similarly, a master is liable for any tort, which the servant commits in the course of his employment.

The reason for this rule of common law is that:
- As the master has the benefit of his servant’s service he should also accept liabilities.
- The master should be held liable as he creates circumstances that give rise to liability.
- The servant was at mere control and discretion of the master.
- Since the master engages the servant, he ought to be held liable when gagging a wrong person.
- The master is financially better placed than the servant.

It must be proved that a person was acting as a servant and that the said tort was committed in the course of his employment before a master can be sued for a tort committed by his servant.

MASTER AND SERVANT

A servant means a person employed under a contract of service and acts on the orders of his master. The master therefore controls the manner in which his work is done.

The concept of vicarious liability is based on the principle of equity that employee is normally people of meager resources and it is therefore only fair that the injured person is allowed to recover damages from the employers. Therefore a master is liable for the torts committed by his servant.

To prove liability under master-servant relationship the servant must have acted in the course of his employment A master is liable whether the act in a question was approved by him or not. It is immaterial that the alleged act was not done for the benefit of the master. But the master is not liable for torts committed beyond the scope of employment.

A servant is a person who works under the control of and is subject to the directions of another e.g. house-help, home servant, chauffeurs etc. Such persons are employed under a contract of service.

The servant would also hold his master liable for torts committed in the course of duty for action done on ostensible authority.

For vicarious liability to arise, it must be proved that:
1. There was a lawful relationship between the parties.
2. There must have been a contract of service between the parties.
3. The servant is under the control and discretion of the master. This control and discretion is determined by the master’s freedom.
- To hire or fire the servant.
- To determine the tasks to be discharged.
- To provide implements.
- To determine how the tasks would be discharged.
- To determine the servants remuneration.
- That the tort was committed by the servant in the course of his employment. This is irrespective of whether the servant was acting negligently, criminally, deliberately or wantonly for his own benefit. In 
  *Patel Vs Yafesi*, where an employee was carrying 3 excess passengers in the vehicle contrary to the master's instructions, it was held that the master was liable as the driver was acting in the course of his employment.

An employer is however responsible for the torts committed by an independent contractor where the contract, if properly carried out, would involve commission of a tort and also in cases where the law entrusts a high duty of care upon the employer.

**INDEPENDENT CONTRACTOR**

An independent contract means a person who undertakes to produce a given result without being controlled on how he achieves that result. These are called contract for service. Because the employer has no direct control of him, he (the employer) is not liable for his wrongful acts.

However, there are certain cases (exception) under which the employer may still be liable. These are:

a). Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act, which causes the damage.

b). Where the thing contracted is in itself a tort.

c). Where the thing contracted to be done is likely to do damage to other people's property or cause nuisance.

d). Where there is strict liability without proof of negligence e.g. the rule in *Ryland vs. Fletcher*.

**STRICT LIABILITY**

Strict liability means liability without proof of any fault on the part of the wrongdoer. Once the plaintiff is proved to have suffered damage from the defendant’s wrongful conduct, the defendant is liable whether there was fault on his part or not.

Strict liability must be distinguished from absolute liability. Where there is absolute liability, the wrong is actionable without proof of fault on the part of the wrong-doer and in addition, there is no defense whatsoever to the action. Where there is strict liability, the wrong is actionable without proof of fault but some defenses may also be available.
Strict liability may be considered in the following case namely:
  i. The rule in *Ryland Vs. Fletcher* (1866)
  ii. Liability for fire and;
  iii. Liability for animals.

1. The rule in *RYLAND VS FLETCHER* (1866)
The rule is base on the judgment contained in the above case. It states that; "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 at his peril and, is *prima facie* answerable for all the damage which is the natural consequence of its escape".
The above rule is commonly called the rule in *Ryland vs. Fletcher*. It was formulated on the basis of the case of *Ryland vs. Fletcher* (1866).
In this case Ryland had employed independent contractors to construct a reservoir on his land adjoining that of Fletcher. Due to the contractor’s negligence, old mine shafts, leading from Ryland’s land to Fletcher’s were not blocked. When the reservoir was filled, the water escaped through the shafts and flooded the plaintiffs mine and caused great damage. The court held that Ryland was liable and it was immaterial that there was no fault on their part.

**Limits of the rule.**
For this rule to apply the following conditions must be applied:
  i. Non-natural user: The defendant must have used his land in a way, which is not ordinarily natural.
  ii. Bringing into, or keeping or accumulating things on land for personal use.
  iii. That the things brought were *capable of causing mischief* if they escaped. These things need not be dangerous always.
  iv. Need for escape: There must be actual escape of the thing from the defendants land and not a place outside it.
  v. That the plaintiff suffered loss or damage for such escape.

**Defenses in rule in Ryland vs. Fletcher.**
  i. Acts of God: Act of God is a good defense to an action brought under the rule.
  ii. Plaintiffs’ Fault: If the escape of the thing is due to the fault of the plaintiff, the defendant is not liable. This is because the plaintiff has himself brought about his own suffering.
  iii. Plaintiff’s consent or benefit: That the accumulation or bringing of the thing was by consent of the plaintiff.
  iv. Statutory authority: That the thing was brought into the land by requirement of an Act of parliament.
  v. Contributory negligence: if the plaintiff was also to blame for the escape.
vi. Wrongful act of third party: the defendant may take the defence of the wrongful acts of a third party though he may still be held liable in negligence if he failed to foresee and guard against the consequences to his works of that third party's act.

2. Liability for Fire:
The liability for fire due to negligence is actionable in tort. It is also a case of strict liability. Therefore, if a fire starts without negligence but it spreads due to negligence of a person, then that person will be liable for damages caused by the spread of the fire.

3. Liability for Animals:
This may arise in cases of negligence. An occupier of land is liable for damage done by his cattle if they trespass onto the land of his neighbors thus causing damage.
In the same way, person who keeps dangerous animals like leopards, dogs, lions, etc is liable strictly for any injury by such animals. He cannot claim that he was careful in keeping them. He remains liable even in the absence of negligence.

**DEFAMATION**
Defamation means the publication of a false statement regarding another person without lawful justification, which tends to lower his reputation in the estimation of right thinking members of society or which causes him to be shunned or avoided or has a tendency to injure him in his office, professions or trade. It has also been defined as the publication of a statement that tends to injure the reputation of another by exposing him to hatred, contempt or ridicule.

In the case of *Dixon Vs Holden* (1869) the right of reputation is recognized as an inherent right of every person, which can be exercised against the entire world. A man’s reputation is therefore considered his property.

Following are the essential elements of defamation:

i. **False statement:** The defendant must have made a false statement. If the statement is true, it’s not defamation.

ii. **Defamatory statement:** The statement must be defamatory. A statement is said to be defamatory when it expose the plaintiff to hatred, contempt, ridicule or shunning or injures him in his profession or trade among the people known to him.

iii. **Statement refers the plaintiff:** The defamatory statement must refer to the plaintiff. But the plaintiff need not have been specifically named. It is sufficient if right thinking members of the society understand the statement to refer to the plaintiff.
iv. **Statement must be Published:** Publication of the statement consists in making known of the defamatory matter to someone else (third parties) other than the plaintiff.

Where the defamatory statement is kept under lock and key and no one ever gets to read it, there is no defamation.

**TYPES OF DEFAMATION**

1. **Slander:**
Slander takes place where the defamatory statement are made in non-permanent form e.g. by word of mouth, gestures, etc. Slander is actionable only on proof of damage. However, in exceptional cases, a slanderous statement is actionable without proof of damage. This is so in cases:
   a) Where the statement inputs a criminal offence punished by imprisonment.
   b) Where the statement inputs a contagious disease on the plaintiff.
   c) Where the statement inputs unchastely on a woman.
   d) Where the statement imputes incompetence on the plaintiff in his trade, occupation or profession.

2. **Libel:**
Libel takes place where the defamatory permanent form e.g. in writing, printing, television broadcasting, effigy, etc. Where a defamatory matter is dictated to a secretary and she subsequently transcribes it, the act of dictation constitutes a slander while the transcript is a libel. An action for libel has the following essential requirements:
   i) it must be proved that the statement is false,
   ii) in writing,
   iii) is defamatory, and
   iv) has been published.

**Distinctions between slander and libel**
Libel can be a criminal offence as well as a civil wrong while slander amounts to a mere civil wrong only.

1. Libel is in a permanent form while slander is in a non-permanent form.
2. Under libel, the wrong is actionable *per se* whereas in slander the plaintiff must prove actual damage except when it conveys certain imputations.
3. Libel can be a criminal offence and may as well give rise to civil liability while slander is essentially a civil wrong.

**Defenses against defamation**

i. **Truth or justification:** Truth is a complete defense to an action on libel or slander. The defendant must be sure of proving the truth of the statement otherwise more serious and aggravated damage may be awarded against him.
ii. **Fair comment:** Fair comment on a matter of Public interest is a defense against defamation. The word "fair" means honesty relevant and free from malice and improper motive.

iii. **Absolute Privilege:** Certain matters are not actionable at all in defamation. They are absolutely privileged. A matter is said to be privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who received it has an interest in hearing it. They include statements made by the judges or magistrates in the course of judicial proceedings, statements made in Parliament by Legislators and communication between spouses, etc.

iv. **Qualified Privilege:** In this case a person is entitled to communicate a defamatory statement so long as no malice is proved on his part. They include statements made by a defendant while defending his reputation, communications made to a person in public position for public good, etc.

v. **Apology or offer of Amends:** The defendant is at liberty to offer to make a suitable correction of the offending statement coupled with an apology. Such offers may be relied upon as a defense. The defendant can make an offer of amends where the publication was without malice and it was published innocently.

vi. **Consent:** In case whereby the plaintiff impliedly consents to the publication complained of, such consent is a defense in defamation.

**Remedies for defamation**

**Damages:** The plaintiff can recover damages for injury to his reputation as well as his feelings.

**Apology:** An apology is another remedy available to the plaintiff. This is because it has the effect of correcting the impression previously made by the offending statement about the plaintiff.

**Injunctions:** The Court may grant injunction restraining the publication of a libel. But the plaintiff must first prove that the defamatory statement is untrue and its publication will cause irreparable damage to him.

**NUISANCE**

This is the lawful interference with a person's use or enjoyment of land or some other rights over or in connection with land. It entails the doing or an unjustifiable thing, which interferes with the use or enjoyment of another's land. This tort protects a person's enjoyment of land or rights vested in the land. Nuisance may be public or private.
Public Nuisance
This is an act, which interferes with the enjoyment of a right of members or a society in general e.g right of fresh air, noise free environment, use of public highway, waterway, etc.
Public nuisance is criminal offence actionable by the state on behalf of the public. However, an individual may sue for public nuisance only if he may prove that he has suffered particular damage or loss over and above what other members of the public have suffered. Such injury caused must be direct and not mere consequential injury. It must also be shown to be of a substantial character in order to avoid multiplicity of litigation. Public nuisance is therefore a tort as well as crime. These suits are dealt with by or in the name of the state.

Private Nuisance
This is the unlawful interference with a person’s use of land or right connected with the land. It affects a person in his individual capacity and hence a personal action for redress is necessary. It may take the form of noise, heat, smoke, vibrations, overhanging branches, playing loud music etc.
Private nuisance is not actionable if the action of the defendant is reasonable in the legitimate use of his property.
The defendant would also not be liable if the plaintiff is over sensitive.
The standard or test applied by courts is that of a reasonable man.
The defendant cannot escape liability by pleading that the plaintiff came to the source of the nuisance.
The defendant cannot escape liability by pleading that the plaintiff came to the source of the nuisance.

Relief / Remedies to tort of nuisance.
1. Damages: The tort of nuisance is not actionable per-se. The plaintiff must prove loss or damage unless the same can be presumed.
2. Injunction: The plaintiff may apply for an order to restrain the defendant from continuing with the tortuous acts and the court may grant the order if circumstances so demand.
3. Abatement: This is the discontinuation of the nuisance e.g. cutting overhanging branches or roots.

A person may only sue for nuisance if he has an interest in the land affected.
A guest whose enjoyment of land is interfered with has no action in nuisance unless he is vested with the management and control of the source of nuisance.

Defenses to the tort of nuisance
1. Prescription: Right to commit private nuisance may be acquired by continuation of the nuisance for 20 years or more. The tortfeaser acquires prescriptive rights if he proves that he has committed the alleged nuisance for such period of 20 years without any interference.
2. **Statutory authority:** This is the offending act has been enabled by an Act of parliament.

3. **Plaintiff’s consent:** This is the defense of *Volenti non fit injuria* i.e. that the plaintiff willingly consented to the nuisance with full knowledge of its character.