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LAW 100
INTRODUCTION TO LAW

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The Challenge of Inclusion

The last quarter of the 20th century has proved to be a period of considerable change in Nigeria law. It has seen Nigeria achieve formal autonomy and legal independence. This has coincided with the Supreme Court's active reshaping of Nigeria law in a manner which has led to an increasing gulf between the law of Federal Republic Nigeria and that of other Commonwealth jurisdiction, including England. Adoption by Nigeria of the Republican path, in 1963 makes the severances of links with the British Monarchy and necessitates substantial revisions to the Federal Constitution. All these changes are deeply significant for the future of Nigeria law. A tradition received from Britain, and modified for Nigeria conditions from the earliest days of white settlement, has now evolved in such a way that it is possible to speak of a tradition of law in Nigeria which s distinct from the legal traditions of other common law countries.

Yet how "Nigeria" is the tradition? It is not Nigeria merely by virtue of the fact that the law has been shaped in a distinctive manner by judges

and the legislation of Nigerian legislatures both State and Federal. Nor is it Nigeria merely because it differs from English law, or the laws of other common law jurisdictions. Distinctiveness may be important to the formation of national identity, but distinctiveness from other legal systems is not sufficient to ensure that a country's legal system is "owned" by its people. For the tradition of law in Nigeria to be Nigerian, it needs to be a tradition which people accept as a valuable aspect of Nigeria life, and which reflects the composition, character and aspirations of the population. Furthermore, lawyers and the court system must be relevant to the general population as a last resort in the resolution of disputes, and not merely to corporations and organs of government. Despite all the changes in Nigeria law over the last quarter of a country, Nigerian law remains largely monocultural, and although women have been able to practice law for most of the century, the public face of the legal system-its judiciary and senior advocates-is predominantly a male face.

The challenge of inclusion is a challenge for the legal system to be more accommodating of the needs of the Nigeria population, and, in its public fact, to be, more representative of the diversity of that population. Perhaps the greatest challenge of all is that the legal system should be more accessible to private individuals, for the costs of justice are so high that they represent a major barrier to the legal system for a large proportion of the population. Increasing access to the court system is important, not merely so that all disputes which require a third party adjudicator can be resolved in accordance with the law, but so that the principle of the rule of law can be sustained.

Accommodation Diversity – A Legal System for All

For the tradition of law in Nigeria to reflect the composition and character of its population, its laws need to be drafted in a way which takes account of the diversity of that population, and the legal system needs to provide adequate protection for the rights of all. Many of these rights are the subject of international conventions to which is a signatory such as the *International Covenant on Civil and Political Rights,* the *Convention on the Elimination of All Forms of Racial Discrimination,* the *Convention on the Elimination of All Forms of Discrimination Against Women,* and the *Convention on the Rights of the Child.* Treaties do not become part of Nigeria law merely because Nigeria is a signatory to them. In any event, many treaties and conventions are drafted with such a degree of generality and deliberate ambiguity that they could not usefully be adopted into Nigeria law as a source of specific rights and obligations. Furthermore, many specific provisions of conventions are not intended to be the source of individual rights but rather impose obligations upon governments to improve the welfare of the population through executive action and administrative measures. Nonetheless,

numerous laws, both State and Federal, prohibit discrimination, and conferring other legal rights which are consistent with the rights conferred under international law.

To a great extent, these international conventions on human rights reflect the values of the western legal tradition. The very language of human rights owes its origins to the western legal tradition, and in particular, the enlightenment precepts of the French and American Revolutions. The notion that the legal system should be the means by which social change is effected is also a peculiarly western idea, tracing its origins historically to the central role which law has had in all social ordering. International law, with its use of moral and political pressure as a means of enforcing otherwise unenforceable obligations, is also dependent upon the notion of respect for law which is part of the western legal inheritance. Thus, although international conventions on human rights are of quite recent origin, and laws prohibiting discrimination have only been enacted in the last few years, these developments find their origin and impetus within the western legal tradition, rather than by departure from it.

Nonetheless, the tradition of law in Nigeria, as in other western countries, has needed, and still needs, to undergo a transformation and renewal in order to become more relevant to the diverse population which the legal system serves and the range of demands upon that system. It should not be surprising that a legal tradition which developed in a time when the population was relatively homogenous, both ethnically and culturally, and in which men of Anglo-Celtic descent dominated and controlled public life, should, at times unwittingly, be insensitive to the needs of Aboriginal peoples, children, the disabled, ethnic minorities and women. The challenge of inclusion is a challenge to make the legal system more accessible, and the laws fairer to, a number of groups in society, so that it meets the needs of the diverse range of people who come into contact with the system.

Women and the Law

Customary laws have provided a framework for the exclusion of women from public life. Women were executed from the professions and from other forms of employment. The social structure, placed women's role in the home, and subordinated their position to that of fathers and husbands. Women did not have an autonomous legal status, rather their position was subsumed within the family unit and their interests identified with the interests of the family. Through the course of this century, this position has gradually changed. Women have been allowed near autonomy as individuals. The barriers to employment have been

removed, and laws have been put in place to try to reinforce the principle of equal opportunity.

Coinciding with these changes, enormous changes have occurred in social structures in this century; now participate in the workforce. Whereas once, women were subsumed within the family unit, there has been a loosening of the ties which bind people together in marriage simultaneously with a marked increase in the legal regulation of the employment relationship. The changes in social structures have in turn produced new dilemmas for the law makers in determining the extent to which employers should be required to accommodate family commitments as a cost of employing staff, the way in which property should be allocated on marriage breakdown, and many other social issues associated with the change social structures.

At a time when society is in such a stage of transition, and when so many aspects of male-female relationships are being renegotiated, an important aspect of the challenge of inclusion is the need to engage in a continual examination of our laws and policies to ensure that a fair balance is being struck between the rights of men and women in different areas of social life. Another aspect of the challenge is to ensure that laws which are apparently neutral on their face do not have a discriminatory impact in practice, and do not contain implicitly masculine assumptions.

Changing laws is, however, only one dimension of the challenge. More difficult is changing attitudes. The structures of business and the professions do not readily accommodate the needs of women as the primary caretakers of children and other family members. Consequently, women continue to pay a disproportionate share of the costs of caring. Attitudes also need to be changed among lawyers and judges in order to eradicate example of discrimination and gender insensitivity in the practice of the law. The process of cross-examination in relation to complaints of domestic violence or sexual assault can be particularly alienating, as some defence lawyers seek to discredit the testimony of women by any means possible. They are aided and abetted in this by the adversarial system, which is predicated on the basis that each side should be able to present its case in whatever way it sees fit without much interference or control from the Bench. While judges have the power to disallow unfair questioning and to prohibit the harassment of witnesses, they are often reluctant to interfere with the manner in which the defence presents its case. This latitude given to defence lawyers in criminal trials is not infrequently at the expense of female witnesses.

Children and the Courts

The legal system has also had to adapt to the needs of children to a much greater extent than hitherto. The awareness in recent years of the extent of child sexual assault, and the public concern about the issue, has led to a considerable increase in the numbers of prosecutions for sexual offences against children, questions have been raised whether or not there should be a reduction in the age at which children might be called to give evidence. In turn, this has led to greater attention being paid to the needs of children as witnesses. The laws of evidence concerning situations when children are deemed incompetent to give evidence, require a reviour particularly the provisions which require that their evidence be corroborated in order to be accepted.

Court is nonetheless a frightening experience for many children. It is an environment which I quite alien from the world of home and school which children are sued to, and they often have misconceptions about the process, for example, that the judge will punish them if they lie in court. Many child witnesses are particularly afraid of seeing the perpetrator in the courtroom, and for this, and other reasons, steps have been taken in most Nigeria jurisdictions to make the process of giving evidence an easier one for children. In other jurisdictions, there in no option of using closed circuit television for child witnesses. Children give evidence from another room, which is connected to the courtroom by closed circuit. The child can see and hear the lawyers who conduct examination and cross-examination, while the lawyers, judge and jury are able to observe and listen to the child on the television monitor. Some jurisdictions also allow the child's evidence-in-chief to be given by means of a pre-recorded videotape. However, the child must normally be available for live cross-examination. These means so not, at present retain Nigeria but deserve some urgent consideration.

The use of technology is only one aspect of the challenge of including children in the court process. It is not only the courtroom, which is strange for children, but also the language used by the lawyers. Prosecutors and judges who are not used to dealing with children, and defence lawyers endeavouring to cast a reasonable doubt upon the accuracy of the child's testimony, may confuse a child witness by using language which is inappropriate to the child's age and linguistic capabilities.

The use of abstract rather than concrete language, sentences with multiple clauses, multifaceted questions, and questions with double-negatives can all serve to confuse children, while a focus upon peripheral rather than central details of their story may give a false impression of unreliability. Judges and magistrates who have an understanding of child development and the needs of child witnesses can intervene to ensure that children are able to understand the question

asked and to prevent then from being subjected to unfair cross-examination. However, a lack of awareness of the problems children have in giving evidence, together with an unwillingness to interfere significantly in the presentation of the defence case, combine to make the experience of giving evidence unnecessarily upsetting and difficult for many children.

Different issues arise in relation to children who are defendants in criminal trials. Almost all children accused of breaking the law are dealt with in special Juvenile Courts. These are generally much more informal that adult courts and sentencing practices have an explicit orientation towards rehabilitation, with custodial sentences being a last resort only used for repeat offenders convinced of serious crimes. The use of police cautioning is also an integral part of the response to juvenile crime.

In the past, the welfare orientation of juvenile courts has been a source of injustice for some children. The use of vague "status offences" such as being in moral danger or being beyond the control of parents has been a means whereby adolescents have been placed in state care "for their own good", but against their will, as a means of controlling their behaviour. Furthermore, the informal nature of court proceedings has justified failures to observe due process. Under modern juvenile court principles, due process is meant to be observed, while courts are required in sentencing to show a proportionality between the offence and the sentence. Nonetheless, may problems remain. Juvenile defendants are amongst the many groups in society who suffer from the pressure to reduce the public costs of justice.

Multiculturalism and the Legal Tradition

The challenge of inclusion is also the challenge of adapting the legal system to the demands of a multicultural society. The Nigerian government's official policy on multiculturalism. One of the government's law by this translates into systematically examining the implicit cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage certain.

Multiculturalism means different things to different people. In terms of the legal system, the claim to respect for the rights of minorities may take five different forms. First, an acceptance of cultural diversity means that the freedom of particular groups to enjoy their culture or religion should not be restricted unless this is necessary to protect the human rights of other. The rights of minorities to be able to practice their religion and maintain their culture are protected by various conventions in international law. For example, Art 27 of the *International Covenant on Civil and Political Rights* provides that in States which have ethnic,

religious or linguistic minorities, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language. This is subject to the qualification, contained in Art 18(3), that State are entitled to impose such limitations on the exercise of people's freedom to manifest their religion or beliefs as are necessary in the interests of public safety, order, health or morals, or for the protection of the fundamental rights and freedoms of others. In the western legal and political tradition, the right of minorities and assemble. Laws which single or religious practices which are particular to them violate the principle of equality before the law. Nonetheless, laws which are neutral on their face and apparently of universal application may in practice have a discriminatory impact upon particular groups by inhibiting the enjoyment of their culture or exercise of their religion.

The second dimension of multiculturalism which is expressed in international conventions and covenants is that governments should act to prevent discrimination based upon religion or ethnicity. Article 26 of the *International Covenant on Civil and Political Rights* prohibits discrimination on the grounds of race and national origin, as does the *Convention on the Elimination of All Forms of Racial Discrimination.* These international obligations are given effect in domestic law by legislation such as the *Racial Discrimination Act 1975* (Cth). State anti-discrimination laws are also consistent with the aims of the international conventions.

The third dimension is that the legal system should be accessible to people irrespective of their cultural background and first language. If people from a non-English speaking background are to be able to understand court cases in which they are involved, this means that they will need interpreter services both in court and in the earlier stages of the legal process, such as interview with police and legal representatives. The right to give evidence through and interpreter is enshrined in the law constitution of the Federal Republic of Nigeria and professional interpreters are used at public expense. Defendants who do not understand what is being said in the trail should also be provided with an interpreter. It is perhaps necessary that the expansion interpreter services in other branches of the legal system.

A fourth possible dimension of multiculturalism in relation to the law is that government officials and courts should take account of particular cultural factors in the application of the general laws of the land to individuals. Thus, in child custody and access cases involving children of ethnicity, account might be taken of such factors as the importance for the child's cultural development and sense of identity of maintaining

links with her or his extended family. The willingness or unwillingness of one parent seeking custody to allow contact with the family of the other parent might be an important factor in the ultimate decision. In criminal cases, officials or courts might take account of the cultural context in which the offences occurred in deciding whether to prosecute, whether to convict, or how to sentence. Specific exemptions, whether de facto or de jure, might be given to particular ethnic groups where the interference with their religious freedom out-weights any public benefit of the application of the law to them. For example, in a multicultural society, it would be consistent with good policy both to require the wearing of safety helmets by motorcyclists generally, and to take account of the objections of some communities who wear turbans for religious reasons, either by exempting them from the helmet requirement or by exercising discretion not to prosecute them.

A fifth potential dimension for pluralism is that the law should sufficiently reflect Nigeria multicultural estimative in order to allow different communities to be governed by their own laws on matters where cultural values differ significantly between different groups. This fifth claim for multiculturalism is controversial. Sensitivity premise of western conflicts with the principle, which is a fundamental premise of western legal system, that all members of society should be governed by the same laws. Apart from adherence to the fundamental precepts of the western legal tradition, there are other reasons for not allowing different communities to be governed by different legal norms. The recognition and enforcement of certain cultural norms and rules by the law of the country could, in certain instances, violate the principle that the government should protect the rights of vulnerable members of minority groups from practices which are regarded by the dominant culture as oppressive.

Imposing special laws on people because they belong to a particular ethnic group could introduce un-justified discrimination into the law, lead to unnecessary and divisive labeling of people, and possible be oppressive of individual members of the group.

The first four dimension of pluralism have gained support from federal government policy. Pluralism has there aspects; cultural identity, social justice and economic efficiency. The right to cultural identity means that all Nigerians have the right to express and share their individual cultural heritage, including their language and religion. This right is subject to carefully defined limits. Nigerians are required to accept the basic structure and principles of the Nigerians society, defined as comprising the Constitution and the rule of law, tolerance and equality, parliamentary democracy, freedom of speech and religion, English as the national language and equality of the sexes. Social justice, in the

context of a multicultural policy means the right of all Nigerians to equality of treatment and opportunity, and the removal of barriers of ethnicity, culture, religion, language, gender or place of birth. The third aspect, economic efficiency, means the need to maintain, develop and utilize effectively the skills and talents of all Nigerians, regardless of background.

Nigerians domestic policy thus seeks to allow linguistic and cultural diversity within a framework of commitment to values which are seen to be fundamental to the Nigerian society. The notion of the rule of law is a protected principle, but individual rules are not. Nonetheless, the goal of having a multiculturally sensitive legal system is harder to realize in practice than it may sound in theory. The right to cultural expression may conflict with other tights in international conventions to which Nigeria is a signatory, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. The protection of the rights of women and children may at times conflict with particular cultural practices which would otherwise have a claim to recognition. The competing rights contained within these various international covenants and conventions create a difficult balancing operation for governments in a multicultural society. On the one hand, they must respect the cultural practices of minority groups within the society. On the other hand, they must protect "minorities within minorities", that is, the vulnerable members of ethnic minorities, from cultural practices which are oppressive.

In resolving these conflicts, governments and courts have to steer between the twin dangers of cultural insensitivity and cultural relativism. There is scope for individual laws to be much more sensitive culturally than they are at present, but at the same time, there is a danger that culture will be used as an excuse for practices which should not be tolerated and which violate human rights.

Access to Justice: Making Legal Rights Effective

The challenge of inclusion is the challenge of making the law more representative of the character and composition of the population. But beyond the need for diversity is a need to lower the barriers to justice which inhibit a large proportion of the population from exercising their legal rights. Without access to justice, there is a gulf between the law on the books and the law in action.

In many legal systems, this gulf can be vast. Many totalitarian regimes, both past and present, offer examples of legal system in which fundamental human rights are guaranteed on paper, but are violated in practice. Yet even in countries with traditions of democratic

government, a similar discrepancy between theory and practice can occur. Laws can be passed which are presented as the solution to social problems, but which only provide rights on paper without changing institutions and practices in a way which will make those rights effective. Legislation is cheap. Government can point to the legislation when claiming compliance with international conventions or when responding to criticism. Yet sometimes the rhetoric of the law is not supported by the resources necessary to give effect to the stated intentions of the legislators. The law on the books justifies inaction, precisely because it gives the appearance of action.

A failure to provide proper access to justice is a major cause of the dichotomy because the law on the books and the law in action. Access to justice is a fundamental right which makes other rights effective. The formal conferral of a right is of no value unless adequate means exist to protect that right and to enforce corollary obligations. It is also an important aspect of the rule of law. As King CJ of the South Australian Supreme Court has said:

> "We cannot be said to live under the rule of law, in the full meaning of that expression, unless all citizens are able to assert and defend their legal rights effectively and have access to the courts for that purpose. Under our legal system, and indeed under the legal system obtaining in all complex modern societies, that requires professional assistance. If that professional assistance is denied to any citizen who reasonable needs it to assert or defend his legal rights, the rule of law in the society is to that extent deficient.

Many people do not so much need the means to go to court, as they need the capacity to make litigation a realistic threat if the other party continues to deny their legal rights. The vast majority of dispute ate settled informally between the parties or by negotiations which are conducted through lawyers. The threat of litigation is itself an important element in negotiations, for it gives an incentive for settlement.

For many people, the costs of access to justice, and the risks associated with litigation, are often too great for them to use the legal system to protect their legal rights. Perhaps it is an ideal that all citizens should be able to defend their legal rights effectively. It is tempting to contrast the existing situation with a historic golden age in which justice was available to all at moderate expense, and was meted out without fear or favour. It is doubtful that such a legal "garden of Eden" has ever existed in a developed western society. Yet it is vital if the law is to be effective at all, that a sufficient number of citizen are able to get access to justice to enforce their rights.

Bargaining in the Shadow of the Law

The significance of the courts does not lie only in their role as the final adjudicators of individual disputes when all other means of dispute resolution have failed. More than this, the decisions of the courts send message to the community at large. Marc Galanter has written that:

> "The principal contribution of courts to dispute resolution is providing a background of norms and procedures against which negotiations and regulation in both private and government settings take place. This contribution includes, but is not exhausted by, communication to prospective litigations of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would govern adjudication of the dispute, but possible remedies, and estimate of the difficulty, certainty and costs of securing particular outcomes".

Thus, courts send messages which allow people to bargain in the law's shadow. At a fundamental level, the message which the courts send to the community is that the law will be enforced, and that a person who resists compliance with the law and who violates the rights of others will be required not only to comply with the orders of the court, but also to pay the costs of the litigation. Furthermore, the cases which are litigation help to provide the legal norms against the background of which the negotiations take place. These norms confer "bargaining chips" on those engage in negotiation, and affect the outcome of those negotiations.

The role of the courts in sending messages is thus important to the resolution of disputes without the need for an adjudication. If only a few cases reach the courts, or only certain kinds of cases are adjudicated, involving plaintiffs who have the knowledge, means and will to litigate, then the law will be ineffective in providing the background of norms against which the rights of individuals can be protected through negotiation.

Pathways to Justice

There is consideration evidence that the legal system does not adequately provide means of giving redress for at least some of the legal wrongs suffered by citizens. In one Australian study, reported by Jeffrey Fitzgerald, a telephone survey was conducted in which members of households were asked to report on problems entailing injury, harm or loss within a three year period. The aim was to discover "middle-range" grievances of a variety of types, rather than to obtain an exhaustive

litany of problems. These respondents were asked about personal injuries and other tortuous damage where $1000 or more was at stake, consumer complaints over $1000, claims of discrimination, property disputes, grievances concerning landlords, claims against the government and post- divorce dispute, amongst others. The numbers of grievances reported varied from category to category-24 per cent of households reported grievances involving road accidents, accidents at work ad other damage caused by someone else; 16 per cent reported landlord and tenant problems; 77 per cent led to claims against the alleged wrongdoer; 56 per cent of claims were disputed in whole or in part.

Fitzgerald's study indicates that the chances of success in making a claim depends substantially on the type of injury of loss suffered. Ninety four per cent of tort claimants got all part of what they claimed. By contrast, only 65 per cent of consumers received total or partial satisfaction, compared with only 55 per cent pf those in property disputes and only 38 per cent of those complaining of discrimination. The high rate of recovery in tort cases is not surprising. There are well understood procedures for making claims against insurers in the case of road traffic accidents, and lawyers do not often need to be involved even if there is for a time some dispute about the amount the insurer will pay. Motorists often belong to associations which can assist them in such claims. Those who suffer injuries at work similarly have established procedures for claiming against employers under workers' compensation schemes and frequently have access to union assistance if need be. It may well be that these advisory organizations also play a role in screening out cases which are unmeritorious so that the person does not reach the stage of making a claim.

In other sorts of grievance where the path to a successful resolution is not nearly so well marked, nor advice and assistance so readily available, the number of successful claims is likely to be much lower. There are established procedures for making claims against the government, and the Administrative Appeals Tribunal has been established to hear appeals from administrative decisions, a industrial accident claim against the government requires greater personal commitment and access to information for it to succeed. In some jurisdictions advisory organizations exist to assist employees who get injured in an industrial audient.

Obstacles to the Enforcement of Rights

Access to Information

There are a number of obstacles inhibiting access to justice. A fundamental one is that lack of information about the possibility of a legal claim. Before there can be a claim, the aggrieved person must be aware that a legal remedy is available and confident that it is worthwhile for a claim to be made, using lawyers if need be. Access to information about the law thus plays an important part in providing access to justice.

People with grievances need encouragement to pursue a claim from informed non-legal professionals before they take what is for them the major step of seeking legal advice. In one English study, only 26 per cent of those victims of accidents who were incapacitated for two weeks or longer considered claiming damages. Most who did claim did so because someone else first suggested it to them. In general these were people with some knowledge and understanding of the legal system – police, trade union officials, doctors and hospital personnel. Victims of accidents professionals even if blame could be attributed in law to a third party, and less likely to realize that the accident concerned might be grounds for a legal claim.

The major source of information about the law ought to be the large number of solicitors in private practice who are available for consultation by members of the general public. Yet numerous studies have shown that when lawyers are consulted, it is largely in regard to certain types of problem which are perceived as matters on which lawyers can give assistance. Conveyancing and other matter concerning property, the making of a will and the legal consequences of marriage breakdown are all matters on which lawyers are readily consulted. Landlord and tenant disputes and consumer problems are less likely to result in visits to lawyers. This is indicated by Cass and Sackville's study of recourse to lawyers in three relatively disadvantaged areas of Sydney. They asked 548 respondents whether they had experienced problem situations in the last five years where they might have needed legal assistance. Twenty four such situations were presented to them broadly classified into problems concerning accommodation, accidents, consumer matters, money, marriage and family matters and problems with the police. Sixty nine per cent of the sample claimed to have experienced at least one problem situation. Forty four per cent had consulted a lawyer, although if conveyancing is excluded, the proportion fell to 25.4 per cent. Possibly, some people who consulted a lawyer about a conveyance also had a consultation on a non-conveyancing matter. However, consultation with a solicitor was much more common in regard to certain injuries than others. Cass and Sackville commented.

> "The sample of 548 respondents reported a significant number of matters in respect of which, in our opinion, legal advice should have been sought but was not. Some respondents had failed to

> pursue claims that might have been of considerable material value to them, such as those for damages for personal injuries arising out of work-related accidents. Others had failed to seek advice when charged with criminal offences and found themselves convicted without having had the benefit of legal advice. In many cases the respondents who did not seek legal assistance had experienced accommodation, consumer and money problems which, although not involving large sums, were of some importance to the respondents themselves and were not resolved satisfactorily."

This tendency to see lawyers as relevant only to certain sorts of legal problems is not confined to disadvantaged social groups. The findings that people tend only to consult lawyers about certain kinds of legal problems are consistent with overseas studies drawn from surveys of the general population. While it is true that use of lawyers is more likely for those of higher socio-economic status and educational level, those with higher incomes are more likely to be involved in buying or selling property or in making a will.

Cost

A second obstacle to using the legal system is the cost. Indeed for individuals in need of legal advice and representation, this is likely to be the greatest obstacle to seeking legal services. A person's fear that the costs of taking legal action will be far beyond her or his reach is a strong disincentive even to take the first step of seeking legal advice. Often, such fears are likely to be misplaced. Where the person has a clear legal entitlement, as will often be the case, the cost of legal advice, and whatever action if necessary to pursue the claim further, may be only a small fraction of the amount recovered. Nonetheless, a person will only realize this once that advice has been obtained.

Another source of anxiety about legal costs is the fear that the matter will have to go to court. Not only will the litigant be liable for the court fees and the costs of legal representation, but he or she might be liable for some or all of the costs of the other party. In Nigeria, the normal rule is that the loser will bear the reasonable costs of the winning party. These costs are usually assessed by reference to a scale of fees set by the courts. The costs which are allowed to a successful litigant are known as party and party costs. Where the successful litigant has not been charged the scale fees by her or his lawyer, but has been charged higher fees, then the difference between the scale amount and the actual fees charged must be met by that litigant. These actual fees are known as the solicitors-client costs. While the normal approach in most jurisdictions and courts is to award party-party costs only, in some circumstances,

and in some courts, a successful litigant may be awarded costs on a solicitor-client basis as long as those costs were reasonable incurred.

The cost of legal services delivered by the private profession varies considerably from practitioner to practitioner, firm to firm and State to State. It also varies according to the nature of the legal work being done. Typically, in most law firms, some areas of practice are more lucrative than others, and those areas where higher charges can be sustained-in particular, in commercial work-subsidize other aspects of the practice. Charges are levied on a variety of bases. Frequently, solicitors charge in accordance with the number of hours spent in relation to that matter, and detained time sheets are kept in relation to each client. Another common way of charging is by reference to the court scales.

Where litigation is necessary in order to protect a person's legal rights, the costs of taking the matter to court may run into many thousands of naira. While much of this may be recovered from the other party in the event of success, the recovery of costs depends on the extent to which one's own solicitor-client costs are allowed, and the extent of the defendant's capacity to meet an order for costs. The costs of litigation may be such as to require the sacrifice of many years of savings or to necessitate extensive borrowing. It is thus not surprising that people only litigate when they have no choice in the matter (for example, when they are defending against an unjustified claim), where they are seeking compensation and realize that they have a strong protected or preserved which is greater that the costs of litigation. For many others, even those with watertight legal claims, a common response when the claim is resisted is to find other ways of dealing with the problem-changing jobs, moving house or finding other means of exit and avoidance as the case may be.

Improving Access to Justice

Providing Information and Advice

A starting point in improving access to justice and in making the legal system more relevant to people's lives to increase the levels of community education about law generally, so that people realize when legal advise may be necessary. The growth in popularity of legal studies courses in secondary schools is a positive development in this respect, but such courses have only become part of the school curriculum comparatively recently, and then only as an optional subject.

There is a need for general community education with respect to legal rights. For a large percentage of the population, the reticence about taking legal action is so strong that people need considerable

encouragement through education campaigns and by other means, to take the first steps necessary to enforce their rights. When governments bring in reforming legislation which gives extensive rights on paper, people need to be told in plain English not only what those legal rights are, but also the avenues through which they can make their complaints, enforce their rights and pursue their claims.

Education about the law is especially necessary for migrants. Migrants may need explanation of basic aspects of the legal process with which the majority of the population could expect to be familiar, for examples an alier familiar with jury system faced with legal matter is a non-jury system. Education about the law is also an aspect of overcoming the cultural gulf which inhibits members of ethnic minorities from having greater access to the legal system. Education is necessary not only to convey basic information to people about their rights and obligations under Nigerian law, but also to overcome misconceptions people may have about the requirements of Nigerian law, based upon their experiences in their countries of origin. A number of steps need be taken to improve community awareness of legal rights.

In addition to the private profession there are numerous other sources of legal advice. Legal aid solicitors and community legal centers (see below) provide legal advise, and advice on legal rights given by informed non-lawyers may also be provided by government departments, Law Society advisory services and advice bureaux.

Reducing Legal Costs

Many steps have already been taken to reform the legal profession and to remove restrictive practices which have a tendency to increase costs. Many of these practices were the product of traditions which had survived long after the reasons for them had disappeared. The pattern of reform in Western legal system recent years has been either to ensure a fused profession, or to eliminate most of the practical divisions between solicitors and barristers as in the practice in Nigeria.

Some of the reforms which have been made, and others which have been proposed, relate to the levels of consumer information about legal services which are designed to allow them to make more informed choices in deciding who should represent them. In some jurisdiction, legal practitioners are now permitted to advertise, but the various jurisdictions differ considerably in the extent to which restrictions upon advertising are imposed.

Another means of promoting consumer choice, as well as giving clients a greater degree of control over the costs of legal services, is to require that an estimate of costs be given or that there should be an explanation of the basis upon which costs will be charged.

Providing information on costs is important to help clients evaluate all the options available to them in pursuing a claim, and in deciding on legal representation intending a matrimonial cause for example a client need to be imposed possibly in writing about: approximate costs to the client up to and including conciliation conveyance, the estimated future costs of preparation for trial and the estimated costs of first day of trial. However, providing such information can only be a small part of providing access to justice. Consumers of legal services are not used to shopping around to obtain the most reasonably prices advice, and the nature of legal advice is that often only after a quite extensive interview can the legal problems be identified, and a preliminary assessment of the options available be made.

It has also been recommended that surveys be conducted of the fees lawyers charge for different kinds of services, with appropriate adjustments being made for the different levels of seniority of the lawyer and the size of the firm, so that consumers are able to make a more informed assessment of the estimated charges in their own cases.

Where lawyers preparing matters for litigation charge according to court scales, the costs may be assumed to be competitive with other practitioners. However, this can depend upon the way in which the scale is constructed. If the scale allows many of the costs to be calculated by reference to the time spent on a matter, then the actual cost of the legal representation will depend to some extent upon the efficiency of the practitioner.

Contingency Fees

A further reform which has been implemented in some parts of the common wealth, which is under consideration elsewhere, is the use of contingency fees. Contingency fees are widely used in North America and Australia. Typically, the arrangement is used when the claim is for a monetary sum such as damages. The lawyer agrees not to charge if the client losses, (other than court fees in some cases) but is allowed to charge more than her or his normal rate if the client is successful. In North American, it is common for the contingency fee to be calculated as a percentage of the sum recovered. However, this is not the only form of contingency fee arrangement. Australia allows “conditional costs agreements” by which lawyers may charge a premium on their normal fees of up to 25 per cent, if the litigation succeeds. Contingency fees

may also be permitted, subject to certain requirements, and the practitioner is allowed to charge up to double the scale rates if the client succeeds.

Contingency fee agreements, while superficially attractive, have their disadvantages. First, as long as the cost-indemnity rule continues, by which the loser pays some or all of the winner's legal costs, contingency fee agreements only protect the litigant from having to bear her or his own costs. Failure in the litigation may still leave the client with the responsibility of paying a very large bill incurred by the defendants. Secondly, contingency fees usually only benefit plaintiffs, since they are premised on the basis that the legal fees will be paid out of the compensation recovered in the litigation. Therefore, they do nothing to reduce the problem of costs for the defendant. Thirdly, their success is dependent either on practitioners having high ethical standards, or on strict independent scrutiny, or both. Contingency fees ought to be used when the client has a significant risk of failure in the litigation as well as of success. There is an obvious danger that clients with clear entitlements to receive damages will be persuaded to accept a contingency fee arrangement even though the risks of losing the case are negligible.

It has been suggested that contingency fees be allowed of up to 100 per cent above the practitioner's normal charges, so that if the chances if success are only 50 per cent, the practitioner ought to be able to charge double her or his ordinary fees, while the percentage increase would be lower if the chances of success in the litigation were higher. It is recommended that such contingency fees should be permitted in all cases other than criminal law cases and family law cases, and that the reasons for offering a contingency fee, and for the percentage increase involved, should be recorded in writing. Such agreements could be set aside if the client complained subsequently. Furthermore, the client should be given the opportunity to seek independent legal advice.

While this may increase access to justice, it is questionable whether it provides sufficient safeguards against abuse. Obtaining independent legal advice will incur additional expense for the client, and for a client already worried about legal costs, this may be a deterrent. Furthermore, once an agreement is entered into, the safeguard against abuse lies in the client's ability and willingness to complain. This presupposes that he or she will have access higher than the lawyer had represented.

Legal Aid

A Legal Aid scheme exists to provide access to the legal system for many people who are unable to afford a lawyer, and to provide legal advice.

In conception, this was an ambitious scheme to achieve a significant increase in the access of the lass of people to legal services. The aim was for a network to shop front law centers which would not only act in individual cases but play a role in public interest advocacy. This scheme for improving access to justice was an integral part of government's vision for a more equitable social order. However, the vision was never realized. From its inception, the Legal Aim Scheme is heavily reliant on solicitors in private practice and thus the idea of salaried matter which lawyers on a "shop front" basis was not fulfilled. The scope of matter which legal aim convinced could handle was limited, and the salaried lawyers who were employed met with resistance from the private profession.

The federal government has responsibility for legal aid and maintains legal aim convene in the zones and state. Thus, the initiative to establish a major legal aid service at federal level has grown into an integrated service on a State by State basis in which people could seek assistance in matters both of Federal and State law at the same office, there has been a significant increase in the public funding of legal aid. The income from solicitors' trust accounts, contributions from assisted persons and costs received by the Commission.

In some parts of the commonwealth, the legal aid scheme enjoys additional sources of revenue from various models for legal aid schemes have tried around the world. In some jurisdictions, the legal aid scheme operates through the private profession. In others, there has been am emphasis on salaried full time legal aid lawyers. Australia combines the two approaches. In 1992-1993, the Legal Aid Commission paid 57.2 per cent of their budges to private practitioners, although the percentages varied from State to State. There are advantages in having salaried lawyers as the basis for a legal aid scheme. It provides an opportunity for lawyers to develop expertise in areas of law most likely to be of concern to indigent people (although private practitioners may choose to specialize in this way as well). Against this must be offset the problem of retention of marketable legal aid lawyers in the fact of higher salaries in the private sector.

Legal aid scheme have two major functions, that of providing advice, and assistance. Legal representation is subject to means tests and merit tests. It may be available only for certain categories of legal problems. Legally aided persons may be asked to make a contribution, and costs may be recovered out of the proceeds of a successful legal claim. The

merit test is a requirement that the applicant has a reasonable prospect of success in the case. Legal assistance and representation may also be provided for people supports charge with grievous crimes who appear in court and are without legal representation.

The priority in the granting of legal aid has traditionally been for defendants in criminal trials, in particular, in cases where a prison sentence may be imposed. This prioritization of criminal matters was reinforce by the decision of the Australia High Court in Dietrich v R (1992). The court held that if an indigent person who is facing trial on a serious criminal charge is unable to obtain legal representation through no fault of her or his own, then the trial should be adjourned or stayed until such representation is available. Mason CJ and McHugh J acknowledged that this decision would probably require a re-ordering of the priorities for legal aid unless further government funds were made available to the legal aid commissions.

Where listed 13 different circumstances in which the Family Court should order separate representation for the child or children in custody and access cases. The effect of this decision is that separate representatives will be appointed in a much lager number of cases than previously. Since separate representation for children is provided from legal aid funds, the decision in Re K, like the decision in Dietrich, is likely to affect the way in which legal aid is allocated between deserving claimants.

This is a healthy development which the legal aid council of Nigeria consider if it is not to be left behind. However, the priority given to defendants in criminal trials seems to have a discriminatory impact. Since most criminal defendants are men, and most applicants for legal aid in criminal trial are men, the majority of recipient of legal aid are men. Apart from criminal law, the other area of law which accounts for a significant proportion of legal aid expenditure is family law. While the right to legal representation in criminal trials ought to be regarded as of very great importance, it has been argued that the loss of custody of one's children may be as significant a loss for many women as is the loss of liberty.

Another area in which the grant of legal aid may be discriminatory is against women victims of domestic violence. In Nigeria, police do not often seek protection orders on behalf of victims, and the onus is upon the complainant to bring her own application which seldom occurs. The effect of legal aid may be that the government does much more to provide legal assistance to the perpetrators of violent crimes than it does to assist the victims.

The problem which Legal Aid Council has in prioritizing very scarce resources amongst different categories of needy claimants are immense. Ultimately, the decisions which must be made are political decisions, concerning the respective priorities of criminal law, family law and other categories of case, and the extent to which the society will tolerate the denial of justice to claimants who cannot afford to litigate, or to defend themselves in litigation, without legal representation.

Then existing problems in providing adequate means of access to the legal system through legal aid suggest that questions need to be asked about the multiplication of laws, legal rights and new tribulations as a means of dealing with social problems. Every new set of legal rights is likely to give to greater demands on legal services for the enforcement of those tights and therefore, more claims for legal aid, unless the possibility of obtaining legal aid is arbitrarily excluded. Another by-product of creating new rights is that pressure upon the court system is also increased, exacerbating the problems of delays in obtaining a court hearing and escalating the costs of providing courts and judges.

There is a tendency for some governments to multiply laws, rights and tribunals without adequately considering the additional strains this might place upon the legal system, and the extent to which the existence of the new category of rights will mean that less public resources are devoted to the protection of existing rights. A question which needs to be asked is how much justice the society can afford to have, and how many rights it can afford to protect at a reasonable level of effectiveness. Legal rights and remedies are only one means of dealing with social problems, and as legal aid colonial has to make hard decisions about priorities, so perhaps, dress the National Assembly.

Legal Services for the Disadvantaged

Some jurisdictions have responded to the need for access to justice for those who cannot afford legal representation or who are otherwise disadvantage by establishing a number of organization and community legal centers for the purpose of providing legal advice and assistance.

1. The Aboriginal Legal Service

A number of Aboriginal Legal Services founded by the Federal Government operate in different parts of Australia providing legal advice and assistance to people of Aboriginal and Torres Strait Islander descent (and their spouses).

The Aboriginal Legal Services have played an important role in bridging the gap between white legal culture and Aboriginal society and have found considerable acceptance in Aboriginal communities. They are controlled by Aboriginals even though often the lawyers are white. In the main, Aboriginal Legal Service work is confined to criminal defence work, but the Services have increased their involvement in civil matters and endeavour to make Aboriginals aware of the use which can be made of the legal system to achieve particular goals.

The Australia Law Reform Commission has recommended that a separate legal service should be established for Aboriginal women. One reason for this is that in traditional Aboriginal culture, there are some things which are "women's business" and may only be revealed to other women. Furthermore, there are some matters in which women's needs are not met by Aboriginal Legal Services.

2. Community Legal Centres

An important aspect of the movement to give disadvantaged people access to justice has been the development of Community Legal Centres. These are publicly funded, "shop front" centers for legal advice and assistance which either operate in disadvantaged localities or as specialist agencies dealing with particular problems such as tenancy advice. Inasmuch as they are publicity funded and generally employ salaried lawyers providing free legal advice, they have some features in common with the Legal Aid Commission Offices. However, in origin, philosophy, and modus operandi they are quite different and operate alongside the formal legal aid structures rather than being subsumed under the organizational system of State Legal Aid Commissions. Indeed, they endeavour to remain strictly independent of such institutional control.

The Legal Aid Council has offices in most sate capitals. They entrust with legal aid structure in say Australia. They former is untraced, the latter is decentralized, it is instructive to examine community legal centers operates in the jurisdictions where they exist.

There are variations between different legal centers in regard to their precise functions and means of working. Case works in of course a central aspect of the work of most legal centres. Full time lawyers and volunteer lawyers combine to provide legal services to clients. Often the centres operates evening sessions staffed by volunteers. Qualified lawyers are frequently assisted by law students and non-lawyers. The legal aspect of a person's housing problems may be an eviction notice, but her or his needs go beyond assistance with resisting an eviction order. Thus, many legal centres endeavour to function in local communities alongside other welfare services and agencies, to provide a co-ordinated and multi-disciplinary response to the problems which clients face.

Legal centres vary in the extent to which lawyers are willing to undertake legal representation in court. Some prefer to leave court work to the legal aid system because of its time-consuming nature, and to confine their work primarily to giving advice, writing letters, assisting with legal aid applications, and other such non-court work. Others take "referrals back" from Legal Aid Commissions more readily. Clients thereby apply for legal aid but are represented in the matter by the solicitor from the community legal centre.

Case work is not the only function of many legal centres. They are also active in publishing and community education. Handbooks, published by legal centres, exist in a number of State and provide a readable guide to the law for those who are not legally trained. Legal centres are also active in law reform and in campaigning for charge on various issues of importance to the disadvantaged. As one writer has said:

> "The element which most clearly distinguishes legal centres from other legal agencies in the public and private sector is their commitment to effecting structural change on behalf of the poor through the legal system. This contrast with traditional rhetoric about legal service delivery which focuses on the provision of legal services to specific individuals on a case by case basis… Essentially it is a political objective, aimed at re-ordering power relations between "the haves" and the "have-nots", which has formed the cornerstone in the ideology of the legal centres movement".

Reality has not always matched rhetoric. Early visions that the centres would be managed and controlled by "the community" through open and public management meetings have failed to reach fruition. The idea that hierarchies would be avoided, and that pay differentials between lawyers and non-lawyers would be minimized have had to compete with other constraints imposed by government award wages and the need to retain experienced staff. Nonetheless, an egalitarian spirit remains. A movement which was intended as a critique of the establishment has had to cope with its acceptance by that establishment. Legal Centres have representatives on some Legal Aid Commissions, and have played a significant role in the development of policy in the delivery of legal services to the disadvantaged.

An important development in the legal centres movement has been the emergency of specialized legal centres, notable in New South Wales. If Australia as the legal centres movement developed, it was realized that there were advantages in specialized services meeting the needs of those with a community of interests. Specialized services, dealing with consumer credit, immigration, intellectual disability and welfare rights are example of such specialized centres.

In its 1994 report, Equality Before the Law: Justice for Women, the Australia Law Reform Commission pointed to the effectiveness of the few women's legal centres, and those which specialize in assisting women who have been victims of domestic violence, as an indication of the value of such services as a means of providing greater access to justice for women. The Commission recommended that the government should fund one extra women's legal service in each State and Territory. Such legal centres can fulfil a valuable role in offering legal advice, referral and representation in areas of the law which are most likely to concern women. The identification of such centres as women's legal services can also help to overcome some of the estrangement which some women feel within a male-dominated legal system.

Alternative Dispute Resolution

Another response to the problems of access to justice has been the vast increase in services offering alternative dispute resolution (ADR) and, in particular, mediation. The common feature of all ADR mechanisms is that they involve the use of a neutral third party who endeavours to facilitate a settlement of a dispute without having the power to adjudicate on the matter. Mediation, conciliation, negotiation, facilitation and independent expert appraisal are all forms of such dispute resolution. Arbitration is sometimes listed as a form of alternative dispute resolution, but it differs from the others – and

resembles court-based adjudication – in that a neutral third party decides the case for the parties.

The form of alternative dispute resolution process which has attracted most attention in recent years is mediation. This is a form of structures negotiation in which the mediator (or mediators) controls the process while the parties control the outcome. Folberg and Taylor's widely used definition is that mediation "can be defined as the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. There are a number of different models of mediation. In family disputes, it is common for there to be two mediators, one male and one female. Where co-mediators are used, the mediators may also bring different professional backgrounds to the process of mediation. Mediation sessions are highly structured. Typically, the parties are each given the opportunity to present their story and to state what they are seeking in the mediation. The mediator identifies points of agreement and disagreement and encourages the generation possible solutions to the matters in dispute. The possible solutions are then evaluate, and the parties are encouraged to attempt to reach an agreement on a solution which would be mutually acceptable. The final stage is to endeavour to formulate an agreement which is realistic for the parties to carry out.

Mediation in encouraged by the court system in a number of ways. Mediation is voluntary. It has been extended to counseling facilities and other ADR processes which have been an aspect of the court's work since its inception. There are also a number of other family mediation services, which receive government funding.

Mediation is also used as a process of dispute resolution in a number of courts as a means of reducing court waiting lists in civil matters. Parties are encouraged to settle their cases and the resulting agreements are embodied in consent orders.

While many courts have thus encouraged mediation programmes, ADR is not necessarily an adjunct to court processes. Independently of the courts ADR has flourished in a variety of different contexts. Mediation or arbitration programmes exist to provide a forum for the resolution of commercial disputes, and mediation is increasingly used by government and business. In certain jurisdictions, the government fund dispute resolution centres which are established to mediate dispute between neighbours, family members and other such private disputes.

Alternative dispute resolution mechanisms have many advantages. They are generally cheaper and more speedy than court processes. For these reasons they are popular with governments which want to reduce legal aid bills, court costs and court waiting lists. They allow the parties the opportunity to tell their stories in their own way; parties are not confined by rules or evidence nor are they limited to presenting those facts which are relevant to prove a particular cause of action. They are not confined either by the range of remedies available to courts. They may devise remedies and solutions which are most appropriate to them.

Despite these many advantages of alternative dispute resolution, there are many dangers in this shift towards ADR. One is that ADR, together with tribunals, will become the justice system for the majority of private citizens, while government and commerce monopolize the civil courts. There are some indications that this is happening in the range of matters which are currently sent to ADR-family matters, consumer complaints, social security claims, disputes between neigbours. Mediation and conciliation may offer useful means of resolving many such disputes, but it should not be assumed that dispute resolution equates with justice.

The limitations of AR are first, that alternative dispute resolution mechanisms presuppose that the claim can and should be compromised. In some disputes, compromise is quite appropriate, especially where the parties are likely to continue in a relationship with one another, as parents must do even after divorce, and neighbours must do for as long as they remain neighbours. But if people need to compromise on their rights in order to get any justice at all, then mediation offers, not justice in the shadow of the law, but dispute resolution outside of the law.

Secondly, mediation and other forms of facilitated dispute resolution presuppose that the parties are both articulate and able to defend their own interest. In many cases, this is simply not so. Linguistic and cultural barriers to assertiveness are likely to diminish the capacity of the person to participate effectively in mediation, and this is likely to be a problem especially for women of non-English speaking backgrounds. A history of domestic violence to stand up to perpetrators, as well as allowing for the possibility of further violence occurring before or after the mediation session. For these reasons, some mediation services do not mediate between couples where there is a history of domestic violence, ad endeavour to screen for indications of such violence when assessing the suitability of the couple for mediation.

Thirdly, the effectiveness of mediation as a means by which parties may protect and assert their legal rights depends on the extent to which they are aware of those rights. Frequently, the advantages of mediation are contrasted with the disadvantages of litigation. However, since the great

majority of all disputes are settled without an adjudication by a judge, the proper comparison to be made is between mediation and negotiation between solicitors. Negotiations take place against the background of solicitors' awareness of the parties' legal rights and their assessment of the chances of success in litigation. Negotiations between solicitors, properly conducted, have many of the same advantages of cheapness and flexibility which are attributed to mediation, with the added advantages that the client is represented by a knowledgeable and articulate representative who will endeavour to gain the best possible settlement for the client. Negotiation is a form of alternative dispute resolution which has been at the heart of legal practice for generations.

There must be concerns therefore about whether governments' enthusiasm for ADR is motivated by the best interest of vulnerable citizens or be an overriding concern to process as many disputes as cheaply as possible. Those who are in a position of bargaining strength in a dispute are much more likely to favour mediation than negotiation between solicitors or litigation in the courts. The more vulnerable party in the mediation will not have the advantage of a representative, and if he or she has not received-and understood-proper legal advice, will not have the bargaining chips derived from knowledge of her or his legal entitlements.

Mediation, supported by legal advice and with agreements scrutinized for their fairness by legal representatives after the mediation, has a valuable role to play in the legal system for some people and in some kinds of disputes. However, where the primary motivation for its introduction or encouragement by governments is to cut costs, there is the danger that it will be used inappropriately, and that people will be forced to attend mediation as a precondition to receiving what they really want-an adjudication by the court in accordance with the law.

Access to Justice and the Problem of Centripetal Law

While governments are increasingly encouraging people to settle their own disputes by alternative dispute resolution, and withholding legal aid for civil litigation, they have so far failed to recognize the problem of centripetal laws which have the effect of drawing parties inexorably towards a judicial resolution, rather than conferring upon them the clear bargaining endowments which would facilitate settlements.

Many Nigerian laws are written on the premise that they will be used by courts in deciding cases, rather than by parties in settling disputes in the shadow of the law. Numerous laws confer broad discretions on judges, for example, to set aside unfair contracts or to compensate for deceptive and misleading practices in trade and commerce. Discretion is a

particular feature of family law. Judges have a broad discretion in dividing the property of a husband and wife following marriage breakdown, and in resolving conflicts concerning with whom the children will live and how often the other parent will have contact with them. The legislation does not offer rules or fixed entitlements, but rather it lists the factors which judges should consider. Sometimes, the courts also have a discretion to divide the property of couples who have been in a de facto relationship.

The argument in favour of conferring broad discretions upon judges is that it gives them the necessary flexibility to tailor the relief awarded to the particular circumstances of each case rather than being fettered by fixed rules. However, this presupposes that a large number of cases will be the subject of judicial decision, and that governments are willing to bear the costs of providing access to the courts so that judges are able to achieve fair outcomes in each case. The greater the degree of discretion, the more difficult it is to bargain in the shadow of the law, for where there is a broad discretion, the law casts only an uncertain shadow. Judges may reasonably disagree on the appropriate outcomes of individual cases, and although experienced practitioners learn to predict outcomes with a certain degree of reliability, the complex messages concerning people's "entitlements" conveyed by the courts through the process of adjudication become simplified into some basic categories of case in order to make negotiations easier.

Centripetal laws assume that courts will make the decisions, and regulate the conduct and adjudication of cases within the court setting. Centrifugal laws send clear messages to people about their rights, obligations and entitlements, so that judicial resolution of disputes is made necessary only where the facts of the case or the scope of the rule are in dispute. For example, centripetal laws concerning family property guide judges on how to exercise their discretion when a dispute comes before the courts concerning the allocation of that property on marriage breakdown. Centrifugal laws would give the parties fixed entitlements, such as equal shares in all the property acquired after the marriage other than by gift to one party, by inheritance or as an award of damages for personal injury, subject to a power to vary those equal shares on application by one of the person's will after death where a dependant has not been adequately provided for. Centrifugal laws would provide that the surviving spouse and dependent children should receive fixed proportions of the estate. Centripetal laws empower judges to set aside or vary standard form contracts which contain unfair terms. Centrifugal laws would provide model standard form contracts, and place the onus upon the business which is relying on the standard form contract to justify variations from the legislative model.

Centrifugal laws may sometimes be arbitrary, but they simplify the messages the law gives, thereby reducing the numbers of disputes and assisting in the resolution of disputes by conferring bargaining chips. They provide a framework within which alternative dispute resolution may operate successfully. An emphasis upon private ordering combined with the conferral of broad discretions on judges in the few cases which come to courts, is the worst of all words; but it is the direction in which the Nigeria legal system is healing rapidly.

Conclusion: The Future of Tradition

At the end of the 20th century, Nigerians find themselves at a time when they are reflecting, and must reflect on their future. Questions are being asked not only about what it means for Nigeria to be a truly multicultural society, about the suitability of the federal constitution for a nation as she enter the 21st century, and about basis aspects of the legal system. How relevant are traditional modes of dispute resolution through adversarial litigation for the needs of modern society? Does Nigeria have a "Rolls-Royce" system of justice, when it can only afford a Holden? To what extent are traditional means of legal reasoning based upon premises which are unsustainable? How does the legal system incorporate the needs, aspirations and particular insights of groups which have not hitherto been part of the mainstream of public life.

To these questions about the future, the past may seem only faintly relevant. In one sense, Nigeria's future cannot rest in recollecting its past, for the ties with Britain are no longer as significant as they once were, either economically, politically or culturally. To face the future, Nigerians must be secure in their identity, and embrace the unknown, or at least the little known.

Yet there is another sense in which Nigerians must recollect their past-the historical and ideological origins of their ideas and institutions-in order to chart successfully a new course for the future. It is only in understanding the origins of those aspects of law and society which constitute foundational ideas and assumptions, that we can assess them properly. With a profound understanding of the past, traditions which seem to be superfluous in the modern era may be seen to have a basis in the hard-fought struggles of another age, with implications for the present.

Above all, traditions have an intrinsic value merely for being traditions. The legitimacy of institutions is conferred as much by emotion as by reason, and as much by memory as by present consent. Sometimes, great trees must be felled in order to make way for new growth; but new saplings do not have the roots of the great trees. They are less able to

withstand storms, and are more vulnerable to the winds of change. Vibrant new growth may sometimes be purchased only at the price of instability. Traditions can insulate societies from what Alvin Toffler described as “future shock”.

The strongest traditions have grown from values which have energized a society towards the development of new structure and institutions. The energy which created the French and American revolutions and other revolutions before and since, was born not only from dissatisfaction with the existing situation, but from an ideological commitment, at least among some of the leaders, to a new order. None of the great revolutions in western society, whether social, political, or intellectual, were won without cost. It is in times when shared value are weak, and individual preoccupation displaces a commitment to the common good, that those traditions born in very different times have their greatest value, as representing a shared heritage.

Above all, it is the strength of traditions that, once established, they can outlast the disappearance of those conditions which were essential to their formation and early development. Many of the most significant ideas of the western legal tradition, respect for law, its prominence as a means of social ordering, the importance of law’s moral quality, the virtue of the rule of law, have all survived for a long time after the reasons which made them important values have disappeared from public consciousness. Similarly, the idea of natural human rights continues in our political discourse long after any consensus has gone about the basis for the existence or identification of these rights. Traditions have the virtue that at times, they can take on a life of their own.

Western societies are at a stage of history when they are living off their reserves. The intellectual conditions which gave birth to the traditions and values of legal and political life in western societies are no longer with us in the same way that they once were. The ideas of natural law, which, at their nest, gave to positive law a standard of accountability, and called it onward to greater integrity, have been displaced from their prominence in jurisprudential thought. The Judaeo-Christian worldview, which gave to people a respect for law as intrinsically valuable, and called people to obey that law not only out of fear but out of civil duty, is not internalized in the values of the populace to the extent that it once was. Locke’s theory of natural rights, and Rosseau’s social contract are but a dim memory. Yet through all these changes in the beliefs and value system of the population, the legal and political traditions of western societies continue on.

The western legal tradition has changed much over the centuries of its life. No one century has left it unaltered. It is an evolving tradition, not a static one. The future, in Nigeria, as elsewhere, depends upon recollecting this past, valuing it, and allowing it to be the basis for further change.

Nonetheless, the tradition of law in Nigeria is in urgent need of renewal. The challenge of inclusion is a challenge to make the legal system relevant and accessible to all Nigeria, irrespective of age, disability, ethnicity, gender or wealth. In the new millennium, the challenge of inclusion appears to be the most urgent challenge of all.

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For Example, in R v Isobel Philips (Northern Territory Court of Summary Jurisdiction, 19 September 1983, Unreported) the Defence of Duress was Allowed to an Aboriginal Woman from the Warumungu Tribe Because the Evidence Demonstrated that She was Required by Tribal Law of Fight in Public with any Woman Involved with Her Husband, and was under a Threat of Death or Serious Injury if She did not Respond. Australian Law Reform Commission, Recognition of Aboriginal Customary Law, Report No 31, op cit, para 430, fn 82. See also the Recommendation of the Australian Law Reform Commission on the Need to take Account of Cultural Factors in the Application of the Criminal Law. Australian Law Reform Commission, Multiculturalism and the Law, Report No 57, op cit, Ch 8.

There is a Specific Legislative Exemption for Sikhs in England: Motor Cycle Crash Helmets (Religious Exemption) Act 1976. For the position in Australian, see Australian Law Reform Commission, Multiculturalism and the Law. Report No 57, op cit, pp 175-176.

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Harris D et al, Compensation and Support for Illness and Injury (Clarendon, Oxford, 1984).

For a review of American, British and Australian Data see Casts, M and Western, J, Legal Aid and Legal Need (Commonwealth Legal Aid Commission, Canberra, 1980) Chs 3 and 4.

In Fitzgerald's Study, (above), Most Claims were made without Recourse to lawyers. In all those Cases where the Claim was disputed, only 21 per cent of People Consulted Lawyers. Lawyers were not consulted at all in regard to Landlord and Tenant Disputes, and were consulted in only 3.4 per cent of Discrimination Claims. Even in Consumer and Tort Problems where the Amount Involved was over $1000, Lawyers were consulted in only 47 per cent of Tort Disputes and 12 per cent of Consumer Disputes. Lawyers were Involved Additionally, However, in Some Cases Where the Claim was not contested. About 19 per cent of Instances in which Lawyers were Involved could be so Categorized.

Cases, M and Sackville, R, Legal Needs of the Poor (Commission of Inquiry into Poverty, AGPS, 1975).

Ibid, p 8.

Ibid, pp 75-76.

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Cass, M and Western, J, op cit, Ch 3.

Significantly, Cass and Sackville Found that there was no Difference between the Income Level of those who Consulted a Lawyer and the Whole Sample (Cass, M and Sackville, R, op cit, p 77).

In Some Courts and Tribunals, the Cost-Idemnity Rule does not apply, or is Only Applied in Certain Situations (where, eg, a Reasonable Offer of Settlement has been refused). See, eg, Family Law Act 1975 (Cth), s 117; Access to Justice Advisory Committee, Access to Justice: An Action Plan (Canberra, 1994), pp 167-168.

In New South Wales, a Completely Different Approach to the Calculation of Costs has been introduced. The Legal Profession Reform Act 1993 (NSW), Amending the Legal Profession Act 1987, Abolished Scales and Provides that Costs Should be Assessed by a Cost Assessor who is a Practicing Lawyer. The Assessor Should Consider Whether it was Reasonable to carry out the Work done, and also the Reasonableness of the Amounts Charged. See Legal Profession Act 1987, ss 208f-208s.

Researchers, Examining the Basis for Charging in Personal Injury litigation in Victoria and New South Wales Found that in New South Wales, 83 per cent Charged Wholly or Mainly by Reference to Time. In Victoria, 68.8 per cent used Court Scales. Worthington, D and Baker, J, The Costs of Civil Litigation: Current Charging Practices, New South Wales and Victoria (Civil Justice Research Centre, Sydney, 1993).

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Studies in the 1970s Indicated that Chamber Magistrates were the Most well known Source of Legal advice in the Community in New South Wales. See Cass, M and Sackville, R, op cit, and Tomasic, R, Law, Lawyers and the Community (Law Foundation of New South Wales, Sydney, 1976.

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Sajdak and Sajdak (1993) FLC 92-348; McOwan and McOwan (1994) FLC 92-451 at 80,691.

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The Access to Justice Advisory Committee Noted that the Commonwealth, and some States such as New South Wales, Requires Legal Services Impact Statements When Considering New Legislation and this May Involve Consultation with Legal Aid Commissions. While this May Lead to an Increase of Funding for Legal Aid to cope with the Increased Demand, it is by no Means certain that Legislation which is likely to result in a Significant Increase in Demand for Legal Services will be accompanied by an Appropriate Increase in Legal Aid Provision. Access to Justice Advisory Committee Report, op cit, p 247.

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MODULE 1

UNIT 1 THE IMPACT OF LAW

CONTENTS

1.0 INTRODUCTION

This topic is designed to indicate how law impacts on our personal daily lives and on business. The law controls and regulates, enforces and punishes. Two passages are used as illustration. The first concerns a

tertiary student; the second, a simple example of a small family business. Both passages highlight the numerous areas of law that may affect our personal and business activities.

With the exception of contract law, and to a lesser extent torts, students are not expected to have a detailed knowledge of the various areas of law identified below. Nor should it be taken that the discussion in this module represents a complete treatment of the law. It is purely to illustrate the impact of law generally.

2.0 OBJECTIVES

By the end of this Unit you should be able to:

- acquire abroad view of the notion of law
- understand that virtually everything one does each day, all the year always has some legal implication
- explain the impact of law in many areas of life.

3.0 MAIN CONTENT

3.2 Instructions

Read the following passages and for each, underline or highlight what you consider to be key words, which suggest to you that some legal issue is involved.

3.1.1 Passage 1

An hour in the life of Bayo Bada an undergraduate of Criminology and Security Studies' NOUN.

Bayo Bada ('Bee-bee' to her friends) peers at her electric alarm clock, shouts obscenities (the window is open and the neighbouring house is only three meters away), shuffles to the toilet (biodegradable type), then to the bathroom for a shower.

While breakfasting, Bee-bee listens to the daily state news which *inter alia* catalogues traffic offences, break-ins, mysterious fires in four local schools and objections to a proposed juvenile detention center for wayward wenches and uncouth youths. Taking pride in being an informed citizen, Bee-bee, between bites of barley bread layered with made in England cheese, flips from the headlines 'UN Funding Fouls' to State news demanding jobs in an area designated for World Heritage. A snippet on tertiary fees and delayed payment to the government catches her attention, which reminds her that her first tutorial looms soon.

Catching the municipal bus, she pays only half fare despite being eighteen years of age. Because her rent is due tomorrow she takes the opportunity to write a cheque to the landlord. Alighting, she posts the cheques. A large group of students just off campus on the footpath of the main road are demonstrating about inadequate infrastructure in the University. To show her displeasure, Bee-bee expectorates on the footpath. Focusing on the ring-leader she shouts, Dele, you are a dim-witted No Hoper!' Dele responds by kicking Bee-bee's briefcase. Other students threaten her physically.
Not wishing to be late for her favourite tutorial session she decamps without further ceremony.

SELF ASSESSMENT EXERCISE 1

1. Give a suitable title to the picture below
2. Describe the scene depicted in the picture
3. Identify the legal impact of what you see.

3.1.2 Analysis of Passage 1

Now check your attempt at identification of key words relating to the legal issues against a lawyer's response:

3.1.3 'NOUN'

Universities operate under the provisions of their own individual statute, in this case the National Open University, Act 1983.

(a) Bayo Bada (Bee-bee)

One may change one's name by common usage or by Deed Poll.

(b) 'Electric Alarm Clock'

Bee-bee to have electricity say, Power Holding Corporation of Nigeria (PHCN), She would need to contract for this service.

A body such as the PHCN is a statutory board under a Federal Government Act.

(c) 'Shouts Obscenities'

Note the proximity of neighbours. Possible tortuous action (ie involves law of torts) for interference with the private rights of her neighbour. Calling for an injunction, ie here a prohibition against doing such acts.

(d) 'Toilet'

The Local Government Bye-law will give sufficient power to each municipal council 'to make local laws for, and otherwise ensure, the good rule and government of its territorial unit…' The toilet in question would need to meet local government standards and approval.

(e) 'To Shower'

If the service (here water) is provided by some local authority, legal obligations will exist between the contracting parties, eg water rate charge on annual rate notice from the local council to the landlord, the owner of the premises.

(f) 'Radio News'

Control will be exercised broadly under the Constitution and specifically under the *Broadcasting and Television Acts*. Whether the station is commercial or not.

(g) 'Traffic Offences'

These are governed in Nigeria by the *Road Traffic Act 1999*. Such offences would be heard in the magistrate court. Nigeria has a codified system laws for criminal offences. This means an attempt has been made to cover as fully as possible all law relating to crime in a piece of legislation known as the Criminal Code or Penal Code. Specifically, 'break-ins' may be referred to in the Code Burglary: Housebreaking: and like offences.

(h) 'Fires'

See the note above on the Criminal Code but refer specifically this time to such offence as Arson. Barley bread, cheese, because these products are imports, they come under the aegis of NAFDAC.

(i) 'United Nations'

International law as opposed to State (or 'Municipal') law.

(j) 'Logging and World Heritage'

Constitutional law. If an inconsistency should arise between the law of the state and a law of the international law, the international law prevails, to the extent of the inconsistency, see section 109 of the 1999 Constitution.

(k) 'Municipal Bus'

Again contract law: Bee-bee paid for the ride. Further, State standards contained in regulations are relevant to the bus.

(l) 'Eighteen Years of Age'

In Nigeria this indicates full legal capacity, i.e she is seen as and accorded the rights of an adult. She is *sui juris*. Under eighteen years of age she would be classed legally as a minor.

(m) 'Rent'

The payment of rent indicates a lease of some kind and leases fall within property law or Rent Control Laws. Further, a lease is another form of a contract.

(n) 'Cheque'

This is another example of the way in which contract law is vital to the business world. Here a contract is formed between the customer and the bank for the use of a negotiable instrument.

(o) 'Student Gathering'

Where? Footpath which is a public thoroughfare. Therefore a blockage of pedestrian traffic may be interpreted as a public nuisance.
Regulation of gatherings on public byways may also be subject to administrative law, e.g. the municipal council is empowered generally to pass by-laws concerning matters with the municipality. Meetings and processing permits are required under the Public Order Legislations.

(p) 'Name Calling'

This falls within a sub-branch of the Law of torts: Defamation. Slander concerns a spoken attack on one's reputation.

(q) 'Kicking'

This is a direct interference with the property of the student. In law this is a 'trespass to property' and falls within the law of torts. Further, under the Criminal Code there is an assault.

r) 'Threats'

Again, both criminal law and the law of torts may be involved here. Under the Criminal Code a threat is viewed as an 'assault'. In torts, an action could be raised for assault as well.

3.2 Passage 2

Adamu, an electrician, together with his wife Mariam, who is a businesswoman, wishes to establish a family business in the sale and repair of electrical household goods. To establish their business they wish to lease space in a major shopping center complex in Abuja.

They intend to advertise and trade under the name of 'Live Wire', but are uncertain as to whether they should incorporate a family owned company to conduct the business or trade as a partnership.

Adamu and Mariam are prepared to sign a three year lease for the 'right' shop in the center. And although their monetary savings will be sufficient to purchase initial stock for the business they have no ready capital to buy fittings and equipment essential for the sale and repair of electrical items. Consequently, they intend to lease certain fittings and equipment and to purchase other equipment under hire-purchase.

They also intend to employ one junior in the business on a full-time basis.

3.2.1 Analysis of Passage 2

Again, check your attempt at identification of key words and concepts relating to the legal issues against a lawyer's interpretation.

Suggested response:

3.2.2 Adamu and Mariam Wish to Establish a Family Business'

(a) Company Law

If Adamu and Mariam, perhaps on the advice of an accountant, intend to incorporate a **company,** this process will be governed by the requirements of the *Companies and Allied Matters Act (CAMA, 1990).* Incorporating a company means the creation of an artificial legal person (ie the company) with an identity separate from Adamu and Mariam. This company will be able to own property, sue and be sued. It will have perpetual succession and a common seal. It may even commit criminal offences, and be persecuted.

The company will be a party to all contracts associated with the business. The company will no doubt be limited by shares, which means that Adamu and Mariam, as shareholders, will have limited liabilities. Their liability will be limited to the unpaid amount of the nominal value of their shares.

(b) Partnership Law

If Adamu and Mariam decide to form a partnership this **partnership** will be controlled by the provisions of the *Partnership Act 1891 and CAMA , 1990.*

The hallmark of a partnership is the fact that the partners (Adamu and Mariam) are the principals and agents of each other. Consequently, the law of principal and agent permeates the whole area of partnership law and the acts of any partner (eg entering into a contract) which are done in the usual way for carrying on business of the kind, which is carried on by the firm (the collective name for the partners) binds the other partners even if they were not aware of that partner's acts.

In the formation of the partnership, the partners can agree as to the rights and duties between them, but if they don't, then the *Partnership Act/CAMA* provides rules governing rights and duties between partners.

(c) Sale of Goods Act 1893

If Adamu and Mariam form a **partnership** then the sale of electrical goods to consumers will be controlled by the provisions of the *Sale of Goods Act.*
This Act 'cuts across' the old rule of *caveat emptor* (let the buyer beware) and provides for certain terms to be part of every contract for the sale of goods. These terms require, in certain circumstances, that the seller (Adamu and Mariam) provide goods that are of merchantable quality and which are reasonable fit for the purpose made known to the seller. Remedies are available to the purchaser against Adamu and Mariam should they breach such terms.

(d) Trade Practices and Fair Trading Legislations

If Adamu and Mariam decide to **incorporate** rather than form a partnership they will be subject in their business transactions to the provisions of the Restrictive Trade Practices Legislations. Part of these provisions related to the protection of consumers both with respect to misleading or deceptive conduct by the corporation (eg false advertising) in trade or commerce and with respect to transactions between the consumer and the corporation. For example, in every contract between Adamu and Mariam's company and a consumer, for either the sale of electrical goods or the repair of electrical items, there will be certain terms implied by law (whether or not the parties to the contract agreed to such terms). These terms, which relate to the quality of the services and the goods supplied, and to their fitness for the purpose, will if breached by the corporation provide a remedy to the consumer against the corporation.

As a result of constitutional limitations on the powers of the National Assembly, the Trade Practices Legislation will not apply to natural persons whether trading alone or in partnership provided such trade is

confined within a State. Some State Assembly have legislation, which apply to sole traders and partnerships.

3.2.3 'Trade under the Name Live Wire'

(a) Business Names Act 1961 and CAMA, 1990

Whether or not Adamu and Mariam incorporate or form a partnership, since they wish to trade under the name of 'Live Wire' it will be necessary for them to register the business name under the *Business Names Act/CAMA.*

Registration would not be required if Adamu and Mariam in partnership traded under their individual names or if after incorporation the company traded under its incorporated name. It is only where a person trades under a name other than his/her own that registration is required.

(b) Taxation Law

It is necessary for Adamu and Mariam to contract the Commissioner for Taxes to indicate that they have commenced business and they would have an option either to have group tax registration or to purchase tax stamps.

If Adamu and Mariam are selling goods subject to sales tax they should apply to the Commissioner of taxes for registration under the *Sales Tax Act.*

3.2.4 'Wish to Lease'

(a) Retail Shop Leases

Adamu and Mariam's **lease** of premises in the shopping complex in Lagos will be subject to provisions of the Retail Shop legislation, which give certain protections to tenants of retail shops against onerous clauses imposed in standard form leases.

The legislations prohibit certain conditions being imposed in retail shop leases and also require that in specified circumstances certain implied conditions shall be part of the lease. Both these measures are designed to protect the tenant.

3.2.5 'Shop'

(a) Factories Act

Adamu and Mariam are required to register their shop under this Act and to keep the premises registered as a shop. They cannot occupy or commence business in the shop until it is registered. Adamu and Mariam should also be familiar with the provisions of this Act which deal with safety, health and welfare.

(b) Local Government By-Law

Adamu and Mariam should be aware of local authority planning laws, which regulate the use of land (land includes buildings on that land, eg Adamu and Mariam's shop).

Use of land falls into three categories:

- Those uses which are prohibited;
- Those uses which are available as of right; and
- Those that require the consent of the Council, or other authorized Body.

It is necessary for Adamu and Mariam to determine which category they fall into with respect to the proposed uses in their shop.

3.2.6 'Three Year Lease'

(a) Contract Law

The importance of contract law in commerce is highlighted in the establishment and conduct of the family business.

The initial **three year lease** of the shop is a **contract**. The lease of the fittings is a contract. The hire-purchase agreement for equipment is a contract. The agreement under which the junior is employed is a contract of service. Each time a customer buys an appliance or leaves an appliance for repair there is a contract. There is a contract relating to the advertisement of the business.

Despite the fact that the common law principles of contract in some of the above contracts may be overridden by the provisions of specific legislation, e.g. *Hire-Purchase Act,* the importance of basic contractual principles cannot be underestimated. Consequently in this course, you will make a detailed study of contract from its genesis in the English Common Law.

3.2.7 'Purchase of Other Equipment under Hire Purchase'

(a) Hire-Purchase Act

Adamu and Mariam wish to buy certain equipment but they have no funds available for this purpose. If they buy the equipment by method of **hire-purchase,** the transaction will be governed by the provisions of the *Hire-Purchase Act.*

In essence, a hire-purchase contract consists of two elements, namely, a hiring agreement with an option to purchase. The option is exercised by the person hiring the goods, making the final payment at the end of the agreed period of the hire. There is only a hiring or leasing until this final payment.

3.2.8 'Fittings'

Property Law

Though property law may affect one's business in various ways, a simple application of property law relates to the distinction between **fixings and chattels.**

Adamu's and Mariam's proposed three year lease may contain a clause, that all fixtures on the rented premises will at the termination of the lease become the property of the landlord. Even without such a clause, land includes fixtures on the land. Consequently, the building and fixtures form part of the land owned by the landlord.

It is therefore important for Adamu and Mariam to be able to distinguish between fixtures and chattels. Fixtures include those things, which are attached or fixed to the building which is itself a fixture. Movable items not affixed are referred to as chattels. For example Adamu and Mariam in fitting out the shop should be advised to keep the distinction in mind.

3.2.9 'Sale and …of Electrical Household Goods'

(a) Law of Torts

Adamu and Mariam as the occupiers of premises to which the public are invited and as the **sellers** of **potentially dangerous products** should consider the implications of **tort law.**

The main body of tort law which has implications for Adamu and Mariam is the law of negligence as it relates to the occupier of premises and the supplier of potentially dangerous products.

Adamu and Mariam will have a **duty of care** cast on them as occupiers of the shop premises to take reasonable care to prevent damage from reasonably foreseeable risks to persons entering the shop.

If a customer is injured as a result of **negligence** by Adamu and Mariam with respect to the static condition of the shop (e.g. slippery floor) that customer may sue the occupiers and recover compensation.

Tort law may also cast a duty on Adamu and Mariam with respect to any dangerous items they may sell across the counter. For example where Adamu and Mariam are aware that the manufacturer has supplied no instructions with respect to the dangerous propensities of an item, and Adamu and Mariam are aware of those propensities but fail to warn a purchaser, they may be held liable to that purchaser for any injuries resulting from that dangerous propensity (e.g. risk of electrical shock when used in a certain way).

(b) 'Repair of Electrical Household Goods'

The common law principles of bailment will apply to the repair side of Adamu and Mariam's proposed business.

Each time Adamu and Mariam or their company contract for the repair of an electrical appliance there will be a bailment of those goods from the consumer to the repairer. The consumer is the bailor of goods for repair, to the repairer who is the bailee.

In **essence,** a bailment is a **temporary parting with possession of goods by their owner to a person called a bailee,** for a specified purpose (eg repair) with an implied understanding that the goods will be returned to the possession of the owner (bailor) when that purpose is fulfilled.

Where there is a bailment of goods (in this instance pursuant to a contract for repair) the bailee comes under a **duty to take reasonable care** in all the circumstances, of the goods of the bailor while they are in the possession of the bailee such that if they are damaged or destroyed or lost through negligence, while in the possession of the bailee, the bailor may sue for damages and recover the loss sustained from the bailee.

3.2.10 'Intend to employ one junior … permanent full-time…'

Labour/Industrial Law

Adamu and Mariam intend to **employ** one permanent full-time employee. They will be required under the *Workers' Compensation Act* to take out a policy of insurance against accident or injury occurring to that employee while in the course of his or her employment.
Such compulsory insurance by the employer offers protection to the employee against accident or injury which is work related.

The employer (Adamu and Mariam) will have certain **common law duties** to **safeguard** the **employee** from unreasonable risks in regard to the fundamental conditions of employment the safety of plant, premises and method of work.

Adamu and Mariam will be required to take reasonable care to provide for the employee both a safe system of work and a safe place of work. Any breach of this duty by the employer may subject that employer to a claim for damages by the employee.

Issues raised in the preceding pages are many but not exhaustive but they suffice to create an awareness of the impact of the law in many areas of life.

4.0 CONCLUSION

In this Unit, you learnt about the impact of law on the simple plan by Adamu and Mariam to establish a business. The feasibility survey is much more extensive than is ordinarily conceived. It involves the consideration of a wide range of laws. You can relate this to your studentship with NOUN, when it first occurred to you and now that you have read this unit. You would have seen the wide difference in the factors you thought of, the laws and regulation you considered if at all, and those you have breached or honoured.

5.0 SUMMARY

Simple buying and selling of any article which you regularly do has legal implications. It may involve different classes of law, e.g. law of contract, tort law or even criminal law and other miscellaneous laws. So also is the common landlord and tenant relationship, partnership or other commercial transactions and business associations. A little understanding of the law therefore is important to every citizen.

6.0 TUTOR-MARKED ASSIGNMENT

Read Passages I and II over again and answer the following questions:

1. Name the classes of laws involved
2. Discuss the objective of each of them

7.0 REFERENCES/FURTHER READINGS

SR. 1.1: Murphy & Stewart. Access this link to find information on preparing for law exams.

You may also find chapter 12 from Crosling & Murphy 1996, How to Study Business law, 2nd edn, Butterworth, Sydney, useful to provide some insight and assistance in studying law for the first time. It is a recommended reading only.

SR 1.2: Scott.

UNIT 2 THE NATURE, SOURCES AND CLASSIFICATION OF LAW

CONTENTS

1.0 INTRODUCTION

A simple everyday activity or undertaking can involve numerous areas of laws. Altogether, they regulate, control, enforce, punish or bring about reparation. In this unit, we shall be looking into the sources of these laws.

2.0 OBJECTIVES

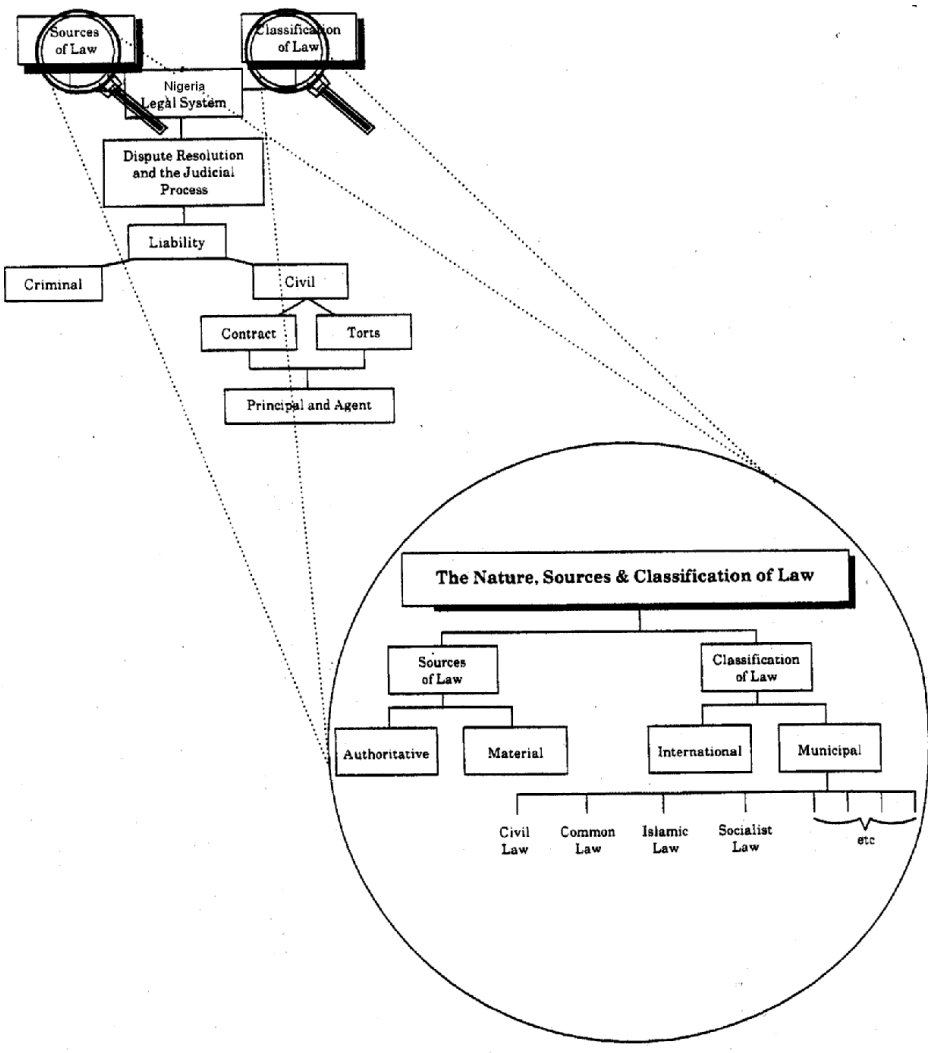
On successful completion of this unit, you should be able to:

- describe, explain, illustrate, and critique the Nigeria legal system
- describe briefly the evolution of the judiciary as a source of law
- explain the significance of the doctrine of precedent to the common law system

- describe briefly the evolution of parliament s a source of law
- explain how a government policy may become part of our statute law
- outline the evolution of an independent Nigeria legal system
- identify the sources of law which apply to Nigerian citizen
- distinguish between different classifications of law by giving appropriate examples.

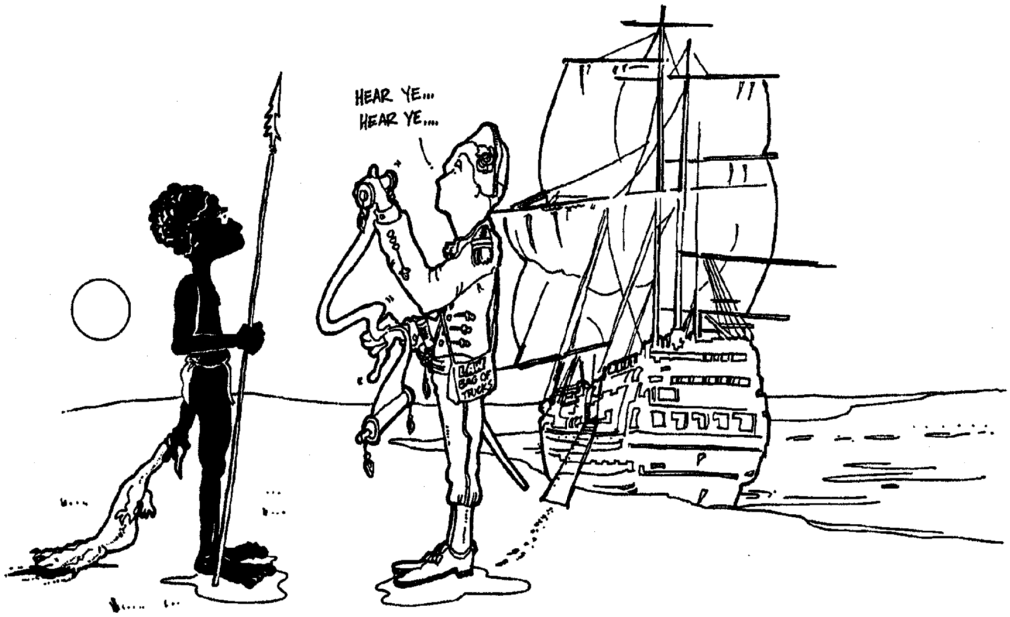
3.0 MAIN CONTENT

3.1 The Nature, Sources and Classification of Law

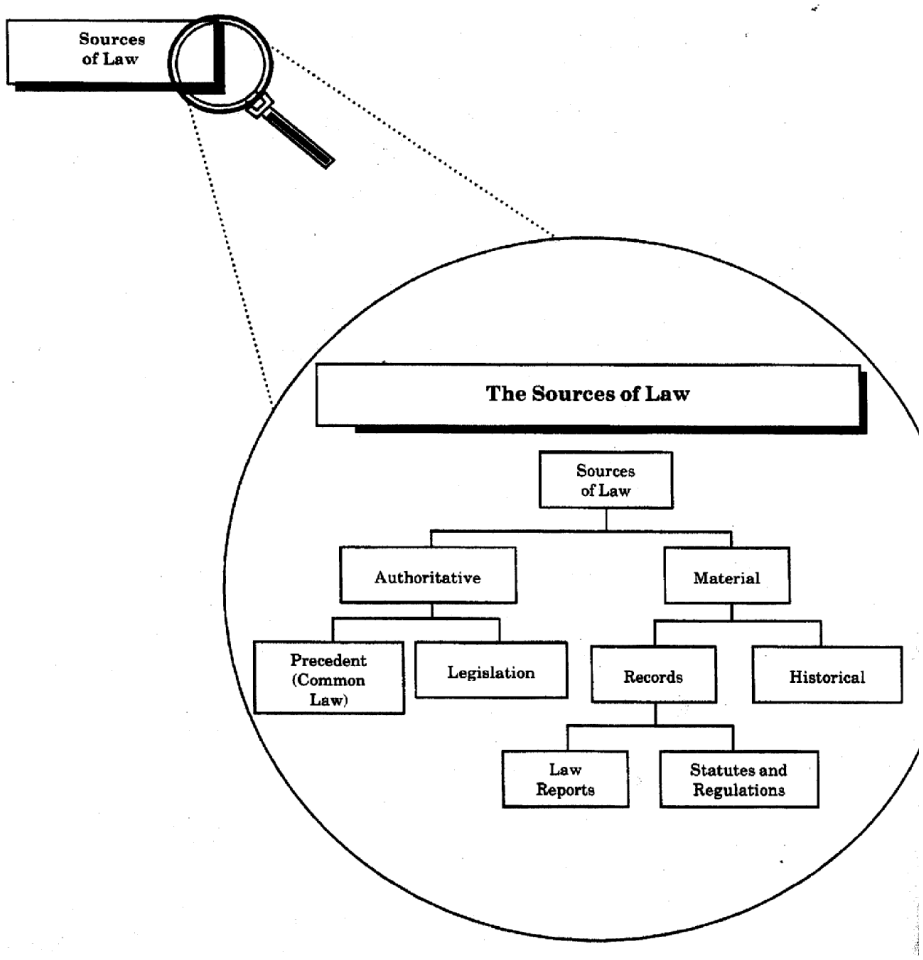


(From University of Southern Queensland, Australia Study Book: Introduction to Law)

3.1.1 The Nature of Law



3.2 The Sources of Law



3.2.1 Authoritative Sources

There are two main sources from which laws derive their authority:

- Judge made law or common law; or
- National and State Assemblies (Parliament)

A broad overview of the development of both the Judiciary and National/State Assembly as sources of law is necessary in order to understand the English Legal System, which formed the basis for our own Nigerian legal system.

3.2.2 'Statute Law' and 'Judge-Made Law'

Take particular note of:

- Development of the common law
- The growth of equity
- Reception of English Law in Nigeria
- Law Reports
- The Doctrine of Precedent – only read the first two pages of Turner on this topic. The balance will be dealt with in module 4
- Statute law
- The Making of Statutes
- Delegated Legislation.

3.2.3 Advantages and Disadvantages of Statutory Law

In their discussion of the Legislature as a source of law, Vermeesch and Lindgren (1992: 24) set out the advantages and disadvantages of legislation as a lawmaking process as follows:

(a) Advantages. The Act of the National Assembly may reflect change in community standards. The argument is that the National Assembly is more responsive to electoral concerns than the judiciary, judges being appointed, effectively, until a ripe old age. The statute may be enacted after thorough inquiry into the need for the proposed law by bodies such as law reform commissions or specialist House of Representative or Senate committees. This contrasts with the decision of the judge which is made on the basis of evidence selected by the parties to strengthen their particular arguments. The legislation may be enacted to deal with a perceived deficiency in the law. Judicial lawmaking depends on the vagaries of litigation. Legislation may be, and usually is, enacted prospectively. Litigation, at least

where the parties are concerned, is a retrospective form of lawmaking.

(b) Disadvantages. The major criticism of statutory law is the difficulty experienced in having statutes enacted. The legislative agenda is very crowded, and becomes more crowded each year, and most law reform proposals are not given a high priority. This is to be contrasted with the relatively free access that disputants have to the courts. The second major criticism is the fact that legislation is often broad brush in its approach and, even when it is not, often requires judicial clarification. This is to be contrasted with the judicial decision which is directed to the particular issue brought before a court.

So far, we have looked at sources of law in a broad sense, directing our attention to the authority which is responsible for particular laws. Another way to look at sources of law is from a narrower viewpoint and to look to the records of where the law is to be found. These records are the law reports and the statutes and regulations.

3.2.4 Law Reports

The most important Nigerian law reports are the authorized Law Reports which are cited by reference to the court in which the decision is made etc. In addition there are the All Nigerian Law Reports cited by the abbreviation "All NLR". In Nigeria the most important reports from our viewpoint are the Nigerian Law Report, Nigerian Weekly Law Reports, Law Breeds, Weekly Report of Nigeria etc.

3.2.5 Statutes

The most important statutes are the Federal statutes and the state laws for each state and the received English Laws. Naturally, enough we focus on the statutes in this course but it should be realized that in many cases the states have equivalent statutory laws. There are for example more or less uniform laws in each state with little variation between the 19 Northern and 17 Southern States. Many of these statutes are based on an English model and have retained their common features for many years, though in declining proportions.

3.3 Historical Sources

3.3.1 The Reception of Law into Nigeria

You may have been wondering why in the earlier discussion constant reference was made to the English legal system and its historical

development and you might have questioned the relevance for Nigeria. The relevance is clear when you realize that English Law and its system were directly implemented in Nigeria when it was British colony. A famous lawyer of the 18th century, Blackstone, expounded a principle as follows:

If an uninhabited country be discovered and planted by English subjects, all of the English laws then in being, which are the birthright of every subject, are immediately there in force.

Their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil on which they stood. Their personal law became the territorial law of the colony.

3.3.2 Native/Customary Law

As noted above, the presence of indigenous people and their laws were ignored when Lagos was first ceded. In fact, that more or less remained the position until nearly 100 or so years of our colonial history. However, the question of the proper place of native/customary law is topical. In this course we will study certain aspects of the customary law in some detail, partly because it raises these fundamental issues, which touch upon our modern legal system and also because it provides useful guide as to what law ought to be observed or enforced.

The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the groupings of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants, provided those laws are not repugnant to natural justice, equity and good conscience that judicial sanctions under the new regime must be withheld…

In the area of criminal law, one author observed that some customary laws and customs may exist as part of the law of the nation, clearly not of general application, but as much entitled to recognition within their sphere of operation as, for example, the by-laws or regulations of statutory authorities or Local Government Councils are recognized within the area and scope of their powers.

3.4 What Law Applies?

The summary that came from the last activity refers more particularly to statute law but at all times English common law was (and still is) being received into Nigeria. It is not binding on our courts but it is often most

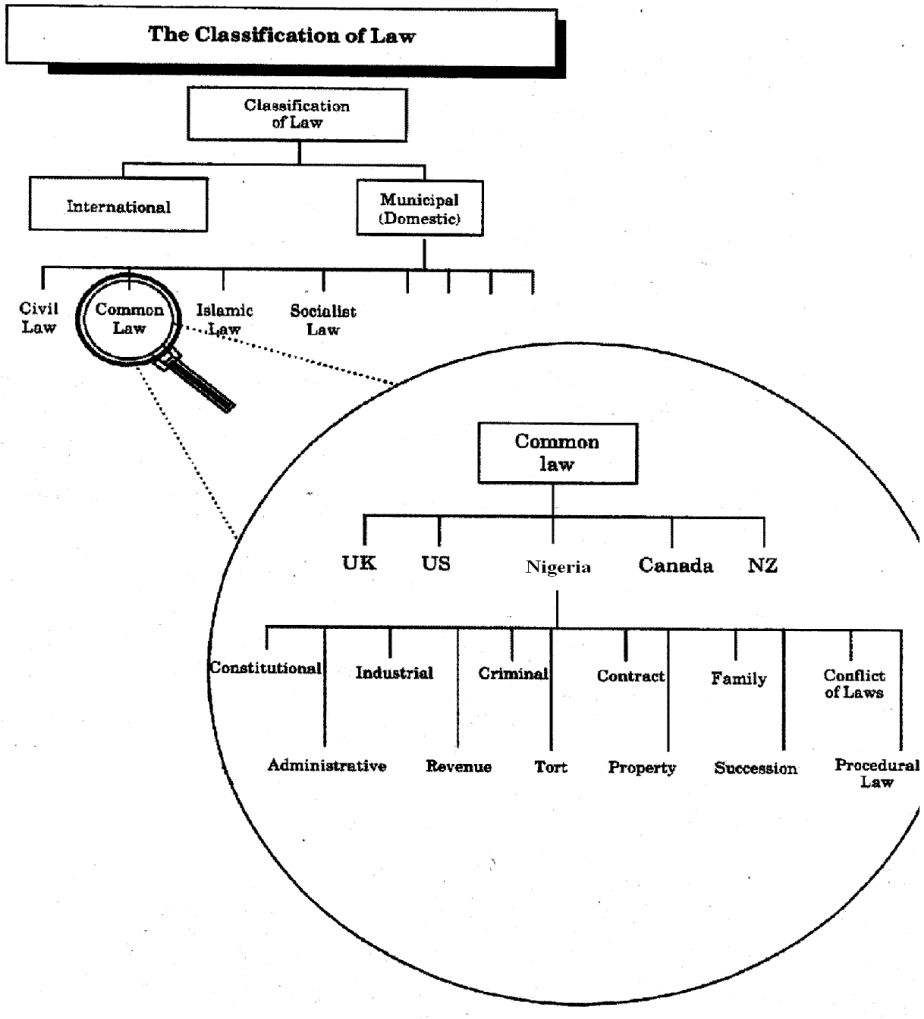
persuasive particularly if there is no relevant Nigerian case on the subject in question.

In general terms if we were to look to the sources of law for an answer to a legal problem the priority would be:

- any relevant Statute of the National Assembly
- any relevant State law
- english Statutes of general applicable to the colonies before 1900
- any Nigerian common law pronouncement;
- the English common law.

While the above order of priority is strictly correct; for practical purposes it is so unusual to find an English Statute still applying in a State that lawyers tend to go immediately to the common law after considering any relevant State Statute.

3.5 The Classification of Law



3.5.1 International Law

(a) Contrast with Municipal Law

As the term suggests, international law is concerned with the rules of law, which govern the relations between countries. On the other hand municipal law relates to the body of law, which governs the internal affairs of a country.

(b) Notes:

- The above branches are not to be seen as exhaustive but merely Indicative

Chisholm and Netheim describe the basic differences between international law and municipal law as:

It is easy to think of international law as relating to war and peace, control of international aggression, and the peace-keeping efforts of the United Nations. These are certainly matters which may involve international law, and are perhaps the most important areas of that law, but they are also areas where international law has most difficulty being effective. For the international legal system, dealing in general with legal relations between countries, does not ordinarily have the same extent of control over those countries as systems of national law usually have over people in the particular country. The problem can be helpfully explained by saying that international law does not have three things that national legal systems have: a legislature (to make laws), a police force (to enforce them), and courts (to apply the law to disputes). This is, of course, an over-simplification, but it is worth considering each aspect.

International Law has no legislature: there is no body which possesses recognized and effective authority to pass legislation which bind countries. The United Nations General Assembly has considerable influence and does pass resolutions about the rights and duties of countries, but its powers in relation to countries are very much weaker than the powers of a national parliament over its citizens. Only the Security Council has power to pass binding resolutions, and only in furtherance of its powers to deal with threats to the peace, breaches of the peace, and aggression. Countries incur obligations in international law only if they choose to, usually by becoming party to a treaty with one or more other countries.

Again, there is nothing in the international legal system really similar to a police force or an army. It is true that the United Nations has some peace-keeping forces, but these are very small in comparison with the

forces available to particular countries. They have to be contributed by member nations for particular operations, and in general can operate effectively only with the consent of the countries where they are deployed. Sometimes they can perform such tasks as policing political or national boundaries. Occasionally, substantial armed forces are assembled and deployed for particular operations. The best known recent example is probably the 1991 deployment of armed forces against Iraq following its invasion of Kuwait. In such exercises the involvement of particular countries through the supply of forces can be so substantial that there can be arguments about whether the force is properly regarded as a United Nations operation or is really an operation of one or more countries with a degree of support from the United Nations. The United Nations efforts are not always successful, and are sometimes criticized, as in the case of Bosnia. Further, in some situations, including some of the most tragic (such as those in Africa in the mid-1990s), the difficulties of the situation, and sometimes the perception by member countries that their own interests do not justify a major investment of funds and personnel, lead to a result that the United Nations is virtually helpless to assist. This is particularly so where the area is so dangerous and unstable that humanitarian relief cannot be provided to the people who need it.

Finally, there are no courts of the kind that exist in national legal systems. There are bodies something like ordinary courts, notably the International Court of Justice (the World Court). However, this court, like other international courts and tribunals, can in general decide cases only with the consent of the countries concerned; it is therefore quite different from national courts, in which people can be sued or prosecuted whether they like it or not. In some cases, as a result of regional treaties (as in Europe), a number of countries can create a legal arrangement in which courts and other bodies can make orders which will be respected and enforced in the member countries. (In recent times the UN Security Council has established international tribunals to deal with international offences committed in the former Yugoslavia and in Rwanda – the first such machinery since the Nuremberg and Tokyo tribunals after the Second World War).

In all three areas, therefore, legislature, police and courts, the international legal system is much less well-equipped than national legal systems. Not surprisingly, the United Nations and the international legal system generally are sometimes criticized as being ineffective, or not being 'law' at all. It is pointed out, quite rightly, that international law did not prevent the Vietnam War or the Middle East, Afghanian, Iraqis or Nigeria Civil wars.

(Source: Chisholm and Netteim 1997, p 18)

3.5.2 Impact of International Law on Municipal Law

Chisholm and Netteim made reference to the importance of treaties as a source of international law. We have a federal system of government, as you are aware, and power is divided between the Federal and State Governments. The powers of the Federal government are restricted by the Federal Constitution. In recent times the power available to the Federal has increased substantially by the State choosing to implement in Nigeria international conventions to which Nigeria is a party. Those international conventions may deal with matters which normally would fall within the control of state governments but by the Federal Government, using its external affairs power in the Constitution, it can legislate against or for the particular conduct. Furthermore, the Federal Government has relied upon treaties concerning World Heritage Listing to protect the environment in Nigeria. This would normally be a state government matter. The issue of Federal-State Government power is explored more fully later.

International law impacts on our domestic law in other ways as well. In the first place customary international law which is law derived from the close adherence by countries to establish customs is technically part of our common law. Since the customs are usually of an international character (such as rules governing the collision of ships) their influence on municipal law is not great.

In addition, in developing the common law judges have been prepared to take into account trends in international law and the domestic law of other countries. For example in the Australia case 2 Mabo v Queensland Brennan J stated that:

Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory acquired by the Crown.

(Source: Brennan)

In the particular circumstances of that case the majority of the High Court was prepared to vary the common law to ensure that it did not discriminate against a particular race. This change brought it into line with international law on land rights both in the way other countries such as Canada and New Zealand dealt with this issue but also in keeping with the judgment of the International Court of Justice in the *Western Sahara* case [1975] ICJR.1. That court severely criticized the *terra nullius* doctrine.

3.5.3 Municipal Law

Before examining some aspects of our municipal law it is useful to take a wider perspective and see how our law fits alongside the legal systems of other countries. While this enquiry has an international flavour it is treated under the heading **municipal law** because it is concerned with the internal laws of different countries.

4.0 CONCLUSION

You have learnt about the sources of law. Most Nigerian laws now derive from statute laws and you have treated the advantages and disadvantages of statutory law as well as the differences between International and municipal law.

5.0 SUMMARY

The laws in Nigeria can be found in the Acts of the National Assembly, the laws of each state, and the by-law of the local government council. Each derives from the common law, equality and English statutes of general application. Law Reports are growing sources of law in Nigeria. Customary law derives from the customs and traditions of the people. Islamic law is customary law but it is written. Treaties to which Nigeria is a signatory is another source of law. Differences lie between municipal laws, International law especially in terms of legislation, enforcement and adjudication.

6.0 TUTOR-MARKED ASSIGNMENT

1. What are the laws that apply in Nigeria?
2. "International law is no law" Comment

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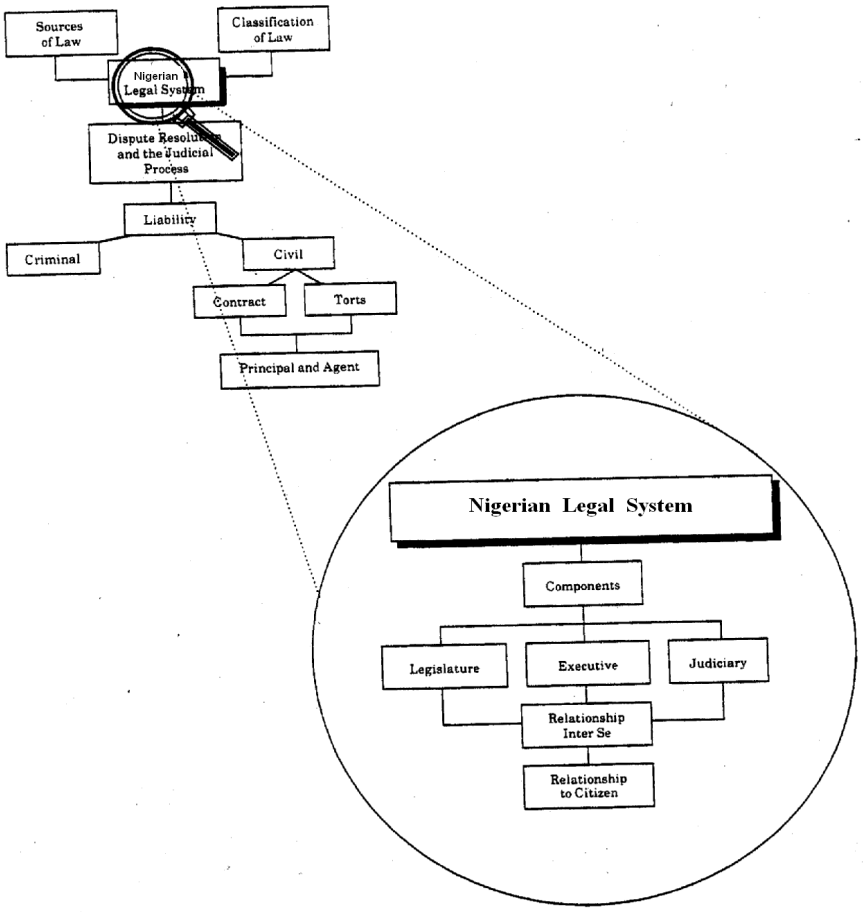
UNIT 3 THE NIGERIAN LEGAL SYSTEM: LAW MAKING

CONTENTS

Overview of the Nigerian Legal System



1.0 INTRODUCTION

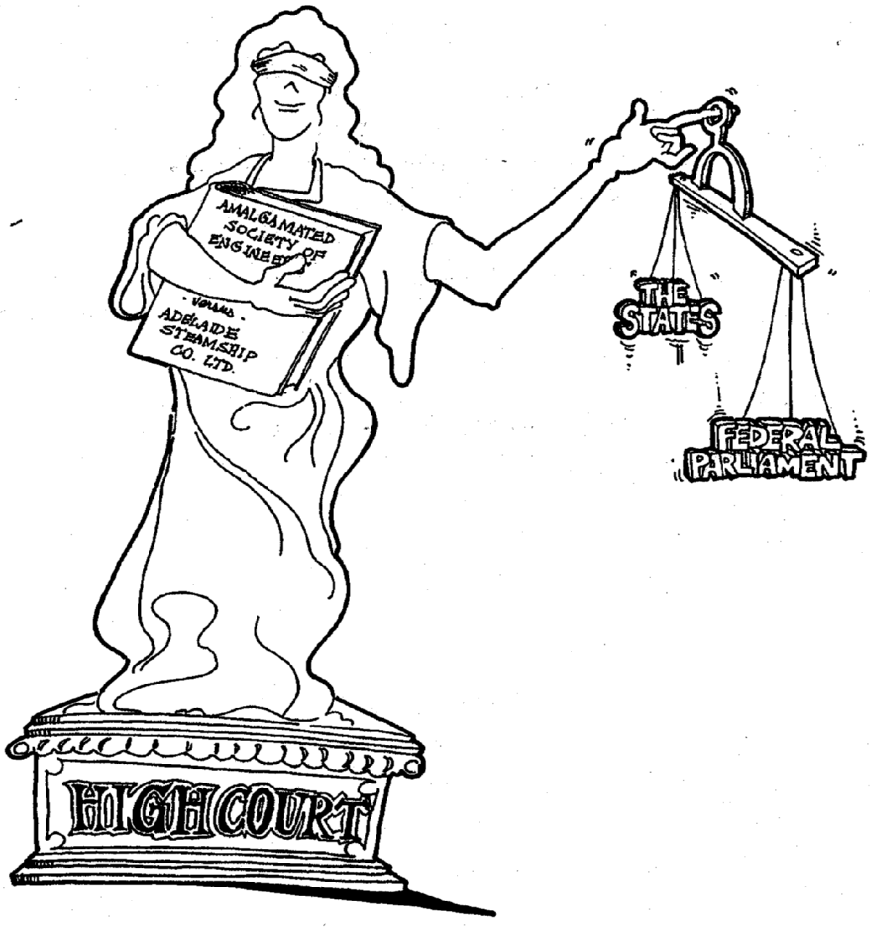
There are three major organs of government in Nigeria with the following functions:

i. Legislature: to make law
ii. Executive: to administer laws and the surrounding system; and
iii. Judiciary: to interpret and apply the laws.

This unit discusses these three major organs as well as their relationship with each other and with Nigerian citizens. The important concepts which affect this relationship with citizens are the doctrines of the separation of powers and the rule of law.

The Pledge of Commitment on a citizen of Nigeria is:

I pledge to Nigeria my Country
To be faithful, loyal and honest
To serve Nigeria with all my strength
To defend her unity
And uphold her honour and glory
So help me God.



Note

The study schedule contains the complete list of pages from Turner that are required reading for this unit.

2.0 OBJECTIVES

At the successful completion of this unit, you should be able to:

- identify the three major organs of government in Nigeria and describe their components and functions
- outline the legislative powers of the National and State Assemblies and explain how they interrelate.

3.0 MAIN CONTENT

3.1 Legislature

3.1.1 National and State Assemblies

There are three levels of legislature which have law making power with respect to Nigeria. They are:

i. The National Assembly, (Senate and House of Representative)
ii. State Assembly
iii. Local Government Council

What we are concerned with here is the division of powers between the Federation and the States. It is assumed that you have a working knowledge of the structure of both Assemblies and the general procedure for passing legislation.

You will no doubt be aware that the National Assembly comprises two Houses, the House of Representatives and the Senate whereas in the State there is only one House. The Senate is comprised of an equal number of senators from each State – a feature of the Constitution which was designed to protect the position of the smaller states – and the Federal Capital Territory.

In this course we are more concerned with the question of the areas of control of the Federal and State governments. The answer to this question is essentially to be found in the Constitution of the Federal Republic of Nigeria.

SELF ASSESSMENT EXERCISE 1

What is a Federal System of Government?

3.1.2 Background to the Constitution

Before we look at the division of power in Nigeria, it is useful to examine briefly the nature of a federal form of government. The usual features of a federal government as listed by Solomon (1975) are:

- the central government must have full authority on behalf of the entire federation to handle relations with other nations;
- the functions of government are distributed between the central government and a number of states governments by means of a Constitution;
- power is distributed in such a way that both the federal and State governments have a direct impact on citizens; and
- there is usually brought into existence a judicial authority which acts as an umpire to ensure that neither the national nor the state governments step outside its limits of power as prescribed in the Constitution.

These four features are present in the Nigerian Constitution. Let us take them in turns:

- The Federal Constitution gives full and complete authority for the National Assembly to legislate with respect to matters within the exclusive legislative list; e.g. foreign affairs, international trade, customs, defence, police, immigration etc. and thereby to handle all aspects of relations with other nations.
- The functions of government are distributed between the Local Government, State and Federal Governments. The manner in which this is done is (i) to list the powers of the Federal Government and leave the residue to the States. (ii) The specific powers are listed in the Constitution and are referred to as concurrent powers, but once Federal legislation is enacted in one of these areas then the Federal law will prevail over an inconsistent State law.

The State governments have residuary powers by the manner in which the Nigerian Constitution is worded. The States once had their own Constitutions. The Constitutions allow the States to also legislate for the **peace, order and good government** of the State – a general formula in keeping with their residuary powers. Now however, there is only one constitution for the whole of Nigeria.

- For Nigerians it will be quite clear from personal experience that

both National and State Governments have a direct impact on citizens.

- Section (6) of the Constitution vests judicial power in the Nigerian court, as well as making the Supreme Court the final court of appeal. The Supreme Court is specifically granted the power to deal with matters arising under the Constitution and its interpretation of disputes between States and in any matters in which the Federation is a party.

  Clearly then the Supreme Court fulfils the function of arbiter referred to by Solomon in the fourth of his points listed above. You should note that the Supreme Court is the final court of appeal in all matters. It is no longer possible to appeal to the Privy Council. This matter is more fully dealt with in the discussion on court system.

3.1.3 Legislative Powers

Briefly then, the power of the State and National Assemblies should be seen in the following perspective:

1. Initially, Nigeria and the former regions, were given power to legislate for the **peace, order/good government** of Nigeria, subject to the overriding sovereignty of the British Parliament.

2. Upon federation, the regions gave up some of these general powers to the Federal Parliament. The Federal Constitution then was drafted in specific terms either conferring powers on the Central government or imposing restrictions (e.g. that trade, commerce and intercourse between Regions shall be absolutely free).

3. The result is that there are:

- powers vested exclusively in the Federal Government – i.e. the States have no power to legislate on these matters, e.g. laws dealing with the seat of government of the State, the military, the Police etc.
- concurrent legislative powers – i.e. matters on which the Central Government may legislate and which also fall within Region or States' general powers. These are the powers mentioned in the concurrent legislative list. However, once the Federal Houses pass a law dealing with these matters, it prevails and any inconsistent state law is invalid to the extent of the inconsistency, e.g. divorce law.
- Exclusive legislative powers of the State – i.e. any matters within the power of the State and not within the power of the Federation e.g. laws dealing with the State judicial system, the Constitution refers to these as residuary powers.

3.1.4 Growth of Federal Power

It would be misleading to list the powers of the Federal Government as enshrined in the 1990 Constitution without a discussion of the change in the balance of power between the Federal and Regional/State Governments since that time.

It is often said that the founding fathers of Nigerian Federation would be mortified if they were alive today to witness the vast expansion in Federal Government power. They would be aghast to learn that the Federal Government exercises power in relation to such matters as education, roads, health to name but three areas traditionally considered the province of the Regions.

How has this change come about? A number of factors are important:

1. The most significant reason for the growth of Federal power has been the manner in which the Constitution has been drafted and then interpreted by the Supreme Court of Nigeria. This process is a complex one and a study in itself.

Sometimes, the Courts have moved away from a legalistic approach to a more liberal, sociological approach, presenting the constitution not as a static document but one which must be interpreted to take into account changes in the political, economic and social structure of Nigeria. At other times, the Supreme Court is utterly legalistic.

- The court has conferred on the Federal Government, responsibility for raising income tax to the exclusion of the States thereby gaining control of the purse strings. The Nigerian press ensures that their readers and listeners are familiar with perennial problem of revenue allocation and states share of the fiscal cake.
- Creation of Local Government is another. A number of states especially Lagos state, took the Federal Government to Court on the matter.

2. Changes to the Constitution itself. As many will be aware, the Constitution lays down a procedure for change to its provisions which in essence requires the alteration to be approved at a referendum of all of the citizens of Nigeria. Clearly this avenue for change has not been significant because the constitution has not been amended at any time.

3. Huge inroads into State power by the Federal Government have occurred by the use of the Grants power in the Constitution.

Under this power, the Federal Government can make grants to States for specific purposes. So the Federal government makes grants to the States for particular purposes and thereby can determine policy in that area. In this way the Federal Government is affecting policy in Education – normally regarded as a State matter. You can see that holding the Federal Government purse strings through income tax levies and Petroleum Funds and Oil Revenue, as well as the concurrent use of the grants power, have substantially re-shaped the extent of central power.

There are numerous economic, political, and social reasons which favour the centralization of power and which have assisted the process described above. A consideration of these factors is outside the scope of this course but one matter which should be noted is that on occasions, the States have voluntarily yielded up their power to the Federal Government.

3.1.5 Local Government

There is a third level of government in Nigeria and that is referred to as the local government. These are the elected bodies who are responsible for the good governance of a particular geographical area within the State. They are not independent law making units and most of their laws or by-laws are subject to approval of the State government or its representative.

The type of laws local governments pass are usually classified as subordinate or delegated legislation.

SELF ASSESSMENT EXERCISE 2

1(a). List five areas of power that you would now expect to be exercised only by the National Assembly.
(b). Where does the National Assembly get its authority to exercise those powers.

2(a). List five areas of power vested exclusively in the State Assembly.
(b). Where does the State Assembly get its authority to exercise those powers?
(c). Give 2 examples of concurrent legislature powers in our federal system and indicate what happens of the National Assembly's "cover the field' in the area of concurrent power.

3.2 Executive

In the Colonial times, the executive function of government (as well as legislative and judicial to an extent) was vested in the Crown. The King administered the laws as well as exercising powers as to proponent of laws and arbitrator on disputes under the law. Gradually, legislative power became vested in the King-in-Parliament and the courts achieved independence from the Crown. Subsequently on attainment of Republican Status, the ultimate executive function of government in the Federal sphere is vested, by the Constitution, in the President. However, the Constitution goes on to provide that this is exercisable by the Federal Executive Council.

There are two strands to the Executive:

- responsible government; and
- statutory bodies and offices.

The Prime Minister (prior to 1963) and President since 1963 is at the head of **Responsible Government.** In the exercise of statutory powers, the convention has arisen that the Prime Minister or the President acts on the Government's advice. This convention however is not always followed.

In its executive capacity, the democratic government prior to 1963 has two forms:

- Cabinet – the less formal body which makes policy decisions; and
- Executive Council – the formal body meeting with the Prime Minister and advising the Prime Minister of cabinet's decision upon which the Prime Minister usually acts to implement those decisions requiring the exercise of his prerogative or statutory powers.

These two bodies are made up of the Ministers who head the government departments staffed by public servants, whose function in theory is to obey the Minister and advise when required. In practice of course, administration of the laws is largely carried out by this public sector.

The 'responsible' aspect of government arises from the convention that the Minister in charge of a government department is responsible for the actions of a public servant, even though the Minister may have no specific knowledge of the matter. The public servant largely remains anonymous. Relevant also to the functioning of this aspect of government is the convention that cabinet operates as a body, and once policy has been decided, the individual Ministers are bound by that decision. If in all conscience they cannot abide by the decision, they must resign.

The Presidential System of government commenced on October 1, 1963. the office of Governor General (Head of State) and of the Prime Minister (head of Government) became united in the Presidency.

Under the present constitution, the powers of government are shared among the Legislative, Executive and the Judiciary. The executive power is vested in the President and may exercise his power, where appropriate, directly or through the Vice President, Ministers or other public officers.

The other strand of the Executive is made up of the **statutory bodies** set up to do specialized tasks, e.g. Nigeria Broadcasting Corporation, Railway Corporation, Power Holding Company of Nigeria, and **statutory offices,** such as the Ombudsman. The function of the Executive is to decide upon policy and to carry out those policy decisions and perform ancillary functions.

4.0 CONCLUSION

There are three tiers of government – Federal, State and Local Government. Each government has defined powers to legislate. Functions of government are also shared into executive (Federal), Concurrent (States and Federal) with the Residue resting on the states. The extension has two strands: responsible government and statutory bodies and offices.

5.0 SUMMARY

Legislative powers are shared among the tiers or levels of governments (local Government, State and Federal) and its functions among its organs (legislative, executive and judicial). In a democratic dispensation the Executive has two strands (responsible government and statutory bodies and offices).

6.0 TUTOR-MARKED ASSIGNMENT

1. Compare the scope of the rule of Prime Minister and Governor General before 30 Sept. 1963 and that of the President since 1st Oct. 1963.
2. Distinguish the ‘Cabinet from the Executive Council.

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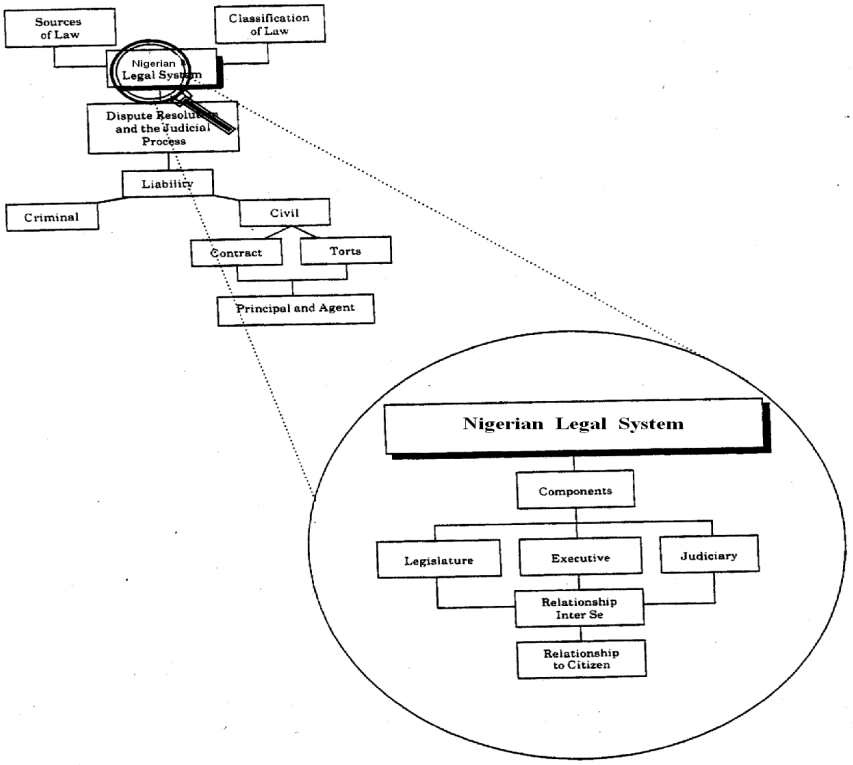
UNIT4 THE NIGERIAN LEGAL SYSTEM: ADMINISTRATION AND ENFORCEMENT OF LAW

CONTENTS

1.0 INTRODUCTION

The various arms of government exercise different powers and also play different roles in the process of enacting, administering and enforcing laws and this forms the theme of this unit. But first let us refresh our memories with an over-view of the Legal System.

The Nigerian Legal System: Overview



2.0 OBJECTIVES

At the successful completion of this unit, you should be able to:

- describe in broad terms the jurisdictions of major courts within the federal and the state judicial hierarchies
- describe the role of lawyers, within the Nigerian legal system
- identify some of the issues currently affecting the profession and proffer solutions.

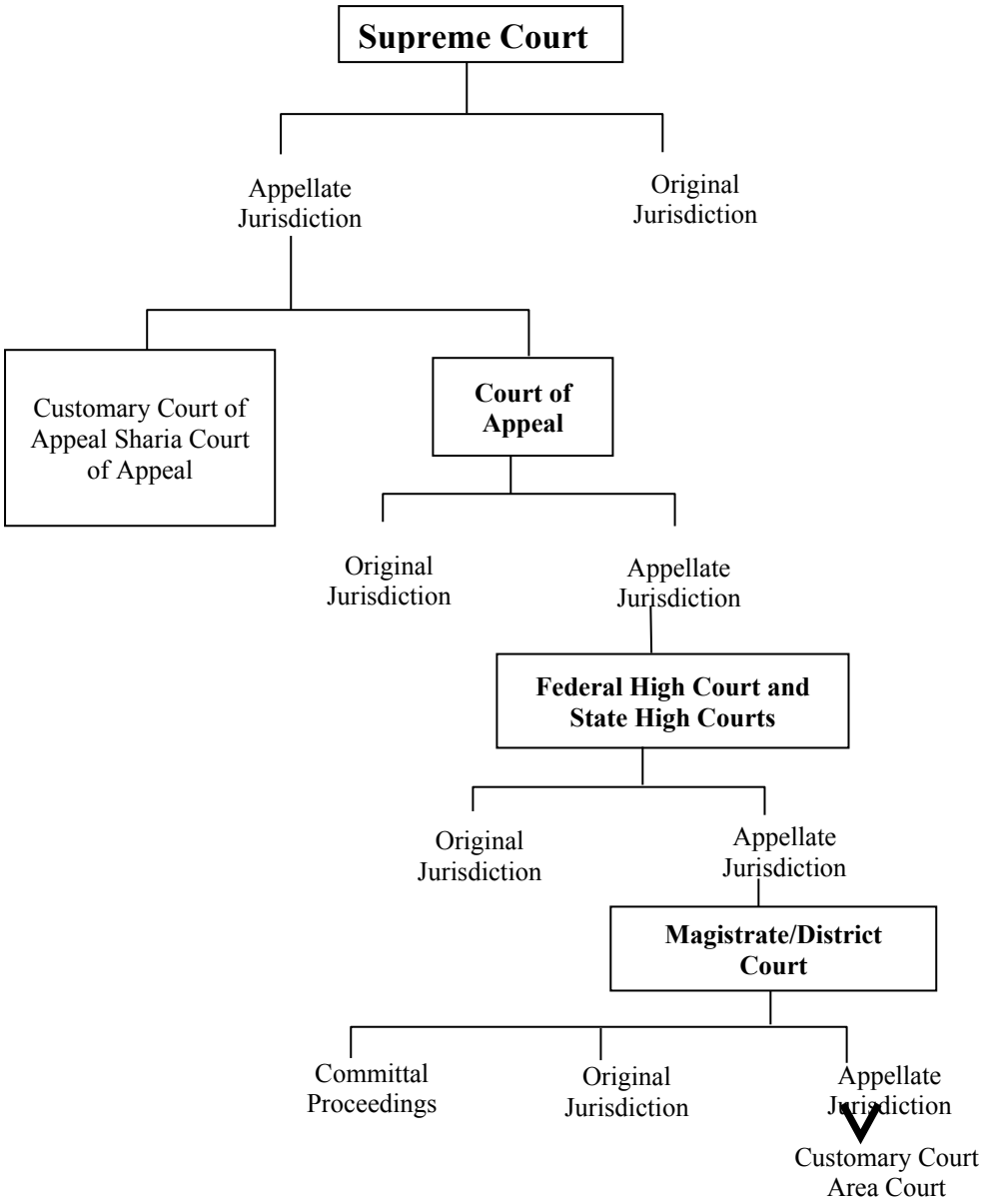
3.0 MAIN CONTENT

3.1 Judiciary

The Judiciary interprets and applies the laws through the court system. The courts of major importance in Nigeria in ascending order of authority are:

- Magistrates Court/District Court
- High Court
- Court of Appeal
- Supreme Court

Below is a diagrammatic representation of the structure of these courts setting out for each court its jurisdiction, type of cases heard and the composition of the bench. You should study the diagram carefully.



(The above diagram is a general guide only. Not all Courts are mentioned)

Notice that each court in the hierarchy has both original and appellate jurisdiction.

SELF ASSESSMENT EXERCISE 1

Discuss the original and appellate jurisdiction of the Court of Appeal.

3.1.1 Jurisdiction

A court's jurisdiction refers to the matters, which it has authority to hear.

(a) Geographical

One aspect of the limits of a court's jurisdiction is the geographical area over which the judgment of the court will have effect. Clearly the decisions of the Supreme Court of Nigeria do not have effect outside the borders of Nigeria.

(b) Original and Appellate

Original jurisdiction refers to matters which can be commenced or originate in that court; while Appellate jurisdiction concerns cases which come on appeal to that court from another court.

(c) Criminal and Civil

A court's jurisdiction can also be defined by looking at its criminal and civil jurisdiction (i.e. matters arising under criminal law or not). The jurisdiction in criminal proceedings is determined by the sentence which can be imposed by the court in question. With civil proceedings, the monetary limit, i.e. the amount which can be claimed or contested, is the deciding factor.

(d) Federal and State

Yet another description of matters which a court may hear is by reference to its State and Federal jurisdiction. This describes matters arising either under State law (e.g. prosecution in the Magistrate Court under State Road Traffic legislation) or Federal law (e.g. maintenance proceedings in the Magistrate Court exercising jurisdiction under the Matrimonial Causes Act.

(e) Cross Vesting Legislation Found Invalid

Our federal system and the division of power between the states and the federation have caused great inconvenience at the court level.

The difficulty was that often it was logical for state courts to exercise some of those federal powers and conversely for Federal Courts to exercise some powers which ordinarily fell to state courts. A good example of the problems lies in the Trade Practices field. Suppose a plaintiff wanted to sue for beach of contract and allege a failure to

comply with state Sale of Goods legislation, this would ordinarily be a matter for the state High Courts. However, if the plaintiff wanted to allege a breach of the *Trade Practices Act,* they could not do so because that was a Federal High Court matter. Similarly, there were problems at the family law level relating to children born within wedlock. If a family comprised children born in wedlock, and also outside it, then custody would have to be determined by two separate courts.

The thrust of the scheme was to confer on the main courts in each hierarchy the general civil jurisdiction of the other courts in the scheme. That is, a State High Court may deal with a contract law issue before it and also any breaches of the *Trade Practices Act 1974* (Cth) alleged as part of the claim.

This was an eminently sensible scheme but see the decision of Re Wakim <http://www.austlii.edu.au/au/cases/cth/high_ct/1999/27.html>. The Constitution prevented the State Assembly from conferring state jurisdiction on the Federal Courts. The reverse that is National Assembly vesting State courts with Federal jurisdiction may be valid.

3.2 Federal Court Hierarchy

The major courts with federal jurisdiction which we shall look at are the Supreme Court, Court of Appeal and Federal High Court. There are other federal courts, such as Customary Court of Appeal and Sharia Court of Appeal.

NAME Jurisdiction	**SUPREME COURT OF NIGERIA**			
	ORIGINAL		**APPELLATE**	
	CRIMINAL	**CIVIL**	**CRIMINAL**	**CIVIL**
Type of Case Heard	No Jurisdiction CFRN. 1990 Sec. 232	CFRN. 1990; Sec. 232	Sec. 233(1), 2(a) (b) (c) (d) (f) 2(3)-(6)	Appeals from the Court of Appeal CFRN. 1990; Sec. 233(1)–(6)
Presiding	5 or 7 Justices	5 or 7 Justices	5 or 7 Justices	5 or 7 Justices

NAME Jurisdiction	**COURT OF APPEAL**			
	ORIGINAL		**APPELLATE**	
	CRIMINAL	**CIVIL**	**CRIMINAL**	**CIVIL**
Type of Case Heard	No Jurisdiction	CFRN. 1990; Sec. 239	CFRN. 1990; Sec. 240-248	CFRN. 1990; Sec. 240, 248
Presiding	3 Justices	3 Justices	3 Justices	3 Justices

(CFRN means The Constitution of the Federal Republic of Nigeria), 1990

NAME Jurisdiction	**FEDERAL HIGH COURT**		
	ORIGINAL		**APPELLATE**
	CRIMINAL	**CIVIL**	
Type of Case Heard	CFRN. 1990; Sec. 251(S) 251 (2), (3)	Unlimited (in Amount and includes Equitable Jurisdiction) CFRN. 1990 Sec. 251	No appellate jurisdiction (civil or criminal)
Presiding	1 Justice	1 Justice	1 Justice

* Jury is unknown to the modern Nigeria legal system.

3.3 The Courts

3.3.1 Magistrate Courts

Magistrate Courts are at the bottom of the judicial hierarchy. Magistrate Courts in the Southern States have both civil and criminal jurisdiction. A Magistrate Court hears only criminal matters in the Northern States. Civil matters are heard in the District Courts. The Magistrates are normally appointed from within the public service, usually the Justices Department, although the numbers appointed from private practice are increasing.

In general terms, the criminal jurisdiction of the Magistrate Courts is limited to less serious offences, for example traffic breaches, drunkenness, common assault and so on. These come before the magistrate as simple offences. A magistrate does have a discretion to offer to the defendant that some indictable offences be tried in the Magistrate Court with the consent of the accused. However, charges of a serious nature which have to be disposed off in the High Courts are commenced in the Magistrates Court by way of committal hearing, or preliminary investigation (P). At this hearing the magistrate determines whether a case to answer has been made out against the accused person. If so, he or she is committed for trial before a Judge.

Note that some states have abolished the process of preliminary investigation. Holding charges similarly operate in some states and not in others.

Civil actions where the amount involved is less than a specified sum may be determined in the Magistrate Court. In addition to its ordinary criminal and civil jurisdictions Magistrate Courts sit as Children's Juvenile Court and Coroners Court.

The Magistrate Court also has authority under various federal statutes and state laws to exercise some jurisdiction e.g. proceedings for maintenance under the Maintenance Causes Act.

3.3.2 High Court

The jurisdiction of the High Court is set out in the diagram. The Court is staffed by judges appointed by the State Government normally from practicing barristers. Only one judge chairs the Court whether it is sitting in its original or appellate jurisdiction.

As well as hearing court cases, judges serve on various State tribunals e.g. Armed Robbery and Fire Arms Tribunal, Election Petition Tribunals.

The High Court sits at the highest level in the State court hierarchy and has unlimited jurisdiction in both criminal and civil matters. Generally, its criminal jurisdiction includes murder, attempted murder, manslaughter, serious drug offences and important serious offences such as treason and piracy. You will notice from the diagram that the High Court is presided over by one justice when exercising both original and appellate jurisdiction.

3.3.3 Federal High Court

The Federal High Court was established by the Federal High Court Act primarily to lighten work load of the High Court. It has only original jurisdiction including jurisdiction in industrial matters and bankruptcy.

3.3.4 Court of Appeal

The power of an appeal court will depend upon the legislation which gives that court jurisdiction. Ordinarily, they can allow or dismiss the appeal or refer the matter back to the lower court for a further hearing. This frequently happens in criminal cases where the appellate court decides that a person was wrongly convicted in the lower court and refers the matter back for a re-trial.

3.3.5 The Supreme Court

Already, we have looked at one important function of the Supreme Court in dealing with constitutional matters. In addition, it acts as an appeal court on all matters, subject to some appeal limitations. The Supreme Court is now based in the Federal Capital Tertiary (FCT).

3.3.6 The Privy Council

The Privy Council is really the Judicial Committee of the Privy Council and is made up of eminent English Law Lords. It sits in London, and notable jurists from countries which allow appeals in the Privy Council are sometimes invited to sit on the Privy Council. While no longer relevant to the Nigerian legal system since 1963, it still does hear appeals from some Commonwealth countries and its decisions are regarded as highly persuasive by our Courts.

3.4 Other Courts and Tribunals

There are other courts or tribunals in Nigeria exercising judicial or quasi judicial functions. One example is the Rent Tribunal which deals with disputes between landlords and tenants in premises with specified rental value. This Tribunal operates in an informal manner without the necessity of legal representation (which is not possible unless there are exceptional circumstances).

SELF ASSESSMENT EXERCISE 2

1. Where does the Supreme Court get its power?
2. Has the Supreme Court any original jurisdiction?

3.5 Other Components of the Nigerian Legal System

3.5.1 Police

It is not proposed to discuss the police in detail. Their function is well known. Suffice to say that any legal system needs an enforcement

agency to carry out the decisions of courts. The police play an important part in the judicial process because they initiate almost all of the criminal cases by either warrant or summons, they prosecute cases and deal with offenders.

3.5.2 Legal Profession

While not strictly part of our legal system, the legal profession does play an important function in its operation. You should read the textbooks on the terms used to describe lawyers, the differences between barristers and solicitors etc. In Nigeria, there is no distinction between both. Most professional people need to work with lawyers at some stage and you should know the structure of the legal profession. You should also be aware that the legal profession is continually undergoing change.

4.0 CONCLUSION

You have seen that the Legislature makes laws, the Executive enforces them while the Judiciary interprets and administers. The hierarchy of courts has also been discussed and demonstrated. You should also draw up the organogram. The Jurisdiction of each is of utmost importance since a party invariably stands to lose his/her case if he files her cause in a wrong court. You should also be familiar with the geographical, original and appellate jurisdictions of courts.

Consider some of the following issues:

- The appointment of judges. They are appointed from the leading barristers but is that an appropriate system? One criticism of judges is that they do not truly represent society. If the system was adopted where judges are separately trained for that office – in fact a separate career path from practicing lawyers – then perhaps some of the existing criticisms of judges would diminish. If all persons could apply to be trained as judges upon leaving the Law School (as occurs in some countries), then perhaps a wider cross section of the community and gender would be represented on the bench. Such a system might also meet the criticism that good barristers do not necessarily make good judges.

- The role of barristers is quite a contentious issue. Should barristers robe for court proceedings? One view is that this practice is absurd in this day; others consider that it brings some degree of solemnity and respect for the court system. Note in this context the quote from Dickens following.

- A final contentious matter is whether the profession should be divided between solicitors and barristers, or remain united.

> *And I am by no means a wholesale admirer of our legal solemnities, many of which impress me as being exceedingly ludicrous. Strange as it may seem too, there is undoubtedly a degree of protection in the wig and gown – a dismissal of individual responsibility in dressing for the part – which encourages that insolent bearing and language, and that gross perversion of the office of a leader for The Truth, so frequent in our courts of law.*
>
> *Still, I cannot help doubting whether America, in her desire to shake off the absurdities and abuses of the old system, may not have gone too far into the opposite extreme; and whether it is not desirable, especially in the small community of a city like this, where each man knows the other, to surround the administration of justice with some artificial barriers against the 'Hail fellow, well met' deportment of everyday life.*
> *(Source: Dickens)*

5.0 SUMMARY

In this Unit, you have learnt about the judiciary, its jurisdiction and personnel. You also differentiated between federal and state Courts and other components of the Legal System. In the next Unit, we shall discuss the related issues of Separation of Powers and the Rule of Law.

6.0 TUTOR-MARKED ASSIGNMENT

1. Draw a diagram of the Courts hierarchy in Nigeria.
2. In what court would you expect the following matters to be disposed off?

a. An action against a body corporate for unfair trading practices
b. A charge of murder.
c. A claim by a person convicted of murder that he did not receive a fair hearing.
d. a charge of driving under the influence of alcohol and causing in death by dangerous driving.
e. A claim by a defeated presidential candidate that the Electoral Tribunal which had his/her case was bias.

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UNIT 5 NIGERIAN LEGAL SYSTEM: SEPARATION OF POWER AND RULE OF LAW

CONTENTS

1.0 INTRODUCTION

The Separation of Powers and the Rule of Law are important concepts or notions that operate within our legal System. A detailed discussion of these concepts is intended in a course of this nature.

Separation of powers implies the division of governmental authority into there branches of government – legislative, Executive and Judicial – each with specified duties on which neither of the other branches can encroach; the Constitutional doctrine of checks and balances by which the people are protected against tyranny. As we shall see, it is extremely difficult in practice to define precisely each particular power.

On the other hand, Rule of law may mean:

- A substantive legal principle
- The supremacy of regular as opposed to arbitrary power.
- The doctrine that every person is subject to the ordinary law within the jurisdiction.

2.0 OBJECTIVE

At the successful completion of this unit, you should be able to:

- understand the notion of the separation of powers and the rule of law and their operation within Nigeria.

3.0 MAIN CONTENT

3.1 Separation of Powers and Rule of Law

3.1.1 Separation of Powers

This concerns the relationship of the organs of government *inter se* (which is a Latin phrase meaning between themselves or among themselves).

The doctrine of the separation of powers is a principle which, it is argued, is basic to democracy and the prevention of tyranny. The doctrine rests on the basis that the organs of government fall into three categories – legislative, executive and judicial all of which are separate from and independent of each other. This structure provides, so the argument runs, a system of checks and balances which is not present in a political system where, in effect, all power is held by one authority. The French political philosopher Montesquieu was a great advocate of the separation of powers and claimed that 'to the separation of powers of government, the English people owed their liberty'.

Few people would maintain that the separation of powers is possible in a pure form today. In particular, it is impossible to separate the functions of the legislature from the executive. The reason is that the executive itself makes an enormous volume of the rules and regulations which govern our lives through the process of delegated legislation, so there is an immediate overlap of function with the legislative arm.

In any event the doctrine of the separation of powers has found its way into our Constitution. The legislative power is vested in the National Assembly, the executive power is held by the Executive Council (a body of government ministers acting in the name of the State) or the Presidency and the judicial power by the Judiciary.

Just as the relations between the States and the Federation have changed since 1954 (due to a large extent to the interpretation of the Constitution by the Apex Court, the present meaning of the separation of powers doctrine in Nigeria has also been determined by Courts.

In the Australian case of *A-G for Australia & Kirby v R and The Boilermakers Society* [1957] AC 288, the matter in dispute was whether both judicial and non-judicial functions could be combined in one tribunal – in this case a tribunal dealing with industrial disputes. The Apex Court considered that they could not and in the judgment a number of important observations were made:

- A distinction must be drawn between the relationship of the legislature and the executive on the one hand and the relationship between these two arms of government and the judiciary on the other. A separation of the legislative and executive functions is not a critical fact in the preservation of a federation whereas the separation of the judiciary from either of the two arms is most crucial.

- The reason why the separation of the judiciary is most important is because the federation rests upon a distribution of governmental powers and only the judiciary can safeguard this distribution.

A more recent decision confirmed that the doctrine of separation of powers was still powerful in the Australian case of *Brandy v Human Rights and Equal Opportunity Commission and Others* (1994 – 1995) 183 CLR 245. In that case, it was successfully argued that the Commission in having its determinations registered and enforceable as Federal Court Orders was exercising a judicial function and therefore unconstitutional.

In reality in Nigeria, there is not a three way separation of powers but rather a two way split between the executive and legislative on the one hand and the judiciary on the other. In fact, even this two way split can be quite blurred at times because courts have power to lay down their own rules of procedure. This is akin to legislation although in the overall scheme of things, it is not a major source of legislation.

3.1.2 The Rule of Law

This notion deals with the relationship between organs of government and the citizen. One of the constraints on the Federal and State Governments is the existence of the Federal Republic of Nigeria Constitution. Another more nebulous constraint is what is often called the **rule of law.**

The rule of law is not easy to define. It is concerned about a number of concepts and notions some of which are quite vague, yet it is considered to be very important in our legal system. The rule of law is a peculiarly an English concept, yet it is frequently referred to in wider legal debates such as in defining international law and justice.

To some people the rule of law is equated with the existence of public order, meaning that peace exists within a country and that its citizens obey the law. However, this is a very narrow interpretation of the doctrine because if we were to adopt that criterion alone it could be argued that the rule of law existed during the regimes of Stalin and

Hitler, or Abacha, under whose Presidency Nigeria had been referred to as a pariah.

While the existence of public order is part of the rule of law, what is more important is the limitations which are placed on the use of arbitrary power by governments and the corresponding liberties enjoyed by the citizens of a State. Another way to express this principle is to say that the rule of law means that both the rulers and the ruled (the citizens) are under the law.

Historically, the development of the rule of law has been concerned with two main issues:

1. Was the Sovereign under the law, which basically meant was he supreme or was Parliament? This issue was decided finally in the English Bill of Rights of 1689 in favour of Parliament.

2. What constraint should be placed on Parliament to prevent an abuse of its power? The constraint came from two sources:

- by ensuring that Parliament is a representative legislature; and
- by the existence of the doctrine of the separation of powers.

In countries like America and Nigeria, there is a third constraint namely - the existence of a written constitution. For example, the Constitution of the Federal Republic of Nigeria places certain limits on the National Assembly and protects human rights, for example, the Constitution protects individual freedom of speech, association, movement etc.

In addition to the constraints which in theory at least should be placed upon the National Assembly, there are a number of other notions which are central to the rule of law:

3.2 Equity

The equal subjection of all classes of people (regardless of class or status) to the ordinary law of the land, administered by the ordinary courts. In particular the way in which the criminal law is administered is regarded as an acid test and there are certain requirements:

- police powers should be limited;
- crimes should be curtailed;
- penal statutes should be strictly construed by the courts; and
- penal statutes should not be retrospective.

3.3 Liberty

There are three fundamental liberties:

- freedom of the person;
- freedom of property; and
- freedom of opinion.

If all of the notions referred to above were in fact present in our system then it would be said that the rule of law exists. In fact, however, there are a number of shortcomings, viz:

1. The constraints on legislature are often quite weak. While legislature is a representative House the use of the party system does give the executive government at least control in the short term, i.e. between elections.

2. The concepts of equality and liberty are vague. They are not bolstered by a written constitution.

However, the Court has found a number of Federal or State laws to be invalid, as being in conflict with the fundamental civil and political rights enshrined in the Constitution. Examples include: freedom of expression, at least in relation to public affairs and political discussion and of association which are indispensable to the efficacy of the system of representative government, for which the Constitution makes provision.

While the fundamental human rights are entrenched in the Constitution of Nigeria, suggestion has been made that there is still a need for a Bill of Rights. The cases for and against such a Bill are concisely set out in Evans et al. (1988, pp 36-8) as follows:

3.4 Bill of Rights

3.4.1 The Case for a Bill of Rights

Those favouring a Bill of Rights believe it to be the only way to protect fully civil liberties. In summary, the claims are:

i. A Bill of Rights would provide the means for preventing abuses of power by governments, agencies and the police.

ii. As a signatory of several international pacts, such as the Declaration of Human Rights (United Nations), and the African Charter, Nigeria has a moral obligation to pass a Bill of Rights

that applies to our own domestic situation as evidence of our support for the international agreements.

iii. Several other Commonwealth countries have passed a Bill of Rights and we should follow the pattern and support their direction.

iv. A Bill of Rights would provide the means for some judges to defend better, the civil rights of individuals and could bring about changes in the law as a result of successful legal actions against unfair practices.

v. As a tool for educating society about the attitudes and values held, a Bill of Rights would be most valuable. Particularly, the Bill would challenge issues of religious, sex, or race discrimination and other violations of basic human rights and freedoms.

3.4.2 The Case against a Bill of Rights

i. A major argument put forward against the Bill centred on the belief that such a Bill was not necessary. Nigeria has adequate protections already because of the right we hold to elect our representatives who govern and because of our legal heritage. It was argued that the common law, the constitution and other indigenous laws have, over the centuries, developed a sufficient body of protections for civil liberties.

ii. The problems of drafting an adequate Bill of Rights are great. The statements from another country cannot be simply grafted on to Nigeria. What should be included is one aspect of the problem; what it should declare as a liberty is another. For example, can the right of workers to be organized into unions co-exist with the rights of an individual worker not to join a union?

iii. Minority groups could hold up the process of government by unreasonably enforcing their civil rights to the detriment of the wellbeing of the majority of citizens.

iv. Critics point to other countries where the most violent abuses of civil liberties often occur as those countries with the best-sounding Bill of Rights. The substance of this argument is that civil liberties declared in an Act can be manipulated in practice, either by being ignored by sections of the community or overruled by governments in the interests of national security.

4.0 CONCLUSION

The organs of government are Legislatives, Executive and Judicial. Each is required to be separate from one another in terms of functions and personnel in order to safe-guard the liberty of the citizens. Rule of law also deals with the relationship of the government subjects to the observance of the law and equality of access to courts.

5.0 SUMMARY

You have learnt about the separation of powers of government to which, according to Montesquieu, the people owe their liberty. You also have learnt the very important concept of rule of law, equity and liberty. You are reminded always that "the Law Rules".

6.0 TUTOR-MARKED ASSIGNMENT

From time to time, it is asserted that Nigeria should have a Bill of Rights. One of the arguments to counter this is that there are enough protections of individual rights provided for in the Constitution and in statute books.

How far have these rights been protected in the Constitution and statues in Nigeria?

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MODULE 2 COURT PROCESS

UNIT 1 JUDICIAL PRECEDENT

CONTENTS

1.0 INTRODUCTION

You have learnt about judicial precedent as a source of law. Our present concern is Judicial Precedent in actual operation.

2.0 OBJECTIVES

On Successful completion of this unit, you should be able to:

- describe, explain, illustrate and critique the Nigerian legal system
- describe, interpret, explain, demonstrates and assess the role and application of precedent in the administration of justice in Nigeria.

3.0 MAIN CONTENT

3.1 Definition of Terms

Before examining the operation of precedent it is important that you understand the following terms:

Res Judicata: a decision handed down by the court is conclusive as between the parties to a case unless it is reversed on appeal. The decision binds the parties and the case and the case cannot be re-opened. The policy behind this rule is that there should be finality in litigation. *Res Judicata* applies even if fresh and relevant evidence comes to light after the case has been decided. One exception to this rule is that certain criminal matters may be re-opened by the way of appeal by the accused if that person can produce new evidence.

Ratio Decidendi: means 'the reason for deciding' or the principle or statement of law (not statement of fact) upon which the decision in a particular case is based. We shall look in greater detail in this concept later in this unit.

Obiter Dictum: means a saying by the way. It is a principle or statement of law (not statement of fact) said in a judgment, which statement of law is not necessary to decide any issue of fact or to decide any question presented for decision in the case. *(Obiter dictum* singular, *obiter dicta* plural.)

Reversing: occurs when a higher court on appeal reverses the decision of a lower court. Reversing affects the *res judicata,* ie the order or judgment of the lower court.

Overruling: occurs when a higher court decides that a proposition of law expounded by a lower court was wrong. The higher court overrules the lower court and thereby affects the *ratio decidenti* of the lower court decision. The higher court may send the case back to the lower court for the case to be re-tried in light of the new ruling on law.

3.2 The Operation of Precedent

You have already been introduced to precedent and to its place in the common law. You will recall that as a principle of law, courts are in some circumstances bound to follow the decision of other courts. This principle is often referred to as *stare decisis* which means **let the decision stand.**

You will no doubt realize that the use of precedent is not confined to the courts. There is pressure to use precedent in our day to day existence to ensure fairness and equality: 'if John Smith was treated in a certain way yesterday then Jill Jones in a similar case ought to be treated in the same way'.

The fact that the notion of precedent affects our daily decisions is borne out by the expression: 'we would like to grant your application but that would be creating a precedent'.

The need for certainty is another pressure in support the use of precedent. As Lord Justice Scrutton stated:

[I]n my view, liberty to decide each case as you think right without any regard to principles laid down in previous similar cases would only result in a completely uncertain law in which no citizen would know his rights or liabilities until he knew before what judge his case would come and could guess what view that judge would take on a consideration of the matter without any regard to previous decisions.

3.2.1 How to Approach the Study of Precedent

There are two central enquiries:

i. Which decisions of which courts in a legal system bind other courts?
ii. What part of the decision is binding? What part of a particular decision is the *ratio decidenti* (called the 'ratio') and which part is *obiter dictum* (if any)? How is a precedent case applied?

3.2.2 Court Practices Regarding Precedent

To deal with the first of these enquiries you need to know in some detail the Federal and State court structure (see unit 3). In particular you need to know how courts rank in relation to each other.

You then need to know what practices the courts have adopted regarding precedent. The most important of these practices are:

i. each court is bound by decisions of courts higher in the same hierarchy, eg the Supreme Court of Nigeria binds the the Court of Appeal, High Courts – that is, a **binding precedent;**
ii. most courts (including the High Court and the Supreme Court) are **not** bound to follow their own decisions;
iii. courts are **not** bound to follow decisions of courts outside their own hierarchy but they may find the decision of the other court quite persuasive. For example a judge in the High Court would treat a decision of the House of Lords (the highest court in England) or of the PCJC as very persuasive in reaching a decision on a case before him or her. These are examples of **non-binding precedent** or **persuasive precedents;**
iv. a court even if it is not strictly bound by its own previous will refuse to follow its own decisions in clear cases of error; and
v. the fact that a precedent is old does not necessarily weaken its authority. Courts frequently rely on early 19th century cases. Obviously, though, in some circumstances because of changed social conditions the effect of a precedent may be weakened.

3.3 Finding the Ratio

As noted in the introduction to this unit, the process of finding the ratio of a case can be quite elusive. It is a skill acquired over many years of practice and is greatly assisted by having a good knowledge of substantive law. Space does not permit such a study in this course and you are only expected to gain a basic understanding of the process. In reality it is unlikely that a non-lawyer will be confronted with a court decision afresh and will have to decide what is the ratio. Instead you will usually be able to draw on the views of legal authors and possibly later court decisions to assist you.

To try to illustrate the operation of precedent let us consider the famous case of Donoghue v Stevenson [1932] AC 562.

3.3.1 Facts

The plaintiff was with a friend who purchased a bottle of ginger beer for her. The shop keeper opened the bottle of beer and poured a tumbler of ginger beer for the plaintiff. When she had drunk some of this her friend poured the remainder of the contents of the ginger beer into the tumbler and a decomposed snail floated out of the bottle. The result of this, and of the impurities in the ginger beer which she had already drunk, was that the plaintiff suffered shock and severe gastro-enteritis (Vermeesch & Lindgren 1992, p 77).

3.3.2 Issue

The basic question for determination by the House of Lords was whether the manufacturer, the defendant, who had no contractual relationship with the plaintiff, owed her a duty of care under that branch of the law of tort which deals with liability for negligence.

3.3.3 Decision

The House of Lords (by a majority) held that such a duty was owed. It should be realized that this case was regarded as a significant expansion of the law because up until that time it was practically impossible for a consumer (such as the plaintiff in this case) to recover damages from the maker of defective products unless there was a contract between them. Here the plaintiff did not buy the bottle of beer from the retailer, let alone from the manufacturer.

In allowing the plaintiff to recover, what was critical to the court was the fact that the ginger beer, upon being made by the manufacturer, reached the consumer in exactly the same form as it left the factory. Furthermore, given the opaque nature of the bottle there was no chance of seeing the impurity or defect before it was opened. The circumstances therefore placed the consumer and maker of the beer in quite a close legal relationship. The *ratio* of the case can be taken from the words of Lord Atkin:

> *...a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care.*

We will return to discuss the ratio in some depth later.

SELF ASSESSMENT EXERCISE 1

Without looking at the text, attempt to define the following:

a. material facts
b. res judicata
c. ratio decidendi
d. obiter dictum
e. stare decisis
f. distinguish
g. persuasive
h. dissenting judgment
i. majority judgment

3.3.4 Facts and Law

In the definitions given earlier of ratio decidendi and obiter dictum, statements of law were distinguished from statements of fact. The difference is important. When a judge hears a case the first step is to establish what the facts are. As part of that process the judge will make certain **findings** of fact. To a large extent these findings are conclusive and will be accepted by any higher court.

In *Donoghue v Stevenson* the judge who heard the case for the first time (sometimes called the final or primary judge) would have made findings that the plaintiff did drink ginger beer, that it contained a snail, that the bottle was opaque and that as a result of drinking the contents of the bottle the plaintiff became ill.

Statements of law are not so easy to identify because they will contain reference to facts (for a story) and it may be hard for a novice to determine what 'law' is. Perhaps the best guide is that statements of law indicate legal relationships, rights or duties and possibly also the consequences of failure to comply with those duties. In *Donoghue v Stevenson* the statement of law is clearly indicated by the words of Lord Atkin '…owes a duty to the consumer to take reasonable care'.

3.3.5 From the Particular to the General

While a judge must make findings of fact, the relevance or materiality of those facts will depend upon how the decision is viewed subsequently. The facts which are material to the *res judicata* will be different to the *ratiodecidendi.*

Remembering that since the *res judicata* principle binds the parties to the particular case, the very specific facts of the case are most relevant here. Those facts will be the names of the parties, the date the incident in question occurred, the loss or damage sustained and so on. These are all the facts that will be important if either party wanted to re-open the case (which they are not allowed to do under *res judicata*). These are the particular facts which may be unique to that case.
The material facts for the *ratio decidindi* however are quite different. None of the facts referred to above will be relevant. Rather it is the basic story. In *Donoghue v Stevenson* the material facts (so far as the *ratio* is concerned) would be:

i. manufacturer of a product designed for consumption;
ii. product reaches consumer in same form as leaves manufacturer;
iii. no reasonable possibility of inspection before consumption;
iv. product negligently manufactured; and
v. causes injury.

You can see here that it is not likely to even be material, that it was ginger beer or that it was a snail that caused the problem. What has been extracted for the *ratio* are the generalized facts which may subsequently apply to another case although it relates to, say for example, a chocolate bar and not a bottle of ginger beer.

3.4 The Ratio as Seen by Later Courts

While one can attempt to decipher the ratio of a case immediately it is handed down, the crucial issue is how is the precedent case treated by later courts. This treatment occurs through the process of **distinguishing or extending the ratio.**

3.5 Distinguishing

Distinguishing happens when a later court refuses to follow the precedent case because it says the precedent case contains relevant facts which are different from the case before it. This is quite a legitimate part of the judicial process. For example, a court in applying *Donoghue v Stevenson* may say that a material fact in that case was that a product was consumed internally and therefore the precedent is different to where, for example, a product is used, such as a power tool, or is worn such as a garment.

If that was the interpretation placed on the *Donoghue v Stevenson* ratio then it quite severely limits its impact. Remember that the pivotal point is identifying the material facts. What a later court might regard as material may be different to what the court deciding the precedent case

seemed to think was material. Accordingly, the ratio of the precedent case (which is in essence the material facts plus the decision) will vary according to how it is treated by later court.

Two factors are likely to be crucial in determining whether a later court distinguishes the precedent. They are **logic** and **policy**. In viewing a precedent case the later court will ask: is there any logical reason why some limit should be placed on the material facts. To use the *Donoghue v Stevenson* example given above, is there any logical difference between consuming something internally or using it or wearing it. Probably not and in fact that is what later courts have decided.

The impact of **policy** is almost certainly harder to identify. This is because quite frequently courts do not spell out what policy factors they have taken into account, if any at all. One reason why there is such reluctance is because courts may not be very well equipped to decide issues to policy. What is policy? It is a collection of reasons why a case should be decided a particular way which goes outside the formal legal process of applying precedent. Policy factors could be economic, social justice, bringing the law up to date, or a desire to introduce certainty or stability. Two policy considerations weighed heavily on the High Court when reaching its decision in the *Mabo* case.

They were the desire to bring Australian common law into step with international law and the desire to eliminate racial discrimination as a basis for determining land right claims.

3.6 Extending the Ratio

The opposite of distinguishing a ratio is where a court **extends** it. Here the second court might accept that there are differences between the precedent case and the facts before it but they regard the differences as insufficient to distinguish the precedent. Instead, the later court extends the ratio to cover the new situation. This is how the law changes. As with the process of distinguishing, the court is guided by logic and policy.

3.7 An Example of Judicial Process

Generally, *Donoghue v Stevenson* has been well received by later courts and the ratio of the case has been extended to cover a much wider range of situations than the snail in the ginger beer bottle. For example, the case has been extended to include liability for garments negligently produced (in that case underwear had a chemical substance which caused dermatitis) and to repairers.

One area where the courts have hesitated before extending the ratio is into the area of economic or financial loss. Between 1932 and 1964 the courts rejected claims for negligence where the injury suffered by the plaintiff was financial only. They said a material fact in *Donoghue v Stevenson* was that the injury caused to the plaintiff was **physical** and that any financial loss (eg medical expenses and loss of wages) stemmed from the physical injury. The courts were concerned that if the duty of care arose where a financial loss **only** was incurred then too many claims might arise and it would be unfair on the defendant. Such a case would be where an auditor negligently audited the accounts of a company. The financial loss suffered by all those who used the accounts could be vast.

3.7.1 Complex Factors

The important point to note is that the whole process of finding and applying *ratios* is quite a complex and a variable one. A lot may turn on whether the precedent case is considered solid and well based or whether later courts think it is too expansive (or restrictive). The process is not purely based on logic or some precisely defined legal process and may come down to the personality of the judges involved.

In one case, Lord Denning (a famous English judge) stated that the fact that an action was novel did not appeal to him. He noted that in many of the important cases the judges were divided in their opinions. He went on, 'On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.' *Candler v Crane Christmas* (1951) 1 All ER.

SELF ASSESSMENT EXERCISE 2

1. In what ways are the following terms significant in the doctrine of precedent:

a. Court hierarchy, and
b. ratio decidendi

2(a) How does the doctrine of precedent provide certainty with flexibility?
(b) What are some of the factors that might influence the application of precedent?

3.8 Obiter Dictum

As noted previously, it is only the *ratio* of a case that is binding on another court. Contrast a statement which is termed the *'obiter dictum'*. It is not binding because it was not necessary for the judge in question to decide the particular issue or question. Again it gets back to material facts. If a judge makes a statement of law which pertains to facts or circumstances which are not material then that statement is *obiter*. This is not to say that every judgment contains *obiter* remarks (unlike *ratio*). Sometimes, judges clearly telegraph *obiter* statements by words such as 'If I had to decide that issue I would…' 'or while it does not arise in this case…' Perhaps more commonly there is no useful prelude and the reader of the judgment has to work back from the material facts and see which statements (of law) are not relevant to them.

An example of this is the extract from Lord Atkin's judgment in *Donoghue v Stevenson* set out above. You will notice that in casting in the duty of care he includes a reference to 'the consumer's life or property'. The reference to 'property' is obiter because it is immaterial to the case in hand.

How later courts regard *obiter* will depend upon a range of matters. Principally, they will be concerned about the status of the court or judge involved, whether the remark was well considered and ultimately whether they think the principle in question is reasonable. Are there policy factors militating against its use or application?

4.0 CONCLUSION

The application or precedent involved two questions.

(a) which decisions of which bind other courts; and
(b) which part of a decision binds other courts.

The first part of this process is relatively straight forward because it is largely a question of deciding where the court which has handed down the precedent fits within the hierarchy as compared with the court faced with applying the precedent. Remember it is only the courts within the same hierarchy that are bound.

The second part of the process is much more difficult. It centers around finding the *ratio*. The crucial question is what are the material facts. These facts form the basis upon which a subsequent court might distinguish or expand a *ratio*. Bear in mind the influence of policy. It is always open to any judge to distinguish the precedent by the way in which he or she interprets the material facts. On the other hand, a judge

might quite readily adopt an *obiter* remarks because it makes good sense even though the material facts may be different.

Also based also on the material facts is the notion of obiter dictum. No court is bound to apply *obiter dictum,* however influential the judge or court making an *obiter* remarks is.

5.0 SUMMARY

Mr. Justice Murphy summoned it all, saying:

> *Then there is doctrine of precedent, one of my favourite doctrines. I have managed to apply it at least once a year since I've been on the Bench. The doctrine is that whenever you are faced with a decision, you always follow what the last person who was faced with the same decision did. It is a doctrine eminently suitable for a nation overwhelming populated by sheep. As the distinguished chemist, Cornford said: 'The doctrine is based on the theory that nothing should ever be done for the first time'.*

6.0 TUTOR-MARKED ASSIGNMENT

Explain how *obiter dictum* may become part of *ratio* of another case

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UNIT 2 STATUTORY INTERPRETATION

CONTENTS

1.0 INTRODUCTION

Statutes are the primary sources of law. They drafted by legal drafters, and passed into law by the legislature. It is left to the courts to interpret the legislatives. In this unit we shall look at the attitude of the court in interpreting statutes. An understanding of the "maxims of interpretation" enables one as a lawyer to predict the possible outcome of a given case.

2.0 OBJECTIVES

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

- describe, explain, illustrate and critique the Nigerian legal system
- describe, interpret, explain, demonstrate and assess the role and application of precedent
- describe, interpret, explain and demonstrate the role and application of the rules of statutory interpretation.

3.0 MAIN CONTENT

3.1 Complexity of Legal Drafting

The law on any particular subject comes either from the common law, equity or a statute; or sometimes a combination of these. Historically, the common law was the most important source of law but in modern time lawyers look first to a statute to find the solution to a legal problem and before going to the common law.
You will have noticed from your readings a number of reasons why legislation is the important source of law:

- Upon the passing of an Act on a certain subject the common law is automatically abrogated
- Legislation allows law reformers to effect a wholesale and dramatic change in the law
- The sheer volume of legislation and the fact that it is increasing makes it an important source of law.

With these attributes one would hope that legislation would clearly and concisely set out the law on a particular subject, however this is not always so. There are a number of reasons for this:

1. As Chisholm and Nettheim, (1984, p 56) state:

The English language, for all its glories, is not a precision instrument, and there will always be people (or their legal advisers) ready to argue that the words used in a statute or regulation do not extend to cover their particular cases.

The difficulties facing courts in the interpretation of legislation are pointed out by all the text writers. To borrow one example: Say an Act passed with the following provision: 'Any person who throws litter in the street shall be liable to a fine not exceeding N100.00'.

This may seem at first glance to be quite clear yet does it cover a person who drops something or leaves something on a park bench? How widely should the word 'throw' be interpreted? Another possible area of controversy is what does the word 'litter' mean in this context? Assume it means something which is useless or rubbish – but rubbish to whom? When does the evening paper become rubbish (or useless); the next day?

Of course it would be extremely unlikely that you would encounter a Statute so vaguely worded, because no doubt, the draftsmen would anticipate at least some of the difficulties referred to above. It is the need to include definitions, exceptions, exclusions and so on which make our

Acts of Parliament so complex. The English language often does not allow Statutes (and legal documents) to be drafted simply and concisely.

2. Some people suggest that lawyers set out deliberately to make the law obscure so that they are the only ones who can understand and citizens will have to pay lawyers for their interpretation. This sort of glib assertion is often ill informed. More commonly, the problem arises because lawyers in drafting documents or Statutes tend to rely on precedents which are often cast in old fashioned English. To these precedents, amendments or modifications are made (in the same style) which adds to the complexity.

3. Another factor is that drafters of both Statutes and legal documents set to try to cover every conceivable contingency. So what commences as tolerably simple becomes very unwieldy. Frequently, this process occurs with legislation because a loophole in the particular provision is exposed by a court case and the government rushes through an amendment to close the loophole. This process is particularly evident with revenue raising Statutes.

   When drafting documents lawyers try to cover all angles because that is precisely what the clients expect. If a lawyer fails to deal with a contingency and the matter has to be resolved in court then the client understandably may be put out.

4. One reason complex or obscure legislative drafting is not amended is because over time its meaning might be drafted by the courts in the way they interpret the particular provisions. If the law is amended then the value of the clarifying decision may be lost and the new wording may raise its own ambiguities. The more court cases you get, the more it is lost by any changes and the greater the inertia for change.

SELF ASSESSMENT EXERCISE 1

Take any Act of the Federation on Law of a State and attempt to identify the following components:

a. Short title
b. Long title
c. Date of reprint
d. Heading
e. Marginal notes
f. Schedule

g. Looking at the table of provisions what section provides, for making of regulations?
h. Definition section or dictionary

3.2 Plain English Drafting

This is not to suggest that the complexity and obscurity of legal drafting is tolerable or is justified by the above factors. Few commentators would disagree that more of an effort should be made to produce statutes and documents in a form that can be understood by the non-lawyer. In fact, there is now afoot in Nigeria a concerted effort in that regard. This drive is coming from a number of sources including:

- State and Federal Government policy. For instance one object of Interpretation Act is to facilitate 'Plain English Drafting'.

- Business is complaining loudly about the cost and uncertainty in complying with laws which are almost impossible to comprehend. One result of this pressure is recent revision of the Company Law and the enactment by the Federal Government of the Companies and Allied Matters Act, 1990.

- In deciding whether the actions of a person or company in a particular transaction is unjust or unconscionable, the courts will have regard to whether any relevant documents could be readily understood. This has caused many finance and insurance companies to re-draft their documents into a more comprehensible form.

- Finally, it is being realized that it is rarely possible to cover every contingency, especially in legislation and a better alternative is to lay down some broad and simple guidelines for conduct; if necessary leaving the courts to provide further guidance through their decision. This is sometimes known as 'fuzzy law'.

The advantage is that this type of Statute Law will be much concise and hopefully it can be understood by at least that section of the community most affected. The drawback is that costly litigation may be required to provide the clarification necessary. On the other hand the old style and more complex approach often does not exactly stem the flood of litigation either.

Legal drafting which used to be taught only in the Law School is now being taught in many universities including NOUN at undergraduate and postgraduate levels.

3.3 Principles, Approaches and Rules

To assist courts to interpret statutes, a number of principles and rules have been adopted over the years. These rules are not necessarily hard and fast and there is still a considerable discretion available to judges.

Courts, by interpreting either widely to cover a particular situation or narrowly to exclude it, in a sense create new law. The effects of a court decision on the interpretation of a Statute can be clearly shown by looking at the Companies Income Tax Act (CITA) and the Income Tax Management Act (ITMA). The scheme of the Act is to impose tax in certain circumstances and almost daily tax payers are challenging that Act saying that its terms do not cover their particular situation for various reasons. If the taxpayers' arguments are upheld by a court, then often, a loophole is opened up and a new legal situation comes about until of course the government closes up the loophole.

The courts have over the years worked out ways and means of interpreting Statutes. These ways and means may be classified into:

- Approaches to the way in which statutes should be interpreted – these approaches are of a general nature; and
- Specific rules which aid statutory interpretation.

Judges differ in opinion on the correct approaches. However, the specific rules are more or less universally accepted.

3.3.1 Approaches to Interpretation

Set out below, is an explanation of the three traditional 'approaches' to the interpretation of legislation. While these methods or rules provide some guidance, their importance should not be over-stated. It could be rare for instance to hear a judge refer to one of these approaches when giving reasons for interpreting a statute in a particular way. While no formal recognition may be given by the judge, certain aspects of these approaches may, however be gleaned from the decision especially if, for example, the objects of the statute are identified. A study of the three approaches therefore can provide a setting against which statutes are interpreted.

Also, they provide a useful illustration of the latitude that courts often have (or consider they have) when interpreting an Act. Just as we saw with precedent and ratio decidendi there is no pre-ordained path or automatic process that will produce a given result.

a. **Literal Approach:** This means you simply interpret the words of the statute as they stand. If this leads to an unjust result, that is

not the concern of the courts but rather of Parliament and the injustice can be remedied by Parliament.

b. **Golden Rules:** A gloss on the literal approach is the **golden rule** which means you apply the literal approach unless that would lead to a manifest absurdity or injustice – which presumably Parliament did not intend.

c. **Mischief Approach:** This involves a consideration of what Parliament intended, which is usually tied up with the question: What mischief does the Act attempt to stamp out?

None of these approaches has received universal acceptance by judges. However, the modern trend is towards the purpose approach, especially it has been recognised by statutes dealing with the interpretation of statute themselves. This development is explained below.

Let us talk more on some examples of these three approaches:

3.3.2 The Literal Approach

In *Prince Blucher, Ex parte Debtor* (1931) 2 Ch 70 is quite a good case in point. That decision turned on the interpretation of a section of the *English Bankruptcy Act* dealing with arrangements by debtors with creditors as an alternative to bankruptcy. The section provided that to avoid bankruptcy the debtor must within a certain period of time lodge with the Official Receiver a proposal in writing signed by him embodying the terms of the composition or scheme. In the particular case the debtor did not sign the proposal but rather his solicitor did – the reason being that the debtor was too ill at the time (this fact was not contested at the trial).

The court had to interpret the words **signed by him** in the relevant provision and did so by applying the literal approach. It was held that the debtor had not complied with the provision and could not gain the benefit of the section. The court recognised the injustice created by this interpretation but followed an earlier English case of *Warburton v Loveland* (1832) 6 ER 806 which expressed the rule that where the language of an Act is clear and explicit the court must give effect to it, whatever may be the consequences; in that situation the words of the Statute speak the intention of the legislature.

3.3.3 The Golden Rule Approach

While some judges still insist that you interpret statutes according to the letter of the law and leave it to Parliament to remedy any injustice arising from the particular provision, there is a strong body of opinion toward a more liberal approach. The golden rule is an example of such an approach.

In *Turner v Ciappara* [1969] VR 851, the defendant pulled up at a set of traffic lights because they were red in his direction. A minute or so passed and the lights did not change and it became apparent that they were jammed. After a number of other cars traveling in the same direction went through the intersection against the red light the defendant did also and collided with another car proceeding at right angles through the intersection with the green light.

The defendant was charged with failure to obey traffic control signals. The question of interpretation before the court was on the meaning to be given to traffic control signals so far as the Act was concerned. Mclnerney J held that these were not **traffic control signals** because, having jammed, they were incapable of exercising control or regulating traffic. He felt that to apply a literal interpretation on the section would result in the necessity for the defendant to sit at the traffic lights indefinitely until they were fixed and showed green in his direction. This was clearly an absurd situation and so the golden rule was applied.

The Mischief Approach: This is something of a sister to the Golden Rule and the two often work closely together. The mischief approach requires judges to examine what the law was before the particular Act was passed and to identify the defect in the law which the statute was supposed to remedy. The Act can be interpreted so as to eliminate the mischief or defect.

An example of the operation of the mischief approach occurred in a case involving legislation to prevent prostitutes soliciting in the public place. A law was passed to prevent this and the prostitutes retreated from the street to doorways and continued to solicit. The question which arose for consideration was whether the prostitutes were soliciting **in the public place** that is, even if they physically were not present in the street. The Court applied the mischief approach and looked at the purpose of the legislation which was aimed at allowing ordinary citizens to use the street without being approached. It was held the prostitutes were soliciting in the street.

You must realize that the mischief approach can only be applied if there is an ambiguity in a statute. Otherwise the literal approach will be adopted.

3.3.4 The Purposive Approach

While the basic step in interpreting a statute is to read the words and sections by giving them their literal meaning, Parliaments in recent times have given the courts legislative direction about the approach they should take if the literal reading of the statute results in some ambiguity or lack of clarity as to its interpretation.

It is now common place for courts in Nigeria to examine the circumstances surrounding introduction of the Act that promotes the purpose or object underlying the Act.

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not shall be preferred to a construction that would not promote that purpose or object).

The intention or purpose of the Legislature must be found in the statute itself but in special circumstances courts may use extrinsic material, eg Hansard, law commission reports, explanatory memoranda etc, to gather the intention or purpose of Parliament.

In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

To assist this manner of interpretation, most recent statutes incorporate a purpose or object clause. Thus, Parliament has stated its purpose at the start of the statute and when faced with some difficulty of interpretation of subsequent provisions, the courts must interpret the provisions so that the act's stated object or purpose is achieved.

Whatever courts eventually do, they will always be obliged to exercise some kind of discretion – even in construing fairly ordinary words in a statue. This liberty would lead to considerable confusion but for the fact that, as we have seen, the judicial system has many built-in safe-guards. First, judges are above the thunder'; they are not personally involved in the controversies. They have the prudent of trained lawyers. They have experience of similar decision in other areas of law. They know that their judgments may be made the subject of an appeal; they may be reported and criticized by fellow lawyers and legal writers. They have the trained sense of what any given words mean to lawyers and of the limited range of meanings which any word in itself can have.
Within these bounds, the range of discretion enables the courts to keep law reasonably fluid. After all, law is, in the words of an eminent American judge, Learned Hand: 'a political contrivance by which the

group conflicts inevitable in all society…find a relatively harmless outlet. The price of judicial freedom' and of a healthy, reasonable, flexible social order, is some degree of unpredictability in our statute law – just as it is in precedent.

SELF ASSESSMENT EXERCISE 2

Identify which of the maxims of statutory interpretation are being referred to in the following statements:

a. The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the parliament that made it, and that intention has to be found by an examination of the language used in the statute as a whole. The question is what does the language mean; and where we find what the language means, in the ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.(*Higgins J in Amalgamated Society of Engineers v. Adeleude Steamship Co. Ltd (1920) 28 CLR. 129 at 161-2)*

b The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency absurdity, or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency but no further *(Per Lord Vensleydale in Grey v. Pearson (1837) 6 HLC 61 at 106)*

c In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation (whether or not the purpose is expressly stated in the Act *(Interpretation Act).*

3.4 Specific Rules of Interpretation

(a) Read Act as a Whole

Tied up with the **approaches** previously discussed is the rule that an Act must be read as a whole. In interpreting a section of an Act it is important that the words under scrutiny can be viewed in the context of the whole Act. If, however, the words of a section convey a clear meaning, effect should be given to that meaning.

(b) Definition of Words

One of the most frequent difficulties encountered in interpreting a statute is the meaning of particular words. The example was given earlier in this study guide of an Act dealing with **litter** – a word which is difficult to define.

If you encounter a word in a statute the meaning of which you need to determine then the following procedure should be adopted:

- Go first to the front of the Act to the definition section where the word in question may be defined.
- If it is defined then the definition will normally be preceded either by the word **includes** or **means.** If the word includes is used then the definition is not exhaustive and everything that falls within the ordinary meaning of the word in question is still included but the definition will normally extend the normal meaning of the word.

For example if the word **aeroplane** in a statute was defined: 'aeroplane includes a glider' then the normal meaning of aeroplane, which would be a powered plane, is extended to include a glider.

If the definition is preceded by the word **means** then the definition itself is exhaustive and all embracing – the presence of the word means closes the meaning of the word in question.

- If there is no definition, refer to a dictionary for the ordinary meaning of the word (subject of course to its context which may indicate for example that is should be given a technical meaning).

(c) Interpretation Acts

For commonly used words and for some definitions, the relevant State of Federal Interpretation legislation has to be considered. These cover the following types of concepts or words:

- Citation of Acts;
- Commencement;
- Repeal, expiration or amendment of Acts;
- Meaning of common words such as: 'writing', 'gender', 'number', 'land', 'month', 'person', 'property', 'statutory declaration', 'contravene', 'corporation';
- Meaning of more specialized words such as: 'affidavit', 'gazette', 'Governor-in-Council', 'Industrial Court', 'Minister', 'public holiday', 'Financial year';
- Reckoning of distance and time;
- Service by post;

- New or updated forms of expression. In the *Interpretation Act* for instance, there are specific provisions dealing with the use of gender, spelling, punctuation, conjunctives and disjunctives and even down to format and printing style.
- Some commonly used words. This allows drafting shorthand, for example, it is possible for statute to be drafted in either gender. On this point, the *Interpretation Act* relevantly provides words indicating a gender to include each other gender.

3.5 The *ejusdem generis* Rule

Is often used by judges in interpreting statutes. It provides that where there is a list of two or more specific words which form a class (or genus), and the list is followed by a more general word (or words), then the meaning of the general words is restricted to the same class of the words that preceded it.

The use of the *ejusdem generis* rule would be employed if a court was faced with this situation:

An Act reads: It is an offence to carry a knife, spear, bayonet or other weapon.

Does a person who carries a gun commit an offence?

The answer would probably be 'no' because the words 'or other weapon' would be read down to the class of the particular words before it so that only weapons which were pointed and did not propel a bullet would be included. A gun is not of the same class (in this context) as a knife, spear or bayonet.

You should note that this rule will **normally** only apply if you have two or more specific words to form the class.

Certain statutes by their nature are interpreted narrowly or strictly. Examples are those which impose a penalty (eg Criminal/Panel Code) or a tax.

3.6 Hints on Interpretation

3.6.1 General Hints

The following are some practical hints for reading and understanding statute. They will enable you to apply rules of interpretation to a given fact situation:

(a) Read the section as you would a normal passage of prose to get a 'feel' for what it is about. Read some of the provisions around the section you are interpreting. (Actually the requirement is that you should read the Act as a whole but that is somewhat unrealistic).

(b) Then read the section much more slowly. Look for what obviously are key words or concepts. You may need to re-read the section many times. It is surprising what new perspectives you can get after closer examination.

(c) Next, you should break the provision down to its elements or parts. These are the elements that need to be satisfied before the section applies to, or covers, the conduct in question. There will invariably be at least two elements and perhaps as many as ten.

(d) Look for the meaning of the key words that you have identified. To do that, you go to the definition section of the Act, where possibly the word is defined. The use of definitions from the statute has been described above. If the statute does not assist, you need to go to a dictionary.

(e) If at this point the meaning of the section or provision is ambiguous you may find it helpful to call on some of the aids to interpretation that have been mentioned previously such as:

(f) Selecting the interpretation that best promotes the purpose or object of the Act.

(g) As part of that selection, to look at extrinsic material that can reveal the purpose or object;

(h) Apply any specific rules of statutory interpretation such as the *ejusdem generis* rule;

(i) Give any statute a narrow rather than a wide interpretation if it covers criminal conduct; and

(j) Consider whether any of the 'approaches' to statute interpretation might assist.

3.6.2 Learning Activity

At this point, it is worthwhile introducing a technique which is essential to a thorough application of a principle of law to a given fact situation

(whether in statutory interpretation, contract or whatever). It is important to be able to translate knowledge of a legal principle (eg *ejusdem generis* rule as outlined above) into an ability to apply it to given fact situation.

The *ejusdem generis* rule states:

When a series of particular words are followed by general words those general words are limited by being read in the context of the particular words preceding them; as a consequence their generality is read down as they confined to the same genus as the particular words.

Now, what are the **essential elements** to establish whether it applies to, and therefore has legal consequences for, the meaning of general words?

- Is there a series of particular words?
- If so, is the series followed by general words?
- If so, can the particular or specific words be classified as having a genus?

If the answer to all three questions is yes, then the legal consequence is that the meaning of the general words must be read down to fall within that genus.

This may seem an obvious process given the rule as stated above. However, you should develop the technique, once you have understood a legal principle, of translating it into a logical and thorough series of questions in order to apply it to a fact situation. (This technique will be referred to again in the topics concerned with Contract.)

4.0 CONCLUSION

Interpretation of the legislation is the function of the Court. Where the language is idea, the literal approach applies. However, where it is vague, the citizen has a right to proper interpretation, using golden rule, mischief, purposive, *ejusdem generis* rule or other approaches.

5.0 SUMMARY

Legislation is often couched in technical language. A situation may also arise where it is not certain whether or not a statute or regulation extends to a particular case, to assist the court, a number of principles, approaches and rules have been adopted over the years. Interpretation is wide or narrow. Approach ranges from Literal, Golden, Mischief, purposive, to *ejusdem generis* rules approaches or other. The Court may just read the Acts as a whole, resort to internal or external aids. It is a matter of judicial function.

6.0 TUTOR-MARKED ASSIGNMENT

The Law of Lagos State provides that "a person shall be guilty of an offence who throws down, drops or otherwise deposits and leaves any litter in or on any public place"

Section 2 of the law defines 'Litter' to mean 'bottles, tins, cartons, packages, paper, glass, food or other refuse or rubbish and 'public place' is defined to mean 'any street, road, lane or thorough fare'

Prince Waidi parked his motor vehicle on a reservation strip separating two carriage ways and drained a quantity of oil from the sump of his motor vehicle leaving a pool of oil on the carriage way.

Prince Waidi has been arrested and prosecuted under the law. What rules of statutory interpretation would be utilized by the prosecution to successfully prosecute Prince Waidi?

7.0 REFERENCES/FURTHER READINGS

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UNIT 3 CRIMINAL AND CIVIL PROCEDURE

CONTENTS

1.0 INTRODUCTION

Before commencing a review of the steps associated with criminal procedure, it is useful to look at the role of the criminal trial as it gives us an insight into criminal law generally.

The purpose of the trial is to determine whether the accused is guilty of the offence as charged. As such, it is not a place for the victims to have the floor to air their grievances and this does cause some victim to feel cheated by the trial process. The prosecutor makes the decisions about what evidence to call and how the State case will proceed. There is no requirement whereby the victim is part of this process. In that sense, the

State or police prosecutor does not appear on behalf of the victim in the same way as the defence lawyers appear on behalf of the defendant. The prosecutor appears on behalf of the community and assumes the responsibility of proving the charges beyond reasonable doubt but essentially this is where his or her duty stops.

When the victim is called to give evidence, it is generally to establish the guilt or innocence of the accused. It is not usually a time when the impact of the defendant's conduct on the victim is dealt with. To the extent that this happens, it is left until the defendant is sentenced, assuming that person is found guilt. An action for criminal compensation can be brought by the victim but again that is a separate process from the criminal trial.

2.0 OBJECTIVE

On successful completion of this unit, you should be able to identify the main steps in a criminal trial.

3.0 MAIN CONTENT

3.1 Definition of Terms

To understand our criminal procedure, it is necessary to know some of the common terms that are used.

3.1.1 Summary and Indictable Offences

Summary offences are of a less serious nature and are ordinarily dealt with by a magistrate. The principal characteristic of these offences is that summary offences are strictly called 'simple' or non-indictable offences that are tried mostly in the magistrate courts. They are offences other than felonies and misdemeanours and may be punishable with imprisonment for less than six months.

However, the term 'summary' is often used within the legal system to indicate that the matter can be dealt with summarily and that expression is used here. Examples of summary offences are traffic matters, contraventions and the like.

3.1.2 Indictable Offences

As you would expect, are of a more serious nature. These are offences which on conviction may be punished by a term of imprisonment exceeding two years or by imposition of a fine exceeding four hundred naira, not being an offence declared by the law creating it to be punishable on summary conviction.

The distinction between summary and indictable offences, however, can become blurred because some indictable offences can be dealt with summarily. To complicate the matter, the option to have the matter dealt with summarily varies between the defence and the prosecution according to the offence. However, in **all** cases the exercise of the choice may be overridden by the presiding magistrate. The types of indictable offences that can be dealt with summarily are stealing, damage to property, minor assault, and unlawful use of a motor vehicle.

3.1.3 Felonies and Misdemeanours

A felony is any offence which is declared by law to be a felony or is punishable without proof of previous conviction, with an imprisonment for three years or more or by death.

A misdemeanour is any offence which is declared by law to be a misdemeanour, or is punishable by imprisonment for not less than six months but less than three years.

There is a distinction between felonies and misdemeanours. The difference is more historical than real.

Generally speaking, a misdemeanour is less serious than a felony but again, as so often is the case, there are exceptions. Historically, the difference between a misdemeanour and a felony was that a person convicted of a felony forfeited his/her property to the State upon conviction. Also at one point in time, a person who was convicted of a felony was liable to be sentenced to death. These consequences no longer apply.

In Nigeria, the difference mainly surrounds whether it is possible to arrest with or without warrant. Where a misdemeanour is involved, a warrant is required. However, there are exceptions to this rule. (A warrant is a document issued by a Justice of the Peace authorizing certain conduct, such as arrest of a person suspected of having committed an offence or the searching of premises).

Another relevant point of distinction flows from the fact that, in some cases, a public official convicted of an offence may have to vacate office

depending on whether he or she has committed a felony or misdemeanour.

3.1.4 Defendant and Accused

A person who is brought to court to face criminal proceeding may either be described as the 'accused' or the 'defendant'. Generally speaking the term 'accused' is used for serious charges while 'defendant' is a broader term and can be applied to all criminal matters. It is the only term used where proceedings are begun by summons (to be discussed later).

3.2 Means by which Defendant is brought to Court

A person facing criminal charges may be brought to court in a number of ways.

3.2.1 Arrest and Charge

The laying of a charge usually follows an arrest so it is useful to start our discussion with arrest. Broadly speaking, a police officer may arrest a citizen where she or he has reasonable grounds for suspecting that an arrestable offence has been committed. If the offence is a 'felony' under the Criminal Code then no warrant is required (contrast misdemeanours). However, the police can arrest in **all** cases where the person is found in the act of committing the offence. This rule applies to all types of offences.

In carrying out an arrest, the police may use such force as is necessary to effect the arrest but this does not extend to the use of **deadly force** unless the police officer is attempting to prevent the person's escape from custody for a serious offence. If a police officer uses excessive force, then he may be open to a civil claim for assault.

When making an arrest, the police must advise that an arrest is being made and the reason for making the arrest. However, these requirements may be satisfied if the person making the arrest acts reasonably in the circumstances. It may, for example, be obvious that a person is being arrested and the reasons for the arrest in which case, strict adherence to the procedure may be dispensed with. If, a police officer takes a person into custody after being fired upon by the arrestee then it would be clear why an arrest has been effected and presumably the reasons for it.

3.2.2 Private Citizen Arrest

A private citizen can effect an arrest, but unlike the police who can arrest where they have reasonable grounds for **suspecting** that an offence has been committed, the private citizen can only arrest if an offence **has** been committed. Any person (including police) who makes an unlawful arrest and detains another may be sued for wrongful or false imprisonment and possible assault. Wrongful imprisonment is a civil action based on a trespass to the person, and, if established, allows the recovery of compensation. Having said that the police may be liable to a claim for false imprisonment, there are some statutory provisions, which relieve police from civil liability.
Nevertheless any person, but especially a member of the public, should be certain of his/her ground before making an arrest. In Nigeria, freedom from arbitrary arrest is regarded as a cornerstone of her criminal system.

3.2.3 Charging the Defendant

Once the arrest has been made and the person taken to the police station, the precise terms of the charge will be formulated and read to the defendant. The charge will indicate the offence and briefly what it is that the defendant is accused of. Additional charges may be added at a later date, either while the defendant is in custody or in court. You will be familiar with the practice of the police charging a person with a 'holding charge' (such as firearms offence) while they investigate more serious charges. This practice no longer obtains in some states of the federation.

The impression should not be given that an arrest is a precursor to a charge being laid in all cases. It may be that the defendant voluntarily goes to the police and confesses to a crime, as where a man came to the Police Station, with a cutlass soaked with blood and said he has killed his wife; and took the police to the scene.

(a) First Court Appearance

Where a person has been arrested, the arrestee must be brought before the court promptly and this obligation lies on the person making the arrest. The law differently provides that the arrestee must be brought before the court 'forthwith'; 'soon as practicable' or 'reasonably practicable'. The contribution stipulates 24-48 hours within which an accused must be brought to court. These provisions reflect the common law requirement that a person cannot be imprisoned except on the authority of a court. In Nigeria, as in most common law countries, much emphasis is placed on this fundamental principle, unlike in some other countries where a person may be detained in prison without being brought before a court for months and sometimes years.
Should the police, for example, fail to bring the arrestee to court within the required time then the person may be regarded as unlawfully

detained. This may mean that any confession given during the unlawful detention will be inadmissible in court. In the Australian case *of Williams (1986) 161 CLR 278* the police arrested a defendant at 6am, questioned him from 11am until 8.30pm and did not take him to the Magistrate Court until the following morning. The person was held to have been unlawfully detained and the confessional material obtained during that period was inadmissible. In these types of cases the police also have themselves open to a claim for false imprisonment. Of course, what is reasonable will vary with the circumstances such as whether the arrest is effected on the weekend, or whether in the urban or remote parts of the federation.

The position as stated above is varied to a limited extent for in certain situations, the police have power to detain to carry out further investigations prior to a court appearance.

When a defendant has been brought before the court, it is rare for the case to be dealt with immediately. The police usually require more time to prepare their case and the defendant may wish to obtain legal assistance. When the matter is adjourned the defendant may be remanded to appear on the next occasion. Whether they are remanded in custody will depend on any application for bail, which is dealt with now.

(b) Bail

Bail is the release of an accused person from the custody to appear in court at a later date. Strictly, it is the contract whereby a person is released from the custody of the police to the custody of persons known as sureties. In that sense, the sureties take on the responsibility to ensure the defendant's reappearance in court and to this end the sureties pledge a certain sum of money or assets which are forfeited if the defendant fails to appear. Depending on the severity of the offence, the defendant may be released on their own recognizance (undertaking) which may or may not require a cash security. This will be a matter for the court to determine.

(c) Criteria for Granting Bail

Is there a presumption in favour of granting bail? Based on the principle that a person is innocent until proven guilty, there seems to be such a presumption. The presumption can be rebutted and bail refused. But literal interpretation of the provisions by the Criminal Procedent Code and the Criminal Procedure Act seem not to support such presumption. However, the matters which will occupy the court in this inquiry are:

- Prior convictions for the same offence;
- Risk of failure to appear;

- Protection of the public and possibly protection of the accused;
- Seriousness of the offence;
- Character of the accused; and
- Stability of home life.

The seriousness of the offence is very relevant for grave crimes; it is for example difficult to get bail for a defendant charged with murder, or armed robbery.

(d) Police Bail

The description of bail as given above refers to the situation where the court grants bail. However, the police also have power to grant bail. Where a person has been arrested and has not yet been brought before the court, bail may be granted by a police officer. The police do not have the power to grant bail for certain serious offences (such as murder). The granting of bail by a police officer involves the signing of an undertaking by the defendant to appear in court on a certain date, the failure to do so constituting an offence.

In some jurisdictions, but not in Nigeria, the arrested person may for some relatively minor cases be required to lodge cash bail, rather than signing an undertaking to appear. In this case, the failure by the arrestee to appear means forfeiture of the bail. Commonly, the amount of *cash bail* set is relatively low and the arrestee/defendant may decide not to appear in court, forfeiting the bail but as no conviction is recorded for the offence this may be satisfactory result all round.

3.2.4 Summons

The other method of bringing a person before the court is to **summons** the defendant. Here, a Justice of the Peace may issue a summons on the written complaint that a person is suspected of having committed an offence. The complaint will most commonly be made by a police but can be laid by others who have the responsibility to administer various statutes such as taxation, social security and local government laws etc.

The summons is served on the defendant and requires her/or him to appear in court on the date referred to in the summons. A summons will be used for less serious offences or where the relevant authority believes that it is likely that the defendant will voluntarily appear in court on the date in question.

3.3 Summary Hearings

As mentioned above simple offences and some indictable offences are dealt with by a Magistrate sitting alone. The hearing proceeds in a similar way to a trial as in the higher courts. The Magistrate deals with both questions of law and fact and must be satisfied beyond reasonable doubt of the guilt of the defendant. A Magistrate has the ability to impose a sentence of up to two years imprisonment and fines to an amount set by the statute under which the offence is constituted, depending on the grade of the presiding Magistrate.

One feature of summary hearing in certain jurisdictions is that in many cases the matter can be dealt with in the **absence of the defendant.** This is in contrast to the practical in Nigeria where the defendant must be present and if he or she does not appear then a warrant is issued for his/her arrest.

A summary hearing is not the same as a hearing commenced by summons. As noted above, a summary hearing is held for all simple offences and for some indictable ones, while a summons is simply the means by which the defendant is brought to court.

3.4Committal Hearing/Preliminary Inquiry

This is the practice whereby every criminal proceeding (except in a few situations) commences in the Magistrate Court. If the case is triable summarily, it goes no further them that court. But if it is an indictable offence, which is not dealt with summarily, such as murder or rape, then it goes through the committal stage/Preliminary Inquiry.

The role of the Magistrate is to decide if there is a *prima facie* ('on the face of it') a case for the defendant to answer. The decision by a magistrate to commit an accused for trial does not mean there is a finding of guilt – just that there is sufficient evidence to warrant sending the case to the superior court. Apart from serving as a filter on cases going to the superior courts, the purpose of the committal is to give the defendant a chance to find out what the case is against them. Commonly, the defendant's counsel cross examines the prosecution witnesses but rarely do they call witnesses of their own.

Committal/Preliminary Inquiry also gives the defence a chance to argue that as a matter of law, the evidence adduced by the state would not, or is unlikely to, secure conviction.

3.4.1 Criticisms of the Committal Hearing/Preliminary Inquiry

Witnesses are required to give evidence twice, i.e in the preliminary inquiry and in the trial itself, and this is particularly distressing for a victim of the crime such as in a rape case.

After the committal, the defence knows precisely what the persecutor's case is, but the prosecutor may have no idea of the defence case.

There is no general requirement in the Criminal Justice System for the defendant to advise the prosecutor of their defence. This is in contrast to civil proceedings where each party has to plead its or his/her case.

Note one exception to this privilege of a defence of non-disclosure. There is the rule that the defence must advise the prosecution if it proposes to use an alibi at the trial. The substance of the alibi has to be disclosed so that the Prosecutor can make their enquiries about the strength of the alibi.

3.5 Coroner's Inquest

A person may be committed for trial by a coroner following an inquest into a suspicious death or a death involving a fist. The coroner is a Magistrate exercising coronial functions. He has the power to commit a person to the Magistrate Court if he or she is satisfied that there is sufficient evidence to do so.

3.6 Trial Process

The trial process is as follows:

The court is constituted; the case is called; the accused is called. His charge is read; he elects trial where appropriate and pleads.

The prosecutor presents the evidence. Witnesses are called one after the other, led in evidence in chief, cross-examined and re-examined. The defence may call its own witnesses who are similarly led in examination and re-examined. At the conclusion of both the prosecution and defence, the counsel for each side addresses the court. The Magistrate is the Judge of the facts. He applies the law to the facts as found by him, decides whether the defendant is innocent or guilty.

If the defendant is convicted, the courts hands down the sentence, after first hearing submissions from the Prosecutor and the defence. At this stage, and for the first time, any prior convictions of the defendant are made known to the court. Note the four aims of the Criminal Law: retribution, deterrence, incapacitation and reformation and rehabilitation.

If the courts find him/her not guilty, she/he is discharged and acquitted.

3.7 Civil Processes

(Source: Creators Syndicate Inc. Reproduced with permission.)

3.7.1 Outline of Civil Procedure

The following is a guide to the steps which form part of civil procedure. It is not complete and is intended to provide you with a general insight only for the purposes of this unit into the manner in which a civil claim may proceed.

To begin with, you need to be aware of the meaning of the terms **plaintiff, claimant, defendant, appellant, respondent.**

Plaintiff:} A person who institutes a civil legal action.
Claimant}

Defendant: A person against whom is brought an action, information or other civil proceedings (other than a petition, summons etc see Respondent); also a person charged with a minor offence.

Appellant: A person who brings an appeal.

Respondent: A person against whom a petition is presented, a summons issued or an appeal brought.

3.8 Commencing Proceedings

To commence a civil claim the plaintiff or a claimant usually through his or her legal representatives, must file a document in the court having the appropriate jurisdiction to hear and determine the claim. This is called commencing proceedings. The traditional name for such a document in the High Court is a writ. The document may also be called a 'claim' in the District or Magistrate Courts.

(a) Service of Process

A copy of the document commencing proceedings, bearing the seal of the court, must be served on the defendant. Where the defendant is a natural person, the initiating document is generally required to be given to the defendant personally. The reason is obvious that a defendant must be given every opportunity to know what the claim against him or her is and be able to defend the claim.

3.9 Defence

If the defendant wishes to defend the claim then he, she or it must file with the court and serve on the plaintiff or claimant, a document which is called a 'notice of intention to defend'. This sets out the basis on which the defendant will argue that he, she or it is not liable to the plaintiff on the claim. A time period is specified in the initiating document within which the defence must be filed. The statement of facts set out in the plaintiff's documents on which the claim is based and the responses to those allegations and further allegations made by the defendant in their defence are called the **pleadings.**

Pleadings are important for a number of reasons. They clarify the issues in contention between the parties and so allow each party to prepare their case knowing that new issues cannot be brought up at the hearing. Pleadings restrict or limit the issues and accordingly limit the evidence which can, or has to be brought, before the Court. For example if one party admits a certain fact in the pleadings (e.g. that they signed a contract) then the other party is not required to prove that fact at the hearing.

If the notice of intention to defend is not filed within the time limit required, then a judgment in default may be entered against the defendant who loses the opportunity to defend the claim.

3.10 Interlocutory Proceedings

Provided a defence has been filed then the litigation may follow a number of intermediate steps between the close of pleadings and the trial. The purpose of these is to ensure that each party is acquainted with the strength of the case against them. It includes requiring answers to questions about facts in contention, called **interrogatories;** and also inspecting the documentary evidence of the other side, **discovery.** It now frequently includes compulsory conferences and meditations designed to resolve the matter without the need for a trial.

Sometimes interlocutory proceedings may be used by one party to delay or frustrate the course of litigation.

3.11 Trial

The basic procedure for a trial is dealt with under the heading **Evidence** later in this study guide.

3.11.1 Execution

After judgment has been delivered or signed and assuming the defendant does not pay up, the plaintiff can execute on the judgment. This may be done by commencing bankruptcy proceedings, by an enforcement warrant redirecting earnings (garnishee order) or by having the Sheriff levy execution against the defendant's goods or land.

3.11.2 Miscellaneous

The above steps are only a broad outline of what is involved. A myriad of steps might intervene e.g. arguments about jurisdiction of the court, about whether the pleadings are proper, about costs and so on. It is not uncommon for a defendant to pay some money into court which gives the plaintiff the choice of taking the money out and resolving the action or proceeding to trial. In the latter case if the plaintiff is awarded less than the amount paid into court he/she is not entitled to costs incurred after the date of the payment in.

4.0 CONCLUSION

Criminal and Civil Procedure prescribed the steps for having a right or duty judicially enforced whereas substantive law defines the specific rights or duties *per se*. but for the majority of civil action are commenced by a writ of summons. Others are commenced either by originating summons, application or petition. The Criminal Procedure is mainly regulated by the criminal Procedure Act, the Criminal Procedure Code and the Magistrate Acts. Other series of rules of Criminal Procedure are the Supreme Court Rules and High court Rules.

A Court may promote reconciliation and encourage and facilitate a settlement of disputes

If we lived in the Garden of Eden, at any rate in its early stages, the law would work in the way visualized by King Ludwig of Bavaria, the patron of Wagner, when he opened a new court house in Munich. He said, as he cut the tape: 'We sincerely trust and expect that all litigants who enter through these portals will emerge successful.'
Alas, soon afterwards – and perhaps not surprisingly – he went mad. The reality is unfortunately epitomized by the wise old judge – by then

slightly cynical – when he said: 'I sit here every day and administer what one side calls justice.'

There is no way out of this dilemma…

(Source: Kerr 1981)

5.0 SUMMARY

You have learnt some important legal terms like single offence, misdemeanour, felony. Summary and indictable offence etc. Also important is the distinction between civil and criminal procedure and between Police and Private Powers of Arrest. You should now be familiar with court process itself and be able to rehearse it.

1a. During a political demonstration, a police officer approaches a press photographer from behind, take hold of him around the neck and places him in a police wagon and then takes him to the police station. The Police officer had been concerned about what he and other police felt was biased reporting of such demonstrations in the past and sought to remove the photographer from the scene. Nothing was said to the reporter at the time of his detention.
What duties has the police described above breached and what might be his civil liability?

b. Assume the detention, described above took place in Ibadan at 8am on a Friday and the photographer was not brought before the Magistrate Court until Monday morning on a charge of disorderly conduct. Form a procedural point of view that might be the ramifications for the police?

c. Why should a private citizen be careful when arresting someone?

2a. Bob, a single man and a farmer, who has lived all his life in a particular area, is charged with the murder of a neighbour over a dispute concerning ownership of cattle. Assume Bob has no previous convictions. What considerations would a court take into account in hearing a bail application and what are Bob's chances of success?

b. what advantage might there be to person charged with a minor street offence such as obscene language, having a reasonable amount of cash with them when arrested?

6.0 TUTOR-MARKED ASSIGNMENT

1. By what means may the following be brought before the Court
2. The presumption of law is not in favour of Bail. Comment.
3. Forms of actions have long been buried but they still rule us imperiously from the rave. Discuss.

7.0 REFERENCES/FURTHER READINGS

Kerr: M. Boyer Lectures, 1984

LFN: Criminal Procedure Act,

LFN: Criminal Procedure Code

LFN: Magistrate Court Act

The Supreme Court Rules

The High Court Rules

UNIT 4 LAW OF EVIDENCE; ADJUDICATIVE AND NON-ADJUDICATIVE PROCESS

CONTENTS

1.0 INTRODUCTION

In this Unit, we shall learn about Law of Evidence as well as other processes of dispute settlement. Law of Evidence is part of adjudicative law, that part of Law of Procedure which, with a view to ascertaining individual rights and liabilities in particular cases, decides:

i. what facts, may and what not, be proved in such cases
ii. what sort of evidence must be given of a fact, which may be proved.
iii. by whom and in what manner the evidence must be produced by which any fact is to be proved.

Only an outline of law of evidence is attempted here before we proceed to other adjudicative and non-adjudicative forms of settling disputes.

2.0 OBJECTIVES

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

- describe in broad outline the different means by which disputes are resolved and in particular the difference between adjudicative and non-adjudicative methods
- state how the issues in dispute which must be determined by a court can be identified prior to the hearing commencing
- describe the basic procedure involved in civil litigation
- list the kinds of evidence which will be accepted by a court and who may give such evidence
- distinguish between the criminal and civil onus of proof.

3.0 MAIN CONTENT

SECTION A Law of Evidence

Evidence

There are four main areas with which the law of evidence is concerned:

- the **kind** of evidence which will be accepted by a court;
- the **amount** of evidence which will be required by a court;
- the **manner** in which evidence is presented to a court; and
- the **persons** who may or must or may not give evidence.

3.1 The Kind of Evidence

Under this heading, evidence may be classified in a number of ways:

- Between direct and circumstantial. Most of you will be familiar with this distinction. **Direct evidence** is evidence of the facts in issue themselves such as the fact that a witness saw one person stab another with a knife. **Circumstantial evidence** is an evidence of facts which are not in issue but from which a fact in issue may be inferred such as the fact that a person was seen running from the vicinity of a murder scene with blood on his clothes.

- Between original and hearsay evidence. **Original evidence** is that which a person sees or hears him/herself: **hearsay evidence** is evidence of what someone else has said about an event. In general terms, hearsay evidence is not admissible in a court. It is one of a number of exclusionary rules of evidence designed to eliminate evidence which might be prejudicial to a party.

- Between oral, documentary and real evidence. **Oral evidence** is the most common form of evidence. Here a person is called as a witness and is asked questions. The advantage of this process is that a court

can evaluate a witness because of the manner in which the witness gives evidence.

3.1.1 Documentary Evidence

Involves the production of documents for the court's inspection.

3.1.2 Real Evidence

Consists of producing objects for inspection other than a document such as a knife, clothing etc. Perhaps best listed in the category of real evidence is the procedure where judges and the jury for example visit the scene of the alleged crime to make an assessment of the site themselves. This procedure frequently occurs in cases involving motor vehicle accidents, where the physical make-up of the road may be said to have caused or contributed to the accident. In this case, the jury may well view the scene to make a judgment themselves.

3.2 The Amount of Evidence

This area of the law of evidence is essentially concerned with the amount of evidence one party has to adduce before satisfying the tribunal of the issues in contest before it. With civil cases, the plaintiff or claimant carries the onus of proof and must prove his/her case on the **balance of probabilities.** With criminal cases the prosecution carries the **onus of proof** and must prove the guilt of the accused beyond reasonable doubt. In other words, the onus is heavier in criminal than in civil cases. The level of proof that a plaintiff or prosecution must reach to discharge their onus, that is balance of probabilities and **beyond reasonable doubt,** is referred to as the standard of proof.

When evidence generally is being considered by a court, there are two questions which frequently arise. Firstly, is the evidence **admissible?** – that is, can it be received by the court at all. There are a large number of rules which exclude evidence of one kind and another such as the hearsay rule. Secondly, if the evidence is admissible, what **weight** can the court place on the evidence. Relevant factors here might be whether it is circumstantial, whether witnesses are biased, whether their memories are vague and so on.

3.3 The Manner in Which Evidence is presented

The form of trial in Nigeria is known as the adversarial or accusatorial system which involves the presentation of facts by the responses of witnesses to questions. The witnesses are called to give evidence by the parties to the litigation and are questioned by the legal representatives of

those parties or by the parties themselves. The function of the judge is to act as an adjudicator rather than an additional inquisitor.

In United Kingdom where cases are tried before a judge and jury, the function of the jury is to decide questions of fact while the judge adjudicates on matters of law. In Nigeria, Judges decide both questions of facts and matter of law. Judges can and do ask questions of witnesses themselves but if there is excessive interference by the judge there may be grounds for appeal.

A case will be opened by the plaintiff or the prosecutor who briefly outlines the nature of the case and the evidence to be called. Generally, the party which bears the burden of proof, the plaintiff or the prosecutor, has the right to begin calling witnesses.

Whoever calls a witness elicits answers to the questions by a process known as **examination in chief.** There are a number of rules regarding the manner in which examination in chief may be conducted. The most important is the fact that leading questions cannot be asked. Leading questions are those which suggest the answer or assume the existence of facts which may well be in dispute. An example of a leading question would be 'After you saw the car go through the red light did you follow it?'. This question assumes that the car went through the red light, a matter which may well be in dispute.

At the conclusion of the examination in chief, counsel for the other party has the opportunity to **cross examine** the witness. The rules of cross examination are more relaxed than with examination in chief and in particular leading questions are permitted. The cross examiner is, in certain circumstances, entitled to question the witness on matters seemingly unrelated to the main issues in order to attack the credit of the witness.

After the cross examination is finished the other party then has a right to **re-examine** the witness. This right is limited to asking non-leading questions about matters arising out of cross examination.

After the plaintiff or prosecutor has no more witnesses to call, then the defendant may call the witnesses for the defence case. The same rules apply as to the mode of questioning.
If the defendant calls evidence then the defendant addresses the judge first, followed by the plaintiff or prosecutor. Otherwise the counsel for the plaintiff or prosecution has the right to give the final address.

3.4 The Persons Who May or Must Give Evidence

Again, there are a number of exclusionary rules which govern this area. Some of these are:

i. Only experts in a certain field can give evidence based on an opinion. Otherwise a witness is not entitled to give evidence beyond what he/she sees or hears.

ii. Certain witnesses or communications are privileged such as the communications between solicitor and client. In some instances, the government can claim privilege of, say, defence secrets.

Section B

3.5 Other Adjudication and Non-Adjudicative Processes of Settling Disputes

3.5.1 Arbitration

i. You may be familiar with the arbitration process that is often associated with the resolution of industrial disputes. This is not the type of arbitration we are concerned with here, but rather with what is sometimes called commercial or private arbitration.

ii. There are three main differences between commercial arbitration and litigation;

iii. With arbitration, the parties must agree to submit the dispute to arbitration. They may do that after the dispute has arisen or (more commonly) they may do it in advance by inserting a clause in their contract to that effect.

vi. In an arbitration, the parties choose the arbitrator. This means that it is possible to use a person who is skilled in the area in dispute.

v. The arbitration process does not need to follow a formal hearing process such as will be found in litigation. The rules of evidence are more likely to be relaxed and there are no detailed pleadings as are required in litigation. Nevertheless, depending upon the arbitrator and the parties, the informality of arbitration can be quickly lost. Not infrequently, barristers are appointed as arbitrators and they tend to run the arbitration hearing more like a court case.

One other point should be made. Originally, arbitration was seen as less costly than litigation. Nowadays this advantage is not heavily relied upon because so often the parties use a similar battery of lawyers as they

would in litigation and, what's more, the parties to arbitration have to pay for the arbitrator.

3.5.2 Non-Adjudicative Processes

Dispute resolution processes can be seen along a continuum from private negotiation between the parties all the way to litigation. Moving along this continuum, changes in three factors may be observed.

Firstly, control passes from the disputants to the third party. In private negotiation, the parties control the process itself, the content and the outcome. 'Content' refers to the issues that can be discussed during the application of the process and 'outcome' refers to the final result of the application of the process. As you move further along the continuum, more control is given each of these to the third party who is intervening to help solve the dispute. A mediator controls the process, but not the content or the outcome. Whereas in adjudication, the rules of procedure and evidence ensure that the judge or arbitrator controls the process and content. As the decision-making power is vested in either the judge or the arbitrator they also control, and indeed impose, the outcome.

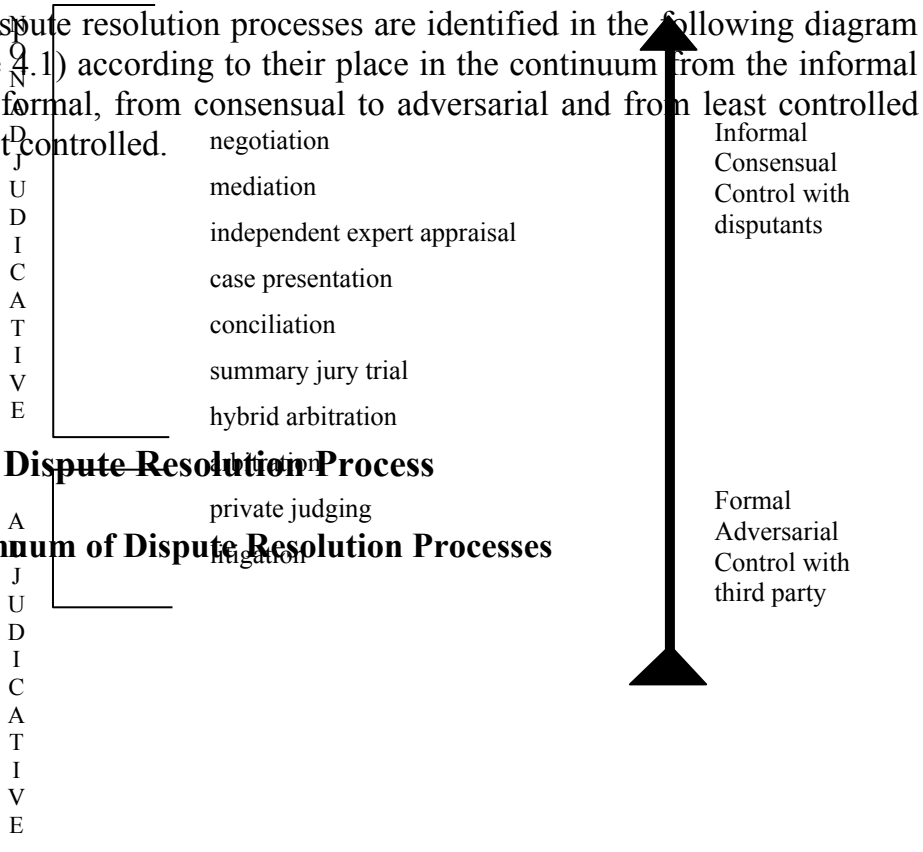
Secondly, the processes move from a consensual mode of dispute resolution, where the disputants attempt to agree on a solution that is acceptable to all, through to an adversarial mode where the decision is imposed by the third party in arbitration and in adjudication.

Thirdly, the further one moves along the continuum the more formal the processes become.

The dispute resolution processes are identified in the following diagram (figure 4.1) according to their place in the continuum from the informal to the formal, from consensual to adversarial and from least controlled to most controlled.

3.5.3 Dispute Resolution Process

Continuum of Dispute Resolution Processes



3.5.4 Advantages of ADR

The commonly given reasons for using these non-court processes may be listed as follows:

(a) **Quicker** – Settlements are usually achieved within weeks or months of starting the process rather than within months and years as can occur within the adjudicative processes.

(b) **Cheaper** – With settlement being achieved earlier, there are usually less legal fees, witness expenses and fewer lost business opportunities whilst management, time and business finance are set aside to fight the litigation.

(c) **Informal** – The rules of procedure and evidence of the adjudicative processes are often incomprehensible to non-initiates, but with a consensual process the disputants can organize meeting times and places that are convenient to them and can organize rules for the process that suit their particular requirements. They can emphasize what is important to them regardless of its legal relevance. Consequently, the disputants have a better understanding of the process and, accordingly, are able to contribute more. They are more in control of the resolution of their own dispute.

(d) **Enhances Business Relationship** – Because the informal processes are consensual and strive for solutions that suit the parties rather than those necessary according to the letter of the law, often all the parties come away with solutions that satisfy their wants or needs. This enhances business relationships between them. Solutions that people agree to themselves and which they feel have advantaged themselves are usually more readily adhered to than those that have been imposed. If one side wins and the other side loses, as in the adversarial processes, usually the loser feels resentment and has no commitment to the solution but only adheres to it because of the fear of punitive action. This situation does little to enhance the business relationship between the parties.

(e) **Wider Remedies** – As the informal processes are not limited to the remedies provided by the law or legal system, a wider range of remedies or solutions may be contemplated and implemented by the disputants. For instance, whilst renegotiation of the whole contract is not a remedy a court can impose, informal processes do allow for this. This is often the most appropriate remedy since most disputants in a commercial dispute have an investment in seeing all parties continue in business, and being profitable. There is a mutual interdependence among businesses which can be enhanced by the informal processes.

(f) **Confidentiality** – As these processes are private they keep the disputants from adverse publicity. Within the process, communications, including those with the third party, are confidential and this encourages more honest exchanges.

3.5.5 Main Types of ADR

(a) **Negotiation** needs no introduction except perhaps to say it is used in this instance to indicate negotiation without the assistance of a third party.

(b) **Mediation** is a significant growth area in ADR in Nigeria today, especially in court-connected schemes. There are many variations of procedure in mediations. However, the usual concept of a mediation is a structured process in which a neutral third party (mediator) helps the parties to negotiate their own solution to their dispute by assisting them to systematically isolate the issues in dispute, to develop options for their resolution, and to reach an agreement that accommodates the needs of the parties. This agreement reached in mediation is not legally binding. However, the parties normally redraft the

agreement into a binding contract after receiving advice from their respective lawyers, accountants and/or other professional advisors.

Usually, the parties voluntarily enter into mediation. 'Mandatory' mediation does not exist, however. Nonetheless, the parties are not obliged to come to an agreement and either party may withdraw at any time.

In broad terms, the parties control the content and outcome whilst the mediator controls the process. The mediator may not impose an outcome on the parties. The mediation session usually proceeds in an extremely informal atmosphere. The parties, if they wish, may be represented by another, such as a lawyer.

Unlike negotiation or mediation, with **independent expert appraisal,** a third person is called in to give their view of the matters in dispute. Unlike arbitration, however, the process is informal and speedy and most importantly the parties are not bound by the expert's conclusion. This process is often very useful where technical issues are in dispute.

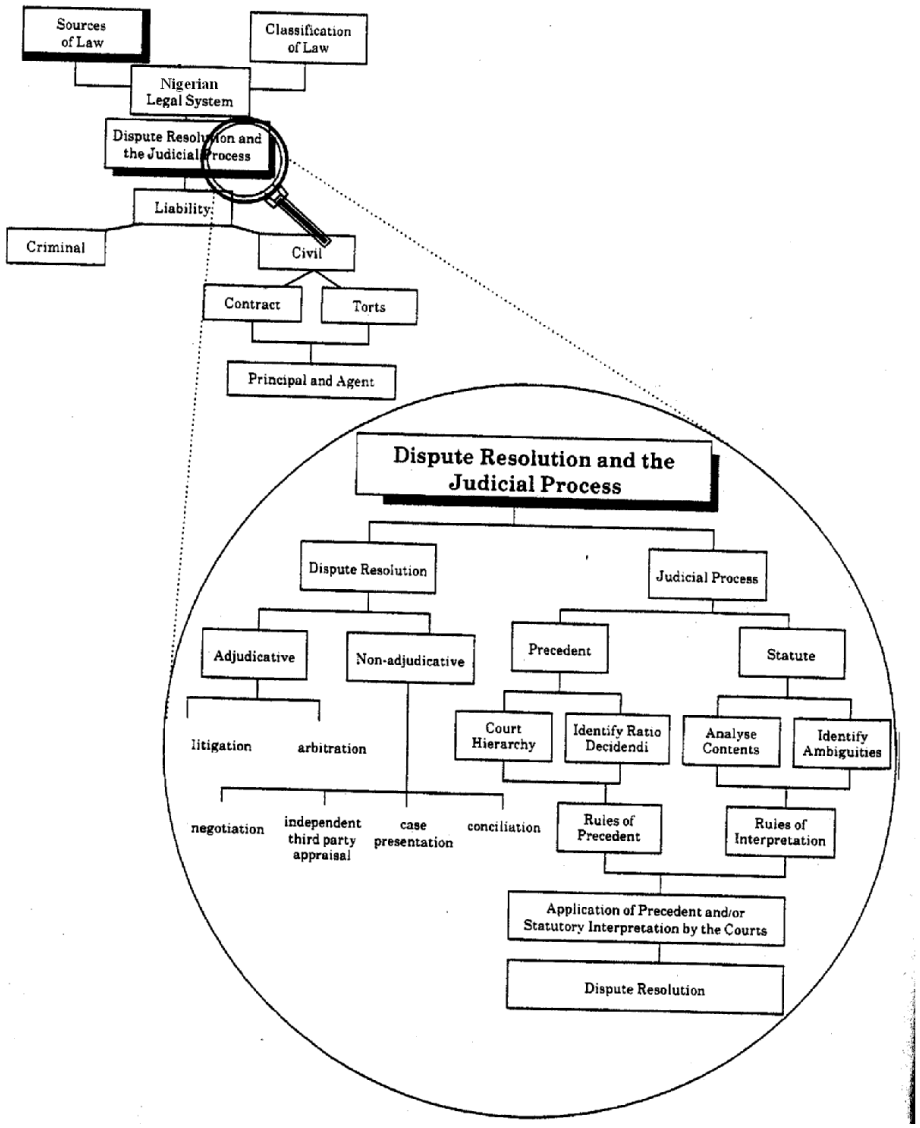
Case Presentation involves each side of the dispute making submissions in. The submissions may be made by lawyers or other representatives of each disputant. Having heard the presentation, are given opportunities to negotiate a settlement of the issues.

(c) **Conciliation** is used in two primary senses in the ADR field in Nigeria:

(i) in a general sense to mean any ADR process whereby a third-party's assistance to the disputants includes the making of a non binding recommendation. In this sense, conciliation still includes mediation and appraisal.

(ii) in a more limited context of bringing the parties together to assist them to use a particular ADR process. The conciliator provides the facilities for the settlement process, such as the premises and support services, but is not involved in the substantive issues of the dispute.

3.6 Overview of Dispute Resolution and the Judicial Process



Five methods of dispute resolution (including court-based) help us to look at the way lawyers' reason and the process adopted by a court in reaching a decision in a given situation.

In the urban areas, dispute resolution is almost entirely taken up with litigation. This is because synonym bonds are weak and most times, people have looked to the courts to resolve disputes. In the rural areas, dispute resolution is still largely informal. In recent times and in both urban and rural sectors, potential litigants, and even lawyers, have turned to other means of resolving disputes. They have become concerned at the cost of litigation (both in human and money terms), the time taken for resolution, the fact that even a successful outcome in court does not always solve the fundamental dispute and most importantly, that an extended court battle invariably destroys the business relationship between the parties. Branded 'Alternate Dispute Resolution' or ADR this movement has continued to gather force and is

increasingly found as an adjunct to court processes themselves. The fundamental difference between ADR and litigation is that the former is non-adjudicative (the parties resolve the dispute themselves) while the later requires a third party (the judge) to adjudicate on the issue. Arbitration falls into the same category as litigation. In this unit it is proposed to divide dispute resolution along those lines, i.e. adjudicative and non-adjudicative systems. In the former we examine the main steps involved in civil litigation together with a brief look at arbitration. In the non-adjudicative field a broad outline is given of the main types of processes, with some more attention being paid to mediation.

4.0 CONCLUSION

We have talked about judicial process in this module. The idea is to enable you to grasp the principles of legal reasoning. This will assist you in your study of substantive branches of law, such as the law of contract and torts, which you will do presently. It is also necessary to assist you to identify legal problems and in some situations to resolve them.

What you must understand though, is that the legal process is a rather inexact science or as some people would describe it, an 'art'. The skills involved are acquired by lawyers over a period of time (often after they leave law school) so in the time available in this course you are not expected to reach anywhere near the standard of lawyers in legal reasoning. So do not feel too frustrated if you find that you cannot grasp all of the principles or that there is more to the area than you are exposed to. You will appreciate the relevance of the material as we study the Law of Contract and Torts. The study of statutory interpretation equips you much more readily with a life skill. The ability to interpret and apply legislation is becoming increasingly important as so much of our every day life is regulated by government laws and by-laws

> *Let us continue with a fairy tale: It is a very popular fairy tale. The public, and especially newspaper editorialists, hate to see it doubted. Once upon a time, the Parliament made the law. The Judges only interpreted and applied it. The Executive enforced it. In this Kingdom of 'strict and complete legalism' it was considered that the Judge certainly never made new the law should be.*

(Source: Kirby 1984)

5.0 SUMMARY

Evidence may be direct or circumstantial original, oral, documentary, or real. Standard of proof is balance of probability (Civil matters) and beyond reasonable doubts (Criminal matters). That is adversarial or accusatorial. The party calling a witness elicits examination in itself. The other cross examines. The party calling him/her re-examines. Only experts may give expert evidence, and certain evidence may be privileged.

Litigation is not the only way to resolve difference. Arbitration is another. It is also adjudication. Non-adjudicative processes include: Alternative Dispute Resolution (ADR) eg. Negotiation, mediation and conciliation. Do not forget what we said about their differences, merits, and disadvantages.

6.0 TUTOR-MARKED ASSIGNMENT

1. Define the following terms:

a. Respondent
b. Interlocutory Proceedings
c. Execution
d. Service

2. Why are pleadings important in a civil litigation?

3.a. What can a court admit as evidence?
b. What is a reason for excluding hearsay evidence?
c. How is evidence presented in court?
d. What is the standard proof in a criminal trial and a civil trial?

7.0 REFERENCES/FURTHER READINGS

LRN: The Criminal Procedure All/Criminal Procedure Code.

LRN: The Evidence Act.

Study Book. Introduction to Law USQ Australia.

MODULE 3

UNIT 1 CRIMINAL LAW

CONTENTS

1.0 INTRODUCTION

At first glance, you may be wondering why there is a segment on criminal law in a course, which has as its primary focus the study of civil law, especially in a business context. The reasons for including criminal law are various but it was felt that some understanding of the criminal justice system is useful for citizens in general also, there is a clear relationship between business and crime. The increase of 'white collar' and computer crime is one fact of this.

Another reason for this study is the fact that there is considerable overlap between the criminal and civil law system. Two examples of this. If a person assaults another then they will be dealt with in the

criminal courts and may be sued in a civil court for damage for the injuries suffered. In company law there are many examples where a director who contravenes a provision of company law may be liable for a fine or imprisonment and may also be liable to compensate a person who has suffered loss as a result of the actions of the director.

2.0 OBJECTIVES

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

- identify the differences between civil and criminal law
- describe the fundamental characteristics of criminal law
- describe the role of the criminal trial
- distinguish between summary and indictable offences and between arrest and summons
- describe the types of bail and outline the basis upon which bail is granted
- distinguish between *mens rea* and *actus reus*
- explain he notion of strict liability and why it is invoked
- describe the problem of 'white-colar' crime and why the law has difficulty in controlling this type of conduct.

3.0 MAIN CONTENT

3.1 Identifying Features of Criminal Law

3.1.1 Differences between Criminal Law and Civil Law

To gain an understanding of criminal law, it is useful to be aware of the essential differences between criminal law and civil law. Some of these differences will be well known to you but they bear repeating.

- Criminal law involves an action between the State and the citizen usually called the accused or the defendant, whereas the civil action has one citizen suing another. The police usually prosecute criminal offences in the Magistrate Court whereas offences in the higher courts are usually prosecuted on behalf of the state by Attorney General of the Federation or Solicitor General at the state.

- The title of civil cases are the names of one party against another whereas criminal cases in the higher courts are titled the State or R.v(/)…in the Magistrate, it is titled Police or Commissioner of Police v (?); Examples: The State v. Obi R. v. Adeleke; Police v. Haruna; Commissioner of Police v. Phillips etc.

- The **function** of criminal law is to punish the wrongdoer while the civil case compensates the individual who has been wronged.

- There are substantial **procedural** differences between criminal law and civil law. One example of this is the way an action is commenced. In the criminal case the police proceed by way of charge, summons or by arrest while the civil action begins with a claim or writ.

- Another important procedural difference centres on the **standard of proof** which for a criminal trial is proof beyond reasonable doubt while in the civil courts, it is the balance of probabilities.

- Given the different functions of criminal law and civil law, the **outcomes** are different. In the criminal sphere the defendant or accused, if found guilty, is fined or imprisoned (there are other forms of punishment) while in he civil case the successful plaintiff is usually awarded damages or granted an injunction to stop the conduct complained of. There is no attempt to punish the defendant. Quare: example damage.

3.1.2 Definition of Criminal Law

Criminal conduct is defined as the 'acts and omissions as are prohibited under appropriate penal provisions by authority of the State'. (Lord Atkin in *Proprietary Articles Trade Association v Attorney-General Canada* [1931] AC 310, 324). Under this broad definition a vast range of offences are included which might run from murder to failure to wear a seat belt. One might ask whether the latter is a 'crime' in the accepted sense of that word but it is treated as such in this course because it is an omission which is prohibited by the law. Statutory crime or offence is an act or omission which renders the person doing the act or making the omission liable to punishment under a written law: Criminal Code.

Generally speaking, there is a correlation between **crime and moral,** but this is not necessarily so. We all recognize that murder breaches our moral code but what about the failure to wear a seat belt? Conversely, selfishness or adultery may be regarded as immoral but they do not breach the Criminal Code. The lack of absolute connection with our moral code means that it is difficult to predict in advance what is a crime or as Lord Atkin (in the *Proprietary Articles* case) said it cannot be 'discerned by intuition'. This is why the simple question is whether the conduct in question is **prohibited** by the law with penal consequences.

3.1.3 Traits of Criminal Law

Gillies, *Business Law* 8th edition page 110, points to some traits of criminal law:

…its public implication (the public has an interest in State intervention; the matter is too important for the activation of the legal machinery to be left to the individual); it has a victim (there are exception for the generally regulatory offence); and that the extent of the injury inflicted by the wrong is such as to demand punishment….

Both the criminal code and the Companies and Allied Matters Act have created corporate crimes.

3.1.4 Aims of Criminal Law

While still on the nature of criminal law, it is as well to bear in mind the four aims of the criminal law as they effect those convicted of a crime.

- Retribution;
- Deterrent effect;
- Restraint or incapacitation of the offender; and
- Rehabilitation
- Reformation

SELF ASSESSMENT EXERCISE 1

1. Identify three differences between Criminal and civil Law
2. Give examples, not taken form the study guide, of where Criminal Law and moral Law differ
3. When Politicians state that they are "going tough on criminals" which of the aims of criminal law are likely to suffer?

4 what role does the victim play in the criminal process?

3.1.5 Source of Criminal Law

In Nigeria, the source of the criminal law are Statutes. Common law crimes have been enacted into statutory from and Nigeria criminal and Penal Codes have displaced the common law.

3.2 Criminal Liability

3.2.1 Elements of a Crime

A crime is established if:

- the accused has carried out certain **conduct** (known as the *actus reus)*;
- which has an **effect** which the criminal law prohibits; and
- where the act in question is done with a **guilty mind** (known as the *mens rea).*

A murder case illustrates the three requirements. The accused must have done certain acts such as shooting the victim (the *actus reus*) which leads to his death (the prohibited effect) and this must be done with intention to kill, the guilty mind (*mens rea).*

Each of these elements must be present before the crime is committed. It would not be a crime, for example, if the death in question was caused by a soldier in battle during a declared war or if the accused shot the victim by mistake. Nor is it a crime if all the accused person does is admit that they would like to murder another but they take no steps to carry out that wish. In this case you may have the guilty mind buy no *actus reus.*

The terms '*mens rea'* and '*actus reus*' are derived from the common law and are not strictly appropriate to Nigeria which has a Criminal Code and a Penal Code. Nevertheless the terms are retained here because of their widespread use in texts on criminal law and because the elements they represent are found in Code provisions. We shall now look at the terms in some more detail.

(a) *Actus Reus*

The *actus reus* is often referred to as the collective external ingredients of the crime or the physical conduct that is prohibited. Typically, the *actus reus* involves **positive** acts such as stealing another's property. However, it can involve an **omission,** where there is a **duty** to act. An example of this type of crime is the failure of parents to adequately feed a young child.

There are two main elements of the *actus reus:* the conduct must be **voluntary** and the prohibited conduct must **cause** the result in question.

(b) Conduct Must Be Voluntary

The conduct of the defendant must be voluntary in the sense that it is

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

(c) Causation

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

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

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

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

attempted murder.

(d) *Mens Rea*

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

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

3.2.2 Strict Liability

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

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

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

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

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

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

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

3.2.3 Defences to Strictly Liability

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

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

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

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

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

3.2.4 Absolute Liability

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

3.3 'White-Collar' Crime

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

3.3.1 Definition of 'White-Collar' Crime

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

3.3.2 Controlling White-Collar Crime

Four problems may be identified in this area:

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

(a) Having the Right Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Keeping up with Technology

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

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

4.0 CONCLUSION

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

5.0 SUMMARY

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

6.0 TUTOR-MARKED ASSIGNMENT

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

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

7.0 REFERENCES/FURTHER READINGS

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

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UNIT 2 TORTS

CONTENTS

1.0 INTRODUCTION

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

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

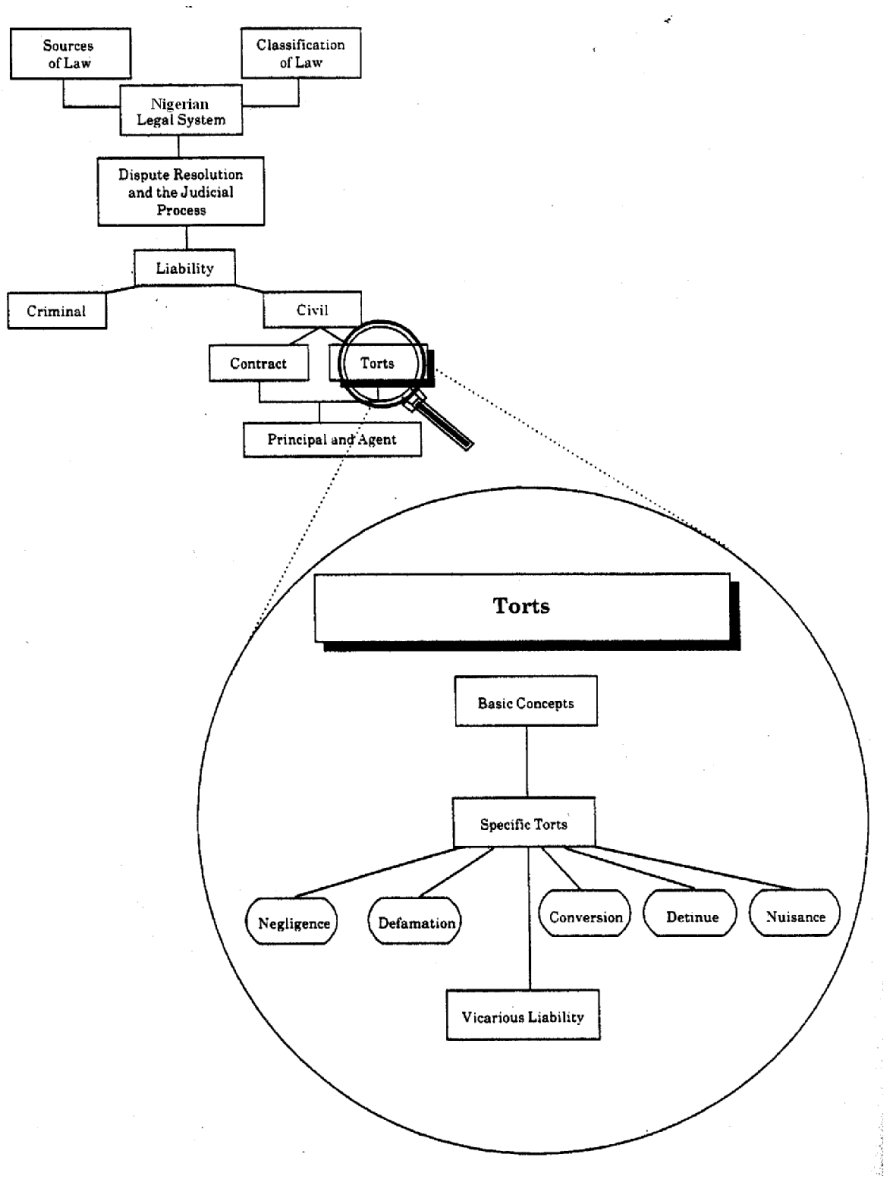
2.0 OBJECTIVES

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

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

3.0 MAIN CONTENT

3.1 Overview of Torts



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

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

3.2 Basic Concepts

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

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

3.2.1 Fault

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

3.2.2 Damages

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

3.2.3 Causation

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

3.2.4 Policy

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

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

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

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

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

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

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

employer will not pay the damages out of his/her own pocket; they carry compulsory insurance. The insurance company pays but is able to recoup through higher premiums which are borne by all its clients. Those clients meet the higher premiums by charging higher prices for their goods or services. So eventually the public pays.

In some areas of tort law there is a hybrid system that combines both fault and loss spreading. The best example is compulsory third party personal injury insurance. Here a plaintiff injured in a motor vehicle accident has to show that the defendant was at fault but (ordinarily) the defendant does not have to pay for the damages. They are met from an insurance fund to which all vehicle owners contribute.

As a rule, courts do not overly take into account the policy of loss spreading or insurance when reaching their decisions and so these factors are more likely to influence legislatures when reforming a particular area of law.

SELF ASSESSMENT EXERCISE

1. Define the term “tort”
2. Give five examples of types of tort

3.3 Elements, Tests, Factors, Rules

3.3.1 Causes of Action

A **cause of action** is a specific law or principle of law that enables the citizen to obtain some redress from the courts. The law regulates only through specific causes of action such as negligence or breach of contract.

3.3.2 Elements

For a plaintiff to be successful, it is necessary to ensure that all requirements of the cause of action have been met. To aid in this task, it is common for lawyers to express the cause of action, or its underlying principle, in the form of **elements**. The point is that each element must be met before the cause of action is established.

The term ‘cause of action’ is most commonly used where the common law is operating. However the same approach can apply to a civil claim based on a statute. Again, you will find it necessary to break the statute up in to its constituent parts (elements) all of which must be satisfied before the claim is met.

3.3.3 Test/Indicative Factors

As we proceed with our lessons, frequent reference will be made to elements but another term that will arise will be **test.** Quite frequently, the application of an element is not clear on its face and it may be necessary to resort to further law to explain the content of the element or to provide some sort of measuring stick. Here, two possibilities present themselves:

(a) The courts may have laid down a test for the application of the particular element. A test might also be used to describe the prerequisite or limits of the elements and forms part of the element. A good example of this is found in relation to negligence. As you will see, one of the elements of negligence is the need to establish that the defendant owed to the plaintiff a duty of care. But how do we measure the duty of care? The answer is by the application of the test of 'reasonable foreseability', that is, was the injury or damage resulting from the defendant's act reasonably foresee-able? [Actually as you will see later on this module there are two tests for the duty of care but only one is mentioned here as an example of the word "test". We look in detail at negligence presently and more information if given on the law. For the moment, we are only concerned with the mechanics of the operation of the law.

(b) The other possibility is that the courts do not lay down a test but leave it to each case to determine if the element in question is met in a particular case. The courts may provide examples that assist in the application of the element but they are no more than examples. These examples are called **indicative factors** and unlike elements, they do not have to be satisfied. A good example of indicative factors is to be found in the first element of *Amadios* case. You will recall that before a person could establish unconscionable conduct they had to show that they were under a 'special disability'. The court did not lay down a test for this element but rather give some examples of what might amount to a 'special disability' such as old age, sickness, illiteracy or lack of education. The list is neither exhaustive nor does it mean that even if one of these examples is met then the element is satisfied. It is still a matter for the court to decide in the particular case whether the element is met.

Quite often, later cases provide more and more illustrations of the application of the element which paints a more detailed picture of the indicative factors (this is one role of precedent) but even so the factors are still just examples.

Where the element is quite clear on its face then it may be a simple task for the court to apply the element to the facts of the case as where the defendant knows of the plaintiff's special disability. Here all the court is concerned with is whether as a matter of fact the defendant has this knowledge. No legal tests or indicative factors are required. You will be told when tests or indicative factors are applicable but one pointer is the presence of a general or vague word (or concept) that could be open to interpretation such as 'duty of care' or 'special disability.

3.4 Rules

The other word that lawyers often use when describing the law on a subject is **rule.** This is a general word, which usually refers to requirements that either are of universal application or have to be met in particular circumstances. Rules are not like elements that have to be met as part of a cause of action. They are developed from precedent cases that have had to deal with particular fact situations that come before the courts and for this reason they usually apply in specific circumstances. Rules appear frequently in contract law and as you study that area rules will become more familiar to you.

4.0 CONCLUSION

Do we have a law of tort or a law of torts or mere "shreds and patches"? What is your view and the basis! What is of more relevance is the meat in the pie – the features or elements of torts; namely fault, damage, causation, policy.

5.0 SUMMARY

In this unit, you have studied Tort Law as a broad outline. Try to remember the features that are reasurable, common to torts., Tort claims call for adjustment of competing interests. In this regard, the deciding factor may range from the function of tort to compensate the plaintiff, and individual responsibility based on fault. The concept of loss spreading impacts on decisions but the court do not admit.

We also talked about causes of autum and attempted to break them into elements. To he successful, all elements must meet some elements and contain a test which is the legal measuring stick for the element. Some elements rather than having a legal test have indicative factors which are examples for guidance only. We noted that Rules are legal requirements that have to be met but they are more specific than elements, which are concerned with courses of action

6.0 TUTOR-MARKED ASSIGNMENT

Distinguish Law of Tort from Law of Contract and the criminal Support your answer with illustration and decided cases

7.0 REFERENCES/FURTHER READINGS

Fleming J. (1992). *The Law of Tort.* 8th Ed. Sydney: The Law Book Company Ltd.

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UNIT 3 SPECIFIC TORTS: NEGLIGENCE

CONTENTS

1.0 INTRODUCTION

Negligence as a separate tort emerged only in the 19th Century. Prior thereto, it was basis of other action like nuisance and trespass. It was subsumed under the action on the case. With the growth of science and technology and mechanical inventions and increase in negligently inflicted injuries, coupled with abolition of forms of action, negligence became a separate tort with its distinct form of principles. Today, it is the most important tort.

Street has noted that more people suffer damages from careless acts of others than from intentional ones. Rereprectably, it is not the law that a person suffering damages as a result of careless conduct can sue in tort. The reason is that careless acts do not necessary constitute the tort of negligence.

According to Lard Wright, "negligence, in strict legal analysis means more than headless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, break and damage thereby suffered by the person to whom the duty was owing"

In this and the next units, we shall be considering these three elements of the tort of negligence duty, break of duty and ensuing damage

2.0 OBJECTIVES

On successful completion if this unit, you should be able to:

- identify the elements of a duty of care in negligence actions and apply those elements to a given fact situation
- illustrate breaches of the standard of care in negligence
- describe the relevance of questions of causation and remoteness of damage where the plaintiff has been found to be negligent
- identify the specific rules applying to negligent mis-statement and professional negligence
- identify the situation where two defences to negligence actions, namely contributory negligence and voluntary assumption of risk, will apply.

3.0 MAIN CONTENT

3.1 Negligence

This is certainly the most important tort. You have already learnt of the celebrated negligence case, *Donoghue v Stevenson* [1932] AC562 – the case about the snail in the ginger beer bottle. The law of negligence has grown in its use and important since that case. Everyday, new cases are testing the extent of liability in negligence such as hotel to its patrons or cigarette companies to consumers and those in the vicinity of smokers.

3.1.1 Elements of Negligence

There are four **elements** which must be established for an action in negligence to be successful. These are:

- Duty of care;
- Breach of the duty
- Loss caused by the defendant's breach; and
- Damage suffered is not too remote.

Duty of Care

The objective of the first element is to establish if a duty of care is owed to the person suffering damage. The **test** for duty of care has two parts:

a. reasonable foreseeability of harm; and
b. proximity of relationship.

(a) Foreseeability

For a test of foreseeability of harm the starting point is the 'negligence principle' of Lord Atkin in *Donoghue v Stevenson*. Notice how widely

the principle is stated. As Turner mentions, foreseeability is an **objective** test. This means that it is not who the particular defendant would think might be injured by his or her actions, but who a reasonable person in the defendant's position would think would be injured by the defendant's actions.
The precise loss or injury to the plaintiff need not be foreseen, more the possibility of loss or injury. Also as long as the plaintiff belongs to a class of persons who the defendant should have realized was at risk (e.g. consumers) then the reasonable foreseeability requirement will be met.

Three points to notice about the test of foreseen ability:

- It is viewed through the eyes of the defendant, or more correctly, a reasonable defendant.

- The test is objective as distinguished from a subjective one. This distinction arises quite frequently in the law. The objective test is a means of trying to find a norm of behaviour which is acceptable to society. To do this you ask what a 'reasonable' driver, repairer, manufacturer (as the case may be) would have done in the particular case. Contrast a subjective test which would enquire into whether the particular defendant thought their behaviour was acceptable. You can imagine the variation that would occur in this situation and it is not permitted in negligence cases. In fact you will find the subjective test is rarely applied by the courts.

- To pass the test of reasonable foreseeability then the defendant does not have to be the best (driver, repairer, manufacturer etc) – just a reasonable one.

(b) Proximity

While reasonable foreseeability is general in nature, the second test, proximity, focuses more on the actual relationship between the parties. There are three aspects of proximity: physical, circumstantial and causal but only one needs to be present to establish proximity.

Jaensch v Coffey (1984) 155 CLR 549 considered whether a duty of care was owed in circumstances giving rise to nervous shock.

In this case the plaintiff's (Mrs. Coffey's) husband (a police constable) was knocked off from his motor bike by a car which (it was admitted) was being negligently driven at the time. The husband sustained quite serious injuries and was taken to hospital. Mrs. Coffey (the plaintiff) was not at the scene of the accident but was informed by police of it and was taken to the hospital, where she saw her husband in great pain in the

casualty ward. The plaintiff waited while her husband was operated upon and after his return from the theater she was told to go home. His condition was described as 'pretty bad'. Early next morning she was advised that he was in intensive care and a few hours later she was asked to come to the hospital as soon as possible because his condition had deteriorated. The husband survived but remained seriously ill for some weeks.

About six days after the accident the plaintiff showed symptoms of a psychiatric illness. The condition, which was an anxiety depressive state, worsened and she was admitted to a psychiatric ward. At the trial, the defendant admitted he was negligent in his driving but denied that he owed a duty of care to the plaintiff. The High Court held that such a duty was owed.

The major judgment was delivered by Deane J from which the following propositions arise:

1. Besides reasonable foreseeability it is necessary to consider the notion of proximity in determining the duty of care.

2. In nervous shock cases in the past it has been necessary to place limits on the ordinary test of reasonable foreseeability by requiring for example, that a duty of care will not arise unless risk of injury in that particular form (i.e. nervous shock) was reasonably foreseeability. This is still the law. Another limitation which had been placed was that the plaintiff had to be within the area of physical danger. This is no longer the case.

3. However, some limitation must be set for the duty of care and it was that the psychiatric injury must result from contact with the injured person either at the scene or is aftermath. Contrast say after-accident care which occurs after immediate accident treatment and which results in a psychiatric illness. The latter is not actionable.

4. Deane J categorized nervous shock resulting from the accident or its aftermath as falling within **causal proximity** although he did admit that it could also satisfy the requirements of **physical proximity** in the sense of space and time. It was casual because the psychiatric illness results directly from matters which themselves form part of the accident and its aftermath. There is a clear link between the illness and the accident.

SELF ASSESSMENT EXERCISE 1

Differentiate between the foreseeability and proximity tests in Negligence.

Re-examination of Proximity

Historically, proximity was developed by the Court to provide an extra control test on the duty of care when they where considering new area of negligence. The reasonable foresseability test worked satisfactorily for the accepted classes of negligence such as motor vehicle accidents, consumer protection cases, industrial injuries and the like – especially where physical injury was involved. However, when a new area was being considered, such as nervous shock to relatives, it was agreed that the foreseeability test was too broad. So Deane, J. formulated the element of proximity as discussed above.

Gradually since *Jaensch v Coffey,* however, there has been a re-evaluation of the proximity test. The problem is that there is disagreement among members of the Court and considerable uncertainty exists. However, until there is a definitive statement by the Apex Court, lower Courts are continuing to apply the element of proximity and so shall we.

Finally, you should be aware that while foreseeability and proximity are separate tests you will find that quite frequently they overlap. For example, if a driver causes a car accident because they failed to remain on the right hand side of the road it is reasonably foreseeability that they would collide with a car traveling in the opposite direction causing injury to the other driver. This event would also satisfy the element of proximity because of the physical and causal aspects of the collision and the resulting injury.

Breach of the Duty of Care

Having established the first element, duty of care, the next question is to determine if there has been breach of the care.

The essential point here is whether the defendant has breached that duty by failing to exercise the care expected of a '**reasonably prudent person'.** Part of the test is to ask how a reasonable person would have responded to that risk. Turner points to various **indicative factors** that go to what is the appropriate response to the risk, namely:

- Probability of risk;
- Gravity of the harm;
- Who carries the burden of eliminating the risk; and
- The utility of the conduct in question.

Note the cases which are referred to in connection with each of these 'indicators' of the standard of care expected of a reasonable prudent person in the defendant's position. You should note also that these factors are not elements of whether the standard of care has been reached, but are guide which may or may not apply in a situation to determine the standard of care.

Causation of Loss and Damages

The law must have some means by which the right to recover damages flowing from a negligent act, is limited. It does this in two ways: by imposing the requirement of **causation** and **remoteness.** Suppose that an executive is driving to the airport to catch a plane to lodge a tender for a lucrative government contract. On the way to the airport, he is involved in a collision with another driver and his car is extensively damaged. Assume it was the other driver's fault. The executive misses his plane, fails to lodge the tender in time and does not win the contract. As a result, his company becomes insolvent and many employees lose their job. Should the employees be able to sue the other driver for their loss of wages? Most people would say, 'that is not fair on the driver to impose that burden'. But how does the law draw the line? This is where the tests for causation and remoteness come in. We consider the issue of remoteness in a moment but first let us look at causation.

As Turner points out – the basic test of causation is the '**but for**' test. In other words, 'but for' the negligence in question the loss would not have been sustained. This test allows the facts to be tested to see if the negligence really causes the loss. Put another way, the court must be satisfied that there is a causal between the negligence and the loss. Suppose in the situation above it can be established that the executive would not have missed the plane anyway because he left the office too late, that the tender would not have won the government contract even if it was lodged in time or that the company would have become insolvent because of the recession, whether or not it obtained the contract in question. In each of these cases a claim by the employees or the company itself would not survive the 'but-for' test. There is no causal link between the negligence of the other driver and the loss or wage. So one way to test for causation is to see if there are any intervening factors operating between the negligence and the loss. In the above example, the lateness of the executive in leaving to catch the plan, the fact that the tender would not have been successful in any event, the economic recession are all intervening events that break the chain of causation.

Turner provides an example of where the plaintiff failed to satisfy the causation requirement, namely, *Cummings v Sir Williams Arrol & Co Ltd [1962] 1 ALL ER 623.*

In the situation described above most observers would say that the employees who lost their jobs should not recover but how does the law draw the line? The causation requirement provides one limit but there is another. The damage suffered by the plaintiff must be of the kind or type which **was reasonably foreseeable** by the defendant. Fairly obviously it would not have been reasonably foreseeable for the negligent motorist who ran into the executive (in the example above) that by doing so he would throw employees out of work and be liable to compensate them for their loss of income.

While a similar test is used to determine remoteness as to determine the duty of care, reasonable foreseeability, the emphasis in applying the test to the remoteness question is on whether the **damage** is foreseeable and also whether it is of the **kind** or **type** of damage. The general test of remoteness is laid down in the *Wagon Mound case)Overseas Tankshoip (UK) Ltd v Morts Dock & Engineering Co Ltd.)* [1961] AC 388. The case provides a good illustration of how the test is applied.

SELF ASSESSMENT EXERCISE 2

1a. What are the four elements of the tort of Negligence?

b. What are the tests used in respect of each element to see if it is present?

3.1.2 Professional Negligence

One important branch of the law of negligence concerns the liability of professionals such a accountants, lawyers, investment advisors and the like for advice given to clients and others. While the general principles of negligence still apply, the courts in this area have developed some specific rules to handle particular activities and professions.

Before looking at the relevant aspects of negligence, it should be noted that in many cases professionals will be liable to their clients in **contract.** The liability from contract will frequently overlap with that of tort because the contract will have an express or implied term that the professional will exercise reasonable care and skill in return for the fee charged. What we are primarily concerned about here is the liability of the professional to **third parties**, that is those who are not in a contractual relationship with the person alleged to be negligent.

3.2 Liability to Third Parties

In this course, we focus on the ability of the professional for providing negligent advice or information (known as negligent mis-statement). However, it will soon be seen that this is not the only source of liability to third parties. An example of where a professional was held liable to a their party through their actions rather than words is *Re Hill & Associated v. Van Erp (1997) 142 ALR 687*. A Solicitor drew a will for a client and under the will property was bequeathed to a Mrs. Van Erp. Unfortunately the solicitor arranged for Mrs. Van Erp's husband to witness the will. Under the law, any gift by will to a person or spouse of a person who witnesses a will is void. Mrs. Van Erp sued the solicitor in negligence. As Mrs. Van Erp and the interest intended for her were clearly identified in the will, the majority of the Court felt that there was sufficient proximity to find a duty of care by the solicitor to Mrs. Van Erp.

3.3 Negligent Mis-Statement

In the past, it was possible for a plaintiff to recover financial loss but it had to be associated with some form of physical injury or damage. So the plaintiff in *Donoghue v Stevenson,* for example, could recover lost wages if she had to take time off from work but only because it was a by-product of her physical illness. Another relevant limitation to negligent claims was that the defendant was not liable for negligent words alone but only for negligent acts. The reluctance to allow a claim for negligent words alone stemmed from the perception that it would result in too wide a range of claims and for excessive amounts. Over time, however, pressure increased on the courts to recognize that, 'pure' financial loss (i.e. loss not associated with some other injury) was just as real as other forms of loss and that it was appropriate for plaintiff in these cases to be compensated.

The first case to allow a claim for pure financial loss was *Hedley Byrne v Heller Partners* in 1964. The following **elements** for negligent misstatement were developed:

1. If a person gives information or advice to another;
2. On serious matter;
3. In circumstances where the speaker realizes, or ought to realize;
4. That he or she is being trusted to give the best of their information or advice;
5. As a basis for action by the other party;
6. And it is reasonable for the other party to rely on that advice.

Then the speaker comes under a duty of care.

Notice that these six elements only go to form the duty of care. The other elements of negligence (breach, causation and remoteness of damage) still have to be satisfied separately. While these six elements are quite specific in their operation they are still broadly concerned with the relationship between the parties and whether there is the required closeness to impose the duty of care.

There are many more cases on negligent misstatement and, as you might expect, a number of subtle variations and exceptions for different applications of the basic duty. These matters are beyond the scope of this course.

3.4 Liability of Auditors

As mentioned above, from the time that the Courts has first sanctioned negligent misstatement actions, there have been concerns that liability could spread too widely. Auditors are a particularly vulnerable group. Public companies must have their accounts audited and the results of these audits become known to the general business community. Could an auditor be liable to a person who buys shares in the company on the strength of the audit where the auditing was performed negligently and did not reveal grave financial difficulties?

For some years the law in this area was quite unclear but was finally settled in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords* (1997) 71 ALJR448.

The appellant, Esanda, had lent money to various companies in the Excel Finance Group. Peat Marwick Hungerfords (PMH) were the auditors of the Excel group and Esanda alleged that PMH had been negligent in carrying our their duties, that Esanda had entered into the transactions in reliance on the audited accounts and as a result of the negligence had suffered economic loss when Excel went into receivership. In claiming that PMH had owed it a duty of care, Esanda pleaded in essence that the loss was foreseeable by reason of Esanda's reliance on the audited accounts of Excel. No evidence was led to show that PMH was aware Esanda would be relying on the company accounts. Thus Esanda had done no more than plead reasonable foreseeability and had failed to allege the existence of a relationship of proximity.

The Appellate Court held that mere foreseeability was insufficient to establish the existence of a duty of care founding a claim for negligence misstatement. The appellant also should have pleaded that there existed a relationship of proximity between it and PMH.
The Court concluded that there were no circumstances which took the case out of the general rule that a person is not liable for negligent

statements unless she/he intended to induce another to rely upon such statements, or in the absence of such intention, she/he knew that the statement would be communicated to the other; either as an individual or as a member of an identifiable class, in connection with a particular transaction or transactions of a particular kind and that the other would very likely rely on it for the purpose of deciding whether to enter into the transaction/s.

SELF ASSESSMENT EXERCISE 3

1. What is the purpose of an award of damages in the tort?
b. Explain the legal principles for determining the extents of damages claimable in an action in the tort of negligence

3.5 Disclaimers

Exclusion clauses or disclaimers are clauses which seek to exclude or excuse a person from liability which night otherwise attach to them.

For present purposes you should note that there is real doubt as to whether a disclaimer can exclude a duty of care. This is because the duty is imposed by the Court as distinct from a contractual disclaimer which is based on enforcement of a contractual term. (As we shall see later even contractual disclaimers are often ineffective). What does seem to be clear is that where the defendant is the only source of information or advice, then a disclaimer will not be enforced. After Shaddock's case many local authorities inserted disclaimer clauses when giving information concerning properties within the local authority area but this has been held to be ineffective *Mid Density-Developments Pty Ltd V Rockdale Municipal Council* (1993) 116 ALR 460.

3.6 Defences to Actions in Negligence

- **Contributory Negligence**

If the executive in our situation outlined earlier was partly at fault then the damages that could be recovered from the other driver for either the repairs to his car, or any personal injuries would be reduced to the extent of that fault. Contributory negligence used to be a complete defence but now under legislative provisions such as the *Law Reform (Miscellaneous Provisions) Act* there is an **apportionment** of liability and hence an apportionment of damage. It is commonly pleaded as a defence in traffic cases because of the strong likelihood that both drivers are at fault. The quantum of damages claimed is reduced by the percentage, which the plaintiff is found to have contributed to those damages.

- **Voluntary Assumption of Risk**

Known also by its latin maxim *volenti non fit injuria,* the principle here is that a person cannot complain of a risk if they have consented to it. A footballer would not be able to sue a fellow footballer for injuries received in a game, assuming the rules were being complied with at the time.

To establish the defence, the plaintiff must have

(a) fully appreciated the risk, and
(b) accepted it willingly.

This can lead to some interesting situations where a passenger sues an intoxicated driver of a motor car for injuries received. On the face of it, the defendant driver would have a defence of *volenti* but not so if the plaintiff was sufficiently intoxicated so that he or she could not appreciate the risk!

4.0 CONCLUSION

The case of *Donoghue v Stenenson* is very instructive. Read it out again and again. Note the dictum of Lard Atkin. Negligence must fail where duty-situation is absent. It is not a duty in the air. It is owned to somebody. Loss may be physical or economic the degree of care which a duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled. Note the important case of *Hedley Bryne & Co Ltd v. Heller & Partners Ltd (1964)*. Damage must not be too remote: the *Wagon Mound* case (1961). Test applied is objective. Defences to negligence include contributory negligence, voluntary assumption of risk (*volente non-fit injuria*)

5.0 SUMMARY

Perhaps at this point you need not be too concerned with the detail. In the context of negligence you should be aware of the role of tort law in compensating the plaintiff but also the need to ensure that the law is fair on the defendant. Against this background much of the development of negligence has been on finding ways of defining the limits to the right of recovery by the plaintiff. One way that this is achieved in negligence is the imposition of the objective test of the 'reasonable person'**.**

At this stage, you may need to go back over your work and more closely at the content of the area in question. Here you need to know the **four elements** of negligence and the different roles played by each of those

elements. With the first element, the duty of care is concerned to establish whether there was sufficient **closeness** between the plaintiff and the defendant. The second, the breach of that duty focuses on the **standard of care** expected and the final two elements on the limitations to be placed on the **damages** that can be recovered.

Hand in hand with the elements are the legal tests for each element. These are important as the elements themselves for without them the elements are meaningless. Here, notice how the notion of reasonableness appears in the tests for the first, second and fourth elements although the tests are designed to achieve different aims.

6.0 TUTOR-MARKED ASSIGNMENT

Chidi was shopping at her local supermarket on Saturday morning when she supped on some wet substance that had been split on the floor. She fractured her pelvis. Three weeks later still recovering in hospital, she fell down a flight of stairs and fractured her other leg.

a. Does the Supermarket owe Chidi a duty of care?
b. Has there been a breach of duty of care?
c. Can Chidi claim damages from the supermarket in respect of:

i. injury one
ii. injury two

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 SPECIFIC TORTS: DEFAMATION, CONVERSION AND DETINNE, NUISANCE, VICARIOUS LIABILITY

CONTENTS

1.0 INTRODUCTION

In this last unit on law of torts, we shall briefly learn about few more specific torts like defamation, conversion and detinne and nuisance and conclude with vicarious liability. Defamation is a statement which is calculated to injure the reputation of another, by exposing him/her to hatred, contempt or ridicule. Action for conversion and detinne arise when one title to chattel is challenged on where the chattel is detained respectively. The term "nuisance" is elastic. It is a state of affairs that interferes with ones use of enjoyment of property. Lastly we will touch the issue of vicarious liability: let the superior make answer"; He who does a thing through another does it himself: that is to say: 'look to the man higher up'.

2.0 OBJECTIVES

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

- describe the basis of defamation action and the common defences
- describe the elements of conversion and detinne and nuisance
- describe the concept of vicarious liability and apply it to a given fact situation.

3.0 MAIN CONTENT

3.1 Defamation

This is an important but very complex area of the law. To cover some of the main principles the following extracts have been chosen from Gillies (1993, pp 96-8):

The tort of defamation is concerned with publications (the concept includes spoken words, written words, cartoons and the like) which tend to injure the plaintiff's reputation. The word 'publication' is a standard one in this part of the law, but it is not synonymous with publication through the media – a relevant publication takes place with the communication of the complained of statement to one or more persons (though publication to the plaintiff alone is not a relevant publication).

(In other words, if you write a letter to someone in which you defame him/her then there is no tort committed – assuming the letter does not fall into the hands of any other persons).

Defamation law is largely a product of the common law, it is also to be found in the Criminal Code and Penal Code.

As with other areas of tort law, policy plays an important role. The law attempts to strike a balance between protecting a person's character and reputation from attack and allowing free speech. However, most commentators agree the scales are tipped against free speech.

3.1.1 Elements

A defamatory statement is broadly defined by the law – it is one which tends to lower a person in the estimation of others. In a classic phrase, it is frequently an imputation which tends to bring the plaintiff into 'hatred, contempt or ridicule', although it need not be this extreme. Defamations can be direct or implied – indeed, provided that the reasonable recipient of such a statement can infer that it is directed at the plaintiff, it is unnecessary that the latter actually be named in it.

The law distinguishes slanders - essentially spoken defamations, and libels – essentially written ones. The division is not clear cut, however – by virtue of decisional and statute law, certain defamations not in writing are classed at libels. For example, defamatory radio and television broadcasts are libels as are defamatory motion films. At law, actual damage must be shown, whereas libel does not require this – an inferred injury to reputation, albeit an intangible one, is presumed.
For practical purposes the distinction between libel and slander have either been abolished or are now irrelevant.

The definition of defamation is broad, and the reports reveal that quite mild strictures have been litigated. Accordingly, the defences bear the brunt of limiting liability for defamation.

3.1.2 Defences

The basic defence is that of justification or truth. The defendant must prove that the statement was true. This is an absolute defence. In certain jurisdictions, this is not enough. The statement also must be in the public benefit, as well be on a matter of public interest (or be published under qualified privilege).

a) Qualified Privilege

This is a broad and potential important defence. At common law, it is a defence where the statement was made by a person having the interest or duty, legal, social or moral, to make it to the recipient, and the latter has a like duty or interest in receiving it. An example would be a conversation between the managers in a company, relating to a personnel matter. The duty or interest must be reciprocal – a limitation. It is arguable that the privilege is not lost because the information is false, provided the defendant acts in the reasonable belief that the information is true. (Malice will defeat the privilege).

For some years it has been supposed that a media company and its audience did not have such a common interest to attract the privilege, on the basis that the recipient's interest had to be a fairly immediate one, such as might be apparent if the communication was relevant to the making of a decision by him or her. However, the times may be changing – it was accepted that such a community of interest could exist between media and audience.

b) Fair Comment

This defence is directed to expressions of opinion only. Having said that, it is often too difficult to tell where fact ends and opinion begins. For the defence to apply, the comment must be 'fair' (meaning honest, rather than reasonable); it must have been based on facts which are true; and it must be on a matter of public interest, such as matters of government, or a work of art or an artistic performance made available to the public, Malice (the concept is vague, but it includes spite) will defeat the defence.

c) Absolute Privilege

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

d) Constitution or Theophanous Defence

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

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

3.2 Conversion and Detinne

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

3.3 Nuisance

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

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

So private nuisance cases usually involve neighbourhood disputes.

3.3.1 Let Us Take Those Elements in Turn:

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

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

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

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

3.4 Vicarious Liability

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

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

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

Two common issues arise in relation to vicarious liability:

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

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

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

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

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

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

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

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

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

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

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

4.0 CONCLUSION

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

5.0 SUMMARY

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

6.0 TUTOR-MARKED ASSIGNMENT

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

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

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

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MODULE 4

Unit 1 Contract: Classification and Formation

UNIT 1 CONTRACT: CLASSIFICATION AND FORMATION

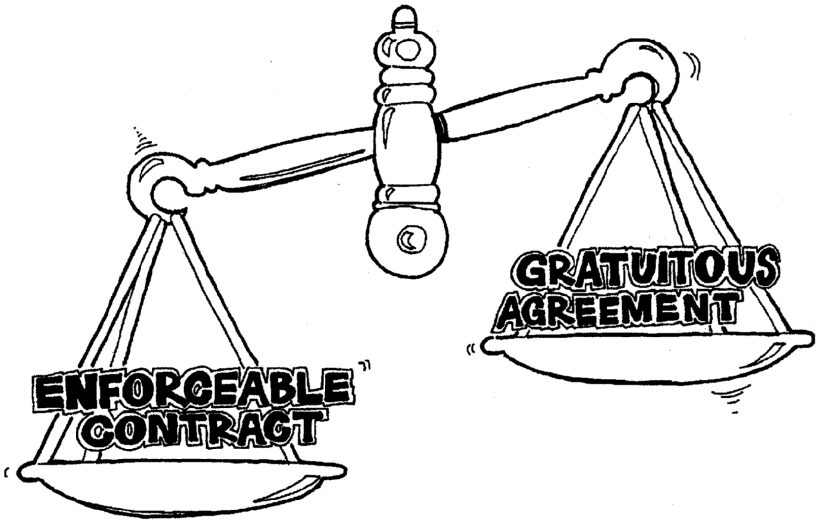
CONTENTS

1.0 INTRODUCTION

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

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

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



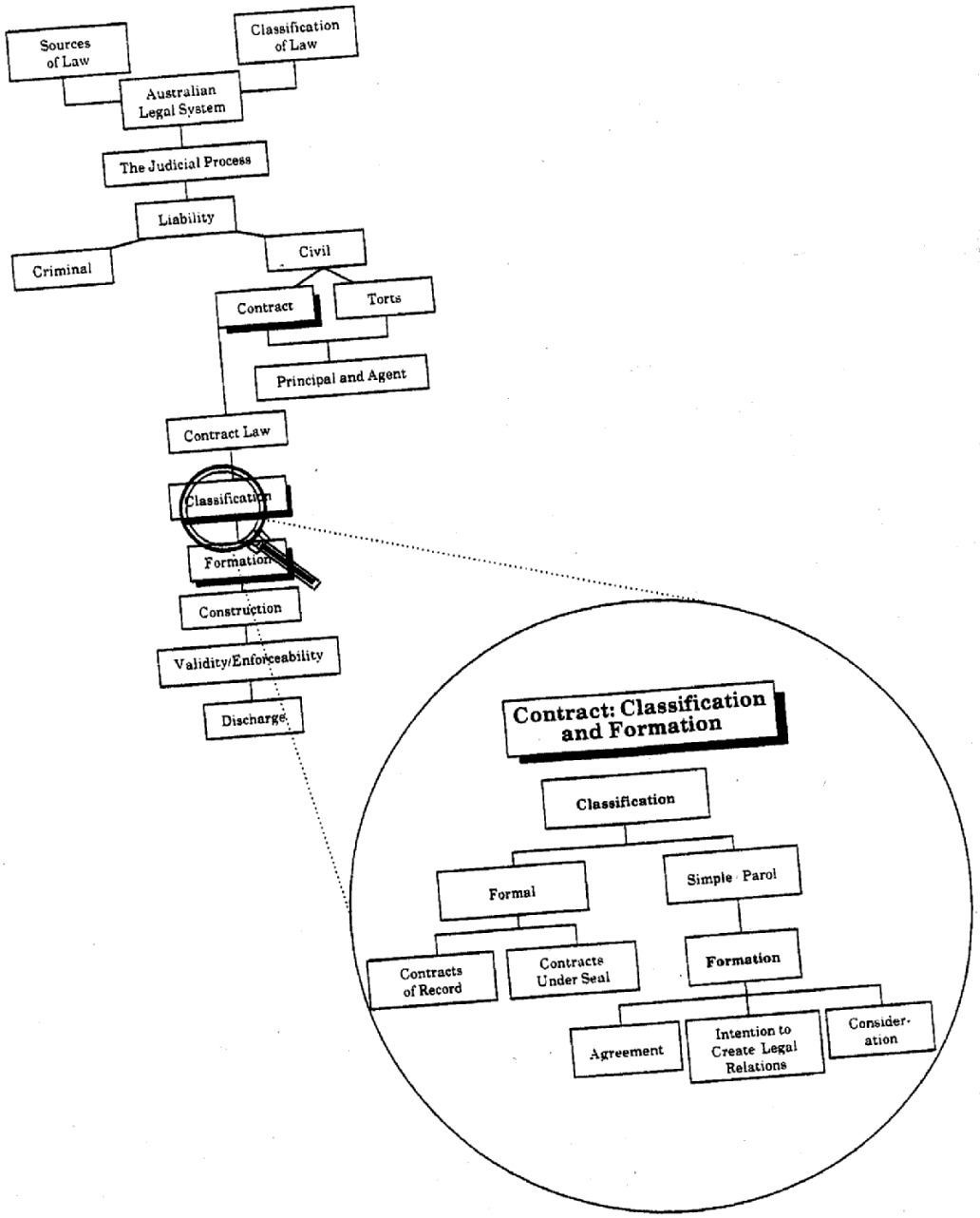
2.0 OBJECTIVES

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

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

3.0 MAIN CONTENT

3.1 Overview of Contract



3.1.1 Definition of Contract

Most definitions of contract usually refer to four elements:

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

3.2 Background to the Development of the Law of Contract

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

3.2.1 The Notion of Agreement

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

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

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

3.2.2 Laissez Faire

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

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

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

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

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

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

3.3 Classification of Contract

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

3.3.1 Formal Contracts

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

(a) Contracts of Record

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

(b) Contracts under Seal

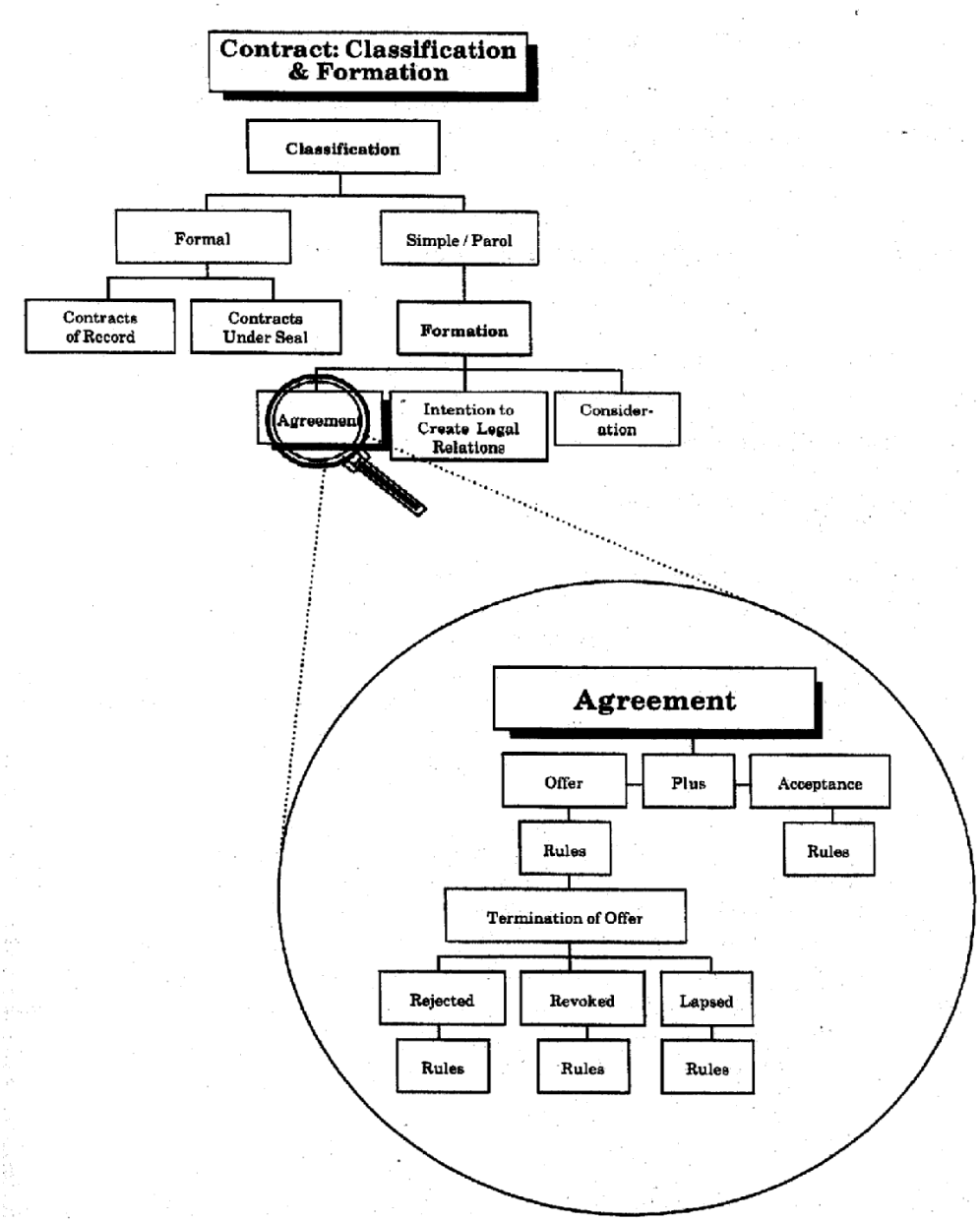
These are more important as they are often used in important commercial transactions, for example, to document loan agreements and mortgages. A contract is classified as being a contract under seal, or a deed, because of the form in which it is expressed. In the past it may have actually been 'signed,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

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

3.3.2 Simple Contract

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

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



3.4 Formation of Simple Contracts

There are three basic elements of the formation of a simple contract:

(a) Agreement: offer and acceptance
(b) Intention to create legal relations.
(c) Consideration.

All three elements must be present if a party is to argue that the promises made by the other form part of a contract and are therefore enforceable. While some texts include other elements as essential such as the capacity of the parties to contract; absence of fraud etc we have included these issues in the discourse. For present purposes let us assume that the parties are of full age and they were not misled etc when

entering the contract and so the focus is on the three basic elements identified above.

3.5 Agreement

In attempting to discover if an agreement has been reached between the parties the courts have traditionally looked for an offer from one party and an acceptance of the offer by the other party. The person making the offer is called the **offeror** and the person receiving the offer is the **offeree**. If the offer is clear, (eg 'you can buy my car for N200,000.00') and the acceptance corresponds with the offer (eg 'I accept your offer') then you have an agreement. In this case you have an express agreement. However, agreement may be **implied** from the conduct of the parties.

In *Clarke Dunraven [1897]* AC 59 at P. 63:

One of a number of yachts in a regatta fouled and sank another. The participants had agreed with the club organizing the regatta to obey the club rules. One of these provided that participants should pay all damages caused by fouling. The question arose as to whether there was any contract between the participants themselves, or whether each had contracted with the club only. The House of Lords affirmed the view taken by the Court of Appeal, holding that, in the words of Lord Herschell: 'The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient ... where those rules indicate a liability on the part of the one to the other, create a contractual obligation to discharge that liability'.

So while the participants did not communicate directly with each other, and there was no offer and acceptance in the usual way, the court found a contract based on their agreement to participate.

3.5.1 Offer

There are a number of basic principles or rules regulating the legal effect of offers.

(a) The single most important test of an offer is that it must show, on the part of the offeror, an intention to be legally bound. Put another way, it is a final commitment by the offeror, a point of no return which, if accepted by the other party, will legally bind the offeror. In this context the language of the supposed offeror is closely examined by the courts to determine whether the communication in question is still part of preliminary negotiations or in fact the final commitment.

Most of the rules that are discussed below are really examples or extensions of this basic requirement.

(b) An offer must be **sufficiently definite** so as to be capable of acceptance. If the so-called offer is too vague or leaves out too many basic terms then it is unlikely that it is an offer at all. Certainly, it is hard to argue that there is a final commitment in that case. If, for example, a person selling her car said that she would like to get 'around N100,000.00' for it then that expression is not likely to be sufficiently definite for the offeree to respond with an acceptance. Obviously, what 'around' means to one person could well be different to another. Similarly, if a possible sale was discussed without any mention of price at all that could hardly be classified as an offer.

It's not that the offer must contain all the terms that might ultimately end up as part of the contract but there must be enough to indicate agreement. There must be enough for the offeree to make up her or his mind as to how they wish to respond and to accept the offer should they wish to.

(c) An offer is often distinguished from an **invitation to treat**. As the term suggests, an invitation to treat is an invitation to enter into negotiations. Examples of invitations to treat are advertisements that list items for sale, catalogues, the display of goods and the calling of tenders for a contract. In these cases, the seller is regarded as advertising their goods to the public who in turn come and make the **offer** to buy. The mere advertising of the goods does not ordinarily show an intention to be bound on the part of the seller.

The distinction between invitations to treat and offers is based on sound commercial practice. If the advertisement contained offers to customers then the customer could come to the seller and purport to accept that offer and claim a binding contract. This would work injustice because the merchant may well in good faith have sold all the particular items advertised. So invitations to treat are simply a means of attracting customers to look at the goods and hopefully (from the seller's point of view) to make an offer to purchase.

Perhaps the most illustrative case on invitations to treat is the *Pharmaceutical Society of Great Britain v Boots Cash Chemists* [1953] 1 QB 401.

The question was whether a contract between a seller and a customer was concluded when the customer took down an article from a shelf in a

self-service store and put it in his basket or whether the customer made an offer when he took his selection to the cashier, which was accepted when the cashier indicated the total price. The Court of Appeal preferred the latter view. On the former view, the display of goods on the shelves would amount to an offer, with the consequences that a customer who had taken an article from a shelf and put it into his basket would not subsequently be able, without the proprietor's consent, to replace it should he find something he liked better. This was contrary to common sense, and the view which would have produced this result was rejected.

Note the different point in time when the contract would be formed if it were held that the display were an offer and the legal effect of this.

(d) Another way to identify an offer is to compare it with what courts have described as a 'mere puff'. A **puff** is a representation about the subject matter of the contract such as a service to be provided, or an item to be sold, which usually exaggerates the features of the service or item and often in circumstances that cannot be proven. An example might be a statement that 'this car is a little beauty'. Such a statement will not form part of the offer because there is no intention on the part of the maker to be bound. In fact, the words are too vague to become part of a contract.

(e) An offer must be distinguished from a **mere answer to a request for information.** Again, such a response will not usually show an intention to be legally bound. These are often made during communications between prospective parties to a contract. An example in point is *Harvey v Facey* [1893] AC 552:

The plaintiff telegraphed to the defendants 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'. The defendant telegraphed in reply 'Lowest price for Bumper Hall Pen £900'. The plaintiff's then telegraph 'we agree to buy Bumper Hall Pen £900 asked by you. Please send us your title-deeds'. The court held that no contract existed as the defendant's response was only an answer to a request for information rather than an offer.

(f) An offer can be revoked at any time before acceptance unless an **option** has been granted. An option is a separate contract whereby the would-be seller gives the prospective purchaser an option to buy the property at a stipulated price, provided the option is exercised within a given time period. It may or may not be followed by a contract to sell the property depending on whether the 'purchaser' decides to exercise the option. To be enforceable the purchaser must give some consideration for the

option. As mentioned above 'consideration' is money or money's worth. So if the offeree was to say to the offeror 'I will pay you $10 to keep your offer open (to me) for one month' then a valid option will come into effect – assuming of course that the offeror agrees. The important point is that the offeree must **pay** something for the right to have the offer remain open. If not, then the offeror can revoke the offer at **anytime** even where she or he has said they will keep the offer open for certain period. A case demonstrating this area of law is *Goldsborough Mort & Co Ltd v Quinn*. When reading this case do not concern yourself at this stage with the meaning of the term 'specific performance.

(g) An offer can be made to one person, a class of persons or the world at large. It is unusual to have an example of the latter because normally a communication to the world at large is an invitation to treat. Again it depends on whether there was an intention to be bound.

SELF ASSESSMENT EXERCISE 1

1. What is the difference between an invitation to treat and an offer to the World at large?
2. What is a Counter offer?

A famous case where an advertisement was an offer to the world at large is *Carlill v Carbolic Smoke Ball Company (1893).*

Read this case carefully because it does illustrate the importance of the central principle that a communication is an offer so long as there is an intention to be bound. That intention can be found in circumstance where at first glance there might have appeared to be an invitation to treat. When reading the case note the grounds upon which the court found that the advertisement was an offer.

(i) It may be relevant to determine to whom the offer is made as only an offeree may accept the offer. For example if an offer is made to a class of persons, only a member of that class (who is aware of the offer) may accept the offer.

(ii) An offer will only be effective when it is communicated to the offeree, when it is brought to the notice of the person to whom it is made.

3.5.2 Possible Responses to the Offer

Once a legally effective offer has been made, a number of things may happen to it. If it is validity accepted, this will result in an agreement. Thus, the first element of a legally binding contract is established.

The other possible outcome, however, is that the offer may be terminated, and thus not be available for acceptance.

3.5.3 Termination of Offer

An offer can be terminated in one of three main ways:

- Revocation;
- Rejection; and
- Lapse.

3.5.4 Revocation of Offer by Offeror

(a) The fundamental rule is that the offer can be revoked at any time before acceptance. As we have seen, an exception to this rule is when a valid option is granted. In such circumstances, the seller is bound to keep the offer open in favour of the would-be purchaser until the end of the period stipulated in the option. Any attempt to revoke the offer in the interim would be a breach of the terms of the option.

Another exception to the rule is where the offer is made for the doing of an act, then the offeror cannot revoke the offer after the offeree has partly performed the act.

(b) Revocation is not effective until it is communicated to the offeree. See *Byrne & Co. v Leon Van Tienhoven & Co. (1880) 5 CPD 344.* Thus, it is not sufficient that the revocation be merely posted, it must reach the offeree. A different rule applies to the **acceptance** of an offer, as will be discussed below.

(c) It is not necessary that the revocation be communicated by the offeror only – as long as the offeree learns of it from some reasonably reliable source.

Dickinson v Dodds (1876) 2 Ch D 463:

On 10 June Dodds made an offer to D to sell him a dwelling-house for £800: 'This offer to be left over until Friday, 9 o'clock am, 12 June' On 11 June Dodds contracted to sell the house to A. D heard of this from

one Berry on the same afternoon. He nevertheless handed Dodds an acceptance of the offer at a few minutes before 9 a.m. on 12 June. Dodds said 'You are too late. I have sold my property'. Dodds, by entering before 9am on 12 June. Dodds sell to A, showed an unequivocal intention to revoke his offer to sell to D. This revocation was communicated by B to D before D had accepted. There was therefore no contract between D and Dodds. Notice of the revocation was good, although it was communicated by a third party, B, and not by Dodds himself.

(d) Revocation can take any effective form. It can be in writing, verbal or as demonstrated in *Dickinson v Dodds*, communicated by a third person.

3.5.5 Rejection of Offer by Offeree

(a) The rejection can be express
(b) It can also be implied. This leads to the rule that a **counter offer** terminates the original offer.

In the case of *Hyde v Wrench* [1840] 49 ER 132.

Wrench wrote to Hyde on the 6th June offering to sell his farm for £1000. On the 8th June. Hyde replied by offering £850, which was rejected by Wrench on 27th June. On 29 June Hyde wrote again to Wrench stating he was prepared to pay the £1000. The Court held that no contract had arisen as Hyde's counter offer of £950 had rejected Wrench's offer of £1000 and he could not revive the offer by writing on the 27th June purporting to accept it.

Compare this with the case of *Stevenson, Jacques & Co v McLean* (1880) 5 QBD 346 where the response from the offeree was characterized as a request for information, not a counter offer. The facts of *Stevenson v McLean* were:

The parties had been corresponding regarding the sale of certain iron. Finally on Saturday the defendant wrote to the plaintiff offering to sell at 40s net cash per ton, the offer being left open until the following Monday. At 9.42am on the Monday the plaintiff telegraphed the defendant enquiring 'whether you would accept 40s for delivery over two months if not, longest limit you would give'. Receiving no reply, the plaintiff at 1.34pm on the same day telegraphed an acceptance of the offer to sell at 40s net cash per ton. At 1.46pm on the same day the plaintiff received a telegram from the defendant, sent at 1.25pm, advising that the iron in question had been sold elsewhere. The court had to decide whether the plaintiff's telegram sent at 9.42am was a

counter offer, in which case the plaintiff was not free to accept the original offer by his 1.34pm, telegram, or whether it was simply a request for information. The court, considering, amongst other matters, the unsettled state of the iron market at the time the telegram was sent, found that the telegram in question should have been regarded by the defendant not as a counter-offer but as a mere enquiry. As such it did nor reject the defendant's original offer, and the plaintiff's subsequent acceptance at 1.34pm was legally effective.

3.5.6 Lapse

(a) Death

Death of either party may result in the offer lapsing. Factors relevant to determining this issue are which party dies, the time at which the other party knew of the death and whether the offer was personal to the party who died. (An example of an offer being personal to one of the parties would be an offer to an artist to pay a sum of money if he/she were to paint the offerer's portrait.)

(b) Death of Offeror

After Acceptance - contract already formed (if all three elements present).

Before Acceptance - whether the offer lapses depends on the knowledge of the offeree at the time of purported acceptance and the nature of the contract.

- if the offeree is aware of the death - no contract.

- if the offeree is not aware of the death - if the offer is personal to the offeror-no contract.

- if the offer is not personal to the offeror – there may still be a valid acceptance.

(c) Death of the Offeree

As a general rule this cause the offer to lapse because only the person to whom the offer is made can accept the offer. There is authority however for an exception in the case of an option if the offer is not personal to the offeree. In such a case if the afferee dies during the option period the offer may be accepted by the executors of the estate within the time stipulated.

(d) Time

The offer may lapse if it is not accepted within the prescribed time or, if no time is prescribed, then a reasonable time. What is a reasonable time depends upon the circumstance; it will be quite short if the goods are perishables but much longer if the offer relates to land.

3.5.7 Condition

If an offer is made subject to a condition and the condition is not fulfilled then the offer lapses. An example of this is when there is an offer to purchase land subject to the buyer obtaining finance. If the finance is not obtained then the offeror cannot be held to his offer.

SELF ASSESSMENT EXERCISE 2

1. How may an offer be terminated
2. What is an option?

3.6 Acceptance of Offer

(a) Only persons to whom the offer is made can accept it. This might be one person, a class of persons or the world at large.

(b) The acceptance must be complete and **unqualified** acceptance of the terms of the offer, otherwise the acceptance (so called) will not be an acceptance in the eyes of the law but a **counter offer** which destroys the original offer. However, as previously discussed, a counter-offer should be distinguished from a **mere request for information** or a mere spelling out of terms which would otherwise have been implied into the offer.

(c) Acceptance must conform with the requirements of the offeror. This has an impact on the mode by which an offer can be accepted.

(d) If the mode is prescribed by the offeror as the sole mode then that mode must be followed by the offeree; otherwise it is not a valid acceptance. So that if the offer stipulates that an acceptance must be by hand delivered letter then that requirement must be followed, otherwise there is no valid acceptance.

(e) If a mode is prescribed by the offeror and it is not stated to be sole mode, then that mode or an equally expeditious mode would be appropriate.

(f) If the mode is not prescribed then the law will require a reasonable mode of acceptance. What is reasonable will depend upon the circumstances of the case and in particular the means by which the offer is communicated in the first place. The mode of acceptance should normally be as quick as (or quicker than) the mode of the offer, unless the offeror expressly or impliedly indicates that some other method is acceptable. If, for example, the offer is made over the telephone, then it is unlikely to be reasonable for the offeree to accept by letter.

(g) There are two points in time at which acceptance might be effective at law:

(i) On Postage

The postal rule states that the acceptance occurs (and the contract formed) at the moment a letter is posted. This will only apply where it is reasonable to use the post as a mode of communication for the acceptance. (See discussion above). This rule can be seen to be unfair on the offeror as that person does not know the precise time of acceptance (or that acceptance has occurred at all). In the circumstance, it is open for the offeror to exclude the use of the post by the offeree when accepting. In the circumstance, the offeror could require the offeree, for example, to telephone their acceptance.

(ii) On Communication

Where the negotiations are conducted by instantaneous means, e.g. where the parties use the telephone, telex or are in each other's presence, the contract forms when the acceptance reaches the offeror.

Where the post has been used, however, and the postal rule is excluded, i.e. actual communication is required (see discussion above), the contract will only form when the acceptance is communicated.

(h) The rule regarding acceptance by post is an exception to the normal rule that a contract only arises when the acceptance is communicated to the offeror. With the postal rule a contract forms the moment the letter is posted whether or not it ever reaches the offeror.

(i) The acceptance must be in response to the offer. The offeree must:

- Know of the offer; and

- Act, at least in part, in reliance upon it.

(j) Subject to the postal rule, acceptance by the offeree is effective at law only upon **communication** to the offeror. There are two parts to this rule:

- Acceptance must be expressed by words or conduct.

Mere passive silence in response to an offer is not acceptance. *See Selthouse v Bindley (1862) 142 ER 1037.*

The offeror may dispense with the need to communicate acceptance by words such as in the *Carlill* case or in the reward situation where performance of the act, (ie conduct), is deemed acceptance. This is distinguishable from *Felthouse v Bindley* where the offeror attempted to make silence acceptance so that the offeree would have to communicate rejection to avoid a contract arising. This is not acceptable in the eyes of the law.

In the context of a contract of employment, acceptance may be implied from the conduct of a person who starts work in response to an offer of employment.

The acceptance must be communicated either by the offeree or the offeree's authorized agent, see Powell v Lee (1908) 99 LT 284.

SELF ASSESSMENT EXERCISE 3

1. How may acceptance be communicated?
2. Can an acceptance be revoked? If yes, how?
3. What is the postal rule? When does it apply?

3.7 Approach to Problem on Agreement

Mention has already been made of the necessary step of translating legal principles (once you have understood them) into an approach to a problem in that area. Listed below are a series of steps that might assist in deciding whether an agreement has been reached. Treat the steps as a check list only. In other words, if the facts of a problem do not indicate the need to consider a particular step or issue, then ignore it.

3.7.1 Point-Form Approach

Step 1 - Is there an offer?
Test: is there a final commitment?

Step 2 - To who is it made?

i.e. Who can accept?

Step 3 - Has it been communicated?
i.e. When is it effective at law?

Step 4 - Can it be revoked?
i.e. is there a binding option?

Step 5 - Has it been terminated?

- Rejected – Express/Implied

- If so, when is the rejection effective a law?

- Revoked – If so, when is the revocation effective at law?

Lapse – Death/Time/Condition.

If so, when is the termination effective at law?

Step 6 - Has it been accepted?

6.1 Is acceptance made by offeree?
6.2 Is acceptance based on offer?
6.3 Is it unqualified acceptance?
6.4 Does it conform to terms of the offer?
6.5 Does the offeree use an appropriate mode?
6.6 Is acceptance in fact communicated (or posted, if postal rule applies)?
6.7 If so, when is acceptance effective at law?

SELF ASSESSMENT EXERCISE 4

Which, if any, of the following are offers capable of acceptance?

a. a departmental store leaflet offering pool furniture at a 50% discount
b. as for (a) above, but also offering "rain checks" for those unable to be supplied from current stock
c. a display in a store window of a video recorder with N5000 price tag
d. a passenger who boards a bus
e an announcement inviting contractors to tender for certain work stating that the lowest tender will be accepted.
f. statement by the Governor, wazobia. State that if re-elected, he will reduce taxes?

4.0 CONCLUSION

Contract is a bargain. There must be an offer and acceptance. We note certain principles of importance which regulate the legal effects of offer and acceptance. You need to be conversant with them. Offer is different from invitation to treat. You also have seen that offer may be revoked, rejected or stale. Only persons to whom offer is made may accept it and such acceptance must be total. It has to be communicated unless communication is dispensed with. If acceptance is by post, then postal rules must apply. Approach to problems on agreement her lies inserted. Practice it and should you encounter any difficulty, then read over the unit until you get over.

5.0 SUMMARY

Each one of us enters into one form of contract or another, every day. Buying and selling articles, entering 'Danfo' 'BRT', Okada, or 'Kabu Kabu' are common forms of contract. Bargain between the Federal Government and Julius Berger to build high way or bridges are also contracts. Contracts may be classified into formal and simple contracts. The latter is more common and of any importance and its basic elements are agreement, intention to create legal relations and considerations. In this unit we dealt with agreement. This comprises offer and acceptance. We discussed what constitutes an offer and how it may be revoked, expressly or impliedly rejected it may also lapse by death, efluxion of time or failure of condition precedent. In the same way, acceptance must be unqualified, by words or conduct and communicated. Please note: the importance of divided cases to problems of contracts cannot be sufficiently stressed.

6.0 TUTOR-MARKED ASSIGNMENT

1. A writes to B saying: "I am prepared to sell you my car for N500.00. If I have not heard from you by Saturday, I'll assume we have a deal and I'll deliver on Sunday afternoon. Assume B did not contact A, comment on the following:

(a) A delivers the car but B refuses to pay or accept delivery
(b) B waits for delivery, A fails to arrive and refuses to sell.

2. On 1 June, S wrote to P offering to sell P his car for N1.2million, the offer to remain open until 7 June. However, soon after posting that letter, S changed his mind, and on the morning of 2 June, he posted a second letter to P addressing him that the car was no longer for sale.

P received S's first letter at 10a.m on 3 June, and at 2, p.m on the same day posted the following reply to S: "I like your offer, but, due to my present financial position, will you accept payment of N200,000 per month. Over 6 months. This letter reached S on the morning of 4 June.

That afternoon (4 June), P also changed his mind; at 3p.m. He posted the following letter to S: "Forget my letter, I accept your offer and can pay immediately I receive the car." An hour after, posting that letter, P received S's second letter and S receives P's second letter the following morning.

a. Is there a contract between S and P? if not, why not? If so, why?
b. Would your answer to (a) be different had S not promised to keep the offer open until 7 June?

7.0 REFERENCES/FURTHER READINGS

Graws; (1993). *Introduction to the Law of Contract*. Sydney: The Law Book Co Ltd.

Vermeesch R. & Anov; (1995). *Business Law of Australia.* Sydney: Butterworths.

UNIT 2 CONTRACT: INTENTION AND CONSIDERATIONS

CONTENTS

1.0 INTRODUCTION

To constitute a valid contract, there must be an agreement (oral or written or both), an intention to create legal relations and consideration. We discussed agreement in the last unit. Can you recall what an offer is and how to bring it to an end? Good. Now we are about to consider the two other basic elements – intention to create legal relations and considerations. But before then, the objectives. Let us see.

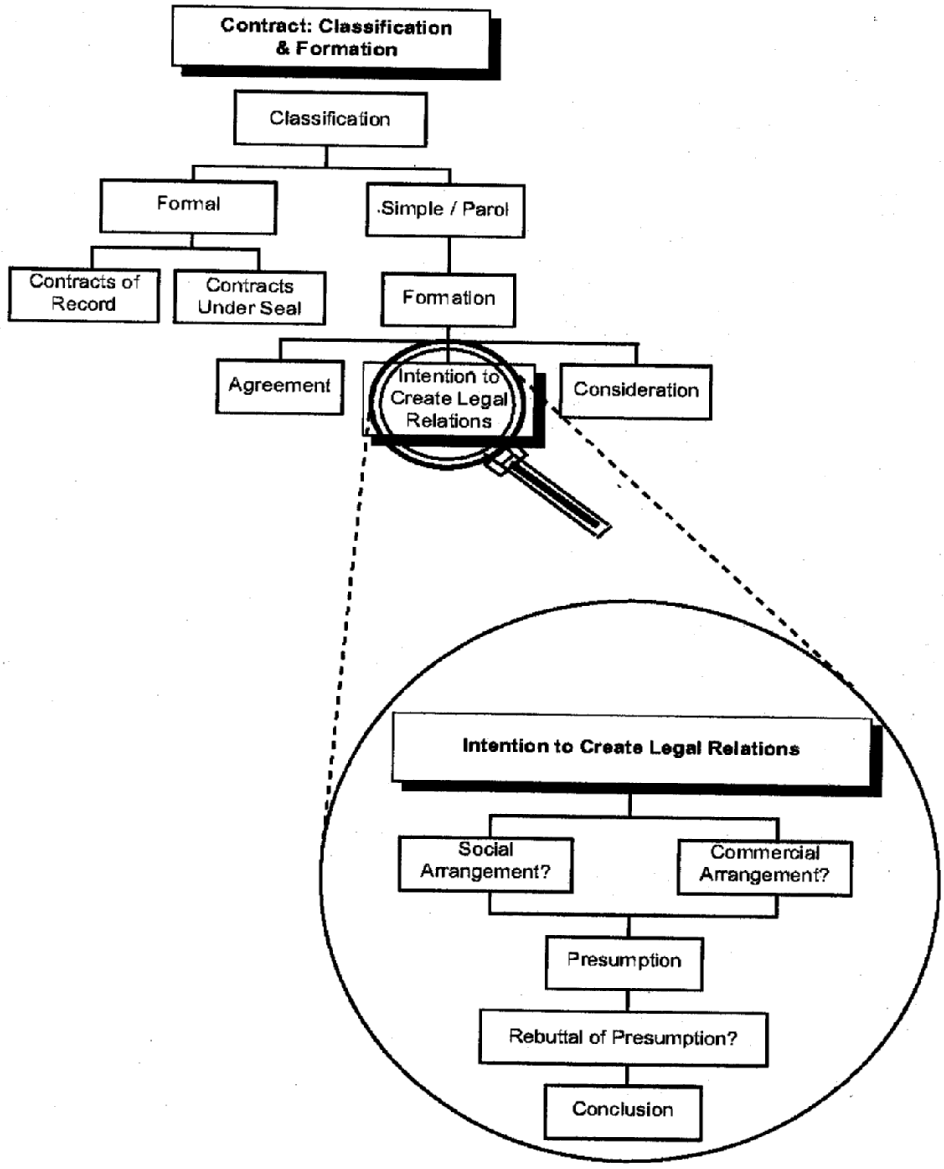
2.0 OBJECTIVES

On successful completion of this unit, you should be able:

- apply the principles relating to intention to create legal relations to relevant problem questions
- define ‘consideration’ and apply the rules relating to consideration to decide whether ‘good’ consideration is present
- explain the impact of promissory estoppels on the enforceability of promises and apply the doctrine to given fact situations;
- decide whether a simple contract has been formed in given fact situations.

3.0 MAIN CONTENT

3.1 Overview of Contract



3.2 Intention to Create Legal Relations

There are certain agreements, which although they may contain an offer and an acceptance, are not enforceable at law. This is because the law considers that there is no intention on the part of the parties to create legal relations. This occurs in most social agreements, for example a person agreeing to come to your place for dinner. It would be ridiculous to think that you could sue that person if he/she failed to turn up.
To determine if there has been an intention to create legal relations, the courts have tended to classify the agreement in question, in one of two ways:

- Social, family or domestic arrangements; or
- Commercial or business arrangement.

Having made the initial classification, the courts then make a presumption. In the case of social agreements the law presumes that there is no intention to create legal relations while in commercial transactions, the presumption works the other way. In both cases the presumption can be rebutted by evidence to the contrary. In considering whether the presumption has been rebutted the courts look at the intention of the parties. However, regardless of what the parties may have subjectively considered their intention to be, the courts apply an objective test and decide on the basis of what a reasonable person would consider the parties' intentions to be in the light of their words and conduct and the surrounding circumstances.

3.2.1 Social or Family Agreements

A case dealing with a social situation where the presumption against the existence of a legally binding contract was not rebutted is *Balfour v Balfour* (1919) 2 KB 571; whereas examples of the reverse situation are *Simpkins v pays* (1955).

While all relevant matters are considered in determining the intention of the parties, a number of **indicative factors** have been developed, which are of assistance (remember that these factors are **not** elements and operate as a guide only). They include:

- The gravity of the forseeable detriment which would be suffered by the promises if the promisor reneged on his/her promise.
- The degree of precision/certainty of the agreement
- The sections legal consequences involved in the promises made (eg changing of wills)
- Whether married parties were living in amity at the time of the agreement.

3.2.2 Business or Commercial

Of course in a business or commercial context the parties almost invariably intend their agreements to be enforceable and the presumption is to that effect. Two cases where the presumption was rebutted are *Rose & Frank Co. v Crompton & Bros Ltd* [1925] AC 445 and *Jones v Vernon's Pools Ltd* [1938] 2 AII ER 626.

A situation more likely to arise in commerce is where one party (usually a company) gives to another a 'letter of comfort'. The nature and effect of a letter of comfort was in issue in *Kleinwort Benson Ltd v Malaysia*

Mining Corp Berhad the circumstances were that the parent company gave a letter of comfort to a bank who was about to loan some money to the parent's subsidiary company. The letter said in part: 'It is our policy to ensure that the business of [the subsidiary] is at all times in a position to meet its liabilities to you under the above arrangements'. The loan was advanced to the subsidiary but was not repaid. The subsidiary became insolvent and the bank sued the parent company on the letter of comfort. The bank lost, the court holding that the letter did not constitute a legally binding promise. In reaching this conclusion the court relied heavily on the word 'policy' in the letter of comfort as suggesting a non-binding undertaking. This case shows that much depends on the words used and there are instances in the law where, on different wording, letters of comfort have been regarded as showing an intention to be legally bound.

Example of Documents

Simple Contract

This agreement entered into on the *24th* day of *July* 1990
BETWEEN *John Smith* of *1 Jones Street, Thomsonville* in the State of Queensland (herinafter referred to as the 'seller')
AND: *Emma Partridge* of *41 Henley Street, Brisbane* in the State of Queensland (hereinafter referred to as the 'buyer').
Recitals
A. The seller is the owner of a motor vehicle *Mazda 929* registered number *ABC-123* (hereinafter referred to as the 'vehicle').
B. The buyer wishes to buy the vehicle from the seller
It is hereby agreed by the parties that:
Operative Part
1. The buyer shall pay the seller the sum of *nine thousand dollars ($9000)* by cash or bank cheque as consideration for the vehicle.
2. The buyer is to pay the seller the total price on delivery of the vehicle.
3. The seller is to deliver the vehicle to the place of residence of the buyer at a mutually agreed time but within seven (7) days of signing this agreement.

SIGNED Emma Partridge (Buyer) SIGNED John Smith (Seller)
WITNESS Jean Mitchell WITNESS Thomas Fraser

Deed

This deed entered into on this *24th day* of *July* 1990.
BETWEEN *Jill Jones* of *1 Smith Street, The Village* in the State of Queensland (hereinafter referred to as the 'seller')
AND: *Jack Johnson* of *13 Long Drive, the Township*, in the State of Queensland (hereinafter referred to as the 'buyer').
Recital
A. The seller is the owner of a motor vehicle *Mazda 929* registered number *ABC-123* (hereinafter referred to as the 'vehicle').
B. The buyer wishes to buy the vehicle from the seller

THIS DEED WITNESSETH AS FOLLOWS:
Operative Part
1 .The buyer shall pay the seller the sum of *nine thousand dollars ($9000)* by cash or bank cheque as consideration for the vehicle.
2. The buyer is to pay the seller the total price on delivery of the vehicle.
3. The seller is to deliver the vehicle to the place of residence of the buyer at *10am* on the *29th* day of *July 1990* unless otherwise mutually agreed but within seven (7) days of signing this agreement.

SIGNED, SEALED AND DELIVERED by the said *Jill Jones* in the Presence of *Bill Smith* Bill Smith (Witness) JP
Jill Jones (Seller)

SIGNED, SEALED AND DELIVERED by the said *Jack Johnson* in the presence of *Bill Smith* Bill Smith (Witness) JP
Jack Johnson (Buyer)

SELF ASSESSMENT EXERCISE

1. Point-Form Approach

Now read the relevant paragraphs on intention and complete the following approaches on a problem in this area.

Point-Form Approach to Intention

Step 1 is the agreement _____or_____?

Step 2 (a) If it is_____, the law presumes_____

_____

(b) If it is_____, the law presumes_____

_____

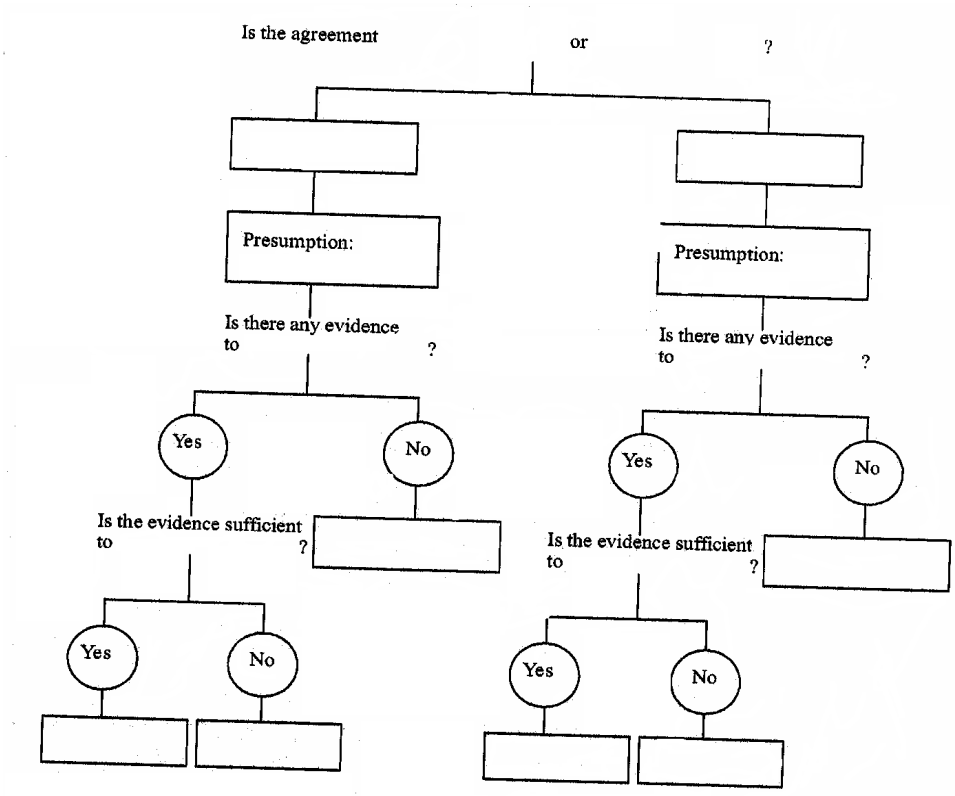
Step 3 is there any evidence to_____?

Step 4 is this evidence sufficient to_____?

Step 5 Therefore the parties did/did not intend to create legal relations.

Feedback is provided at the end of this unit.

2. Algorithmic Approach



Feedback is provided at the end of this unit.

3.3 Consideration

Consideration is the price paid (not necessarily in monetary terms) for the promise of the other party. If you do not pay for (or 'buy') the promise of the other then you cannot enforce that promise. For example, say a person (D) promise to come to P's house each week during the summer to mow P's lawn. This promise is not enforceable by P unless P gives something in return for the promise of the mowing. P might pay for the mowing or promise to fix D's car or provide D with certain goods. The point is that P must promise something in exchange for D's promise to mow the lawn, otherwise D's promise is gratuitous and unenforceable. Of course for a contract to be enforceable it must comply with the other elements of a contract such as agreement and intention to create legal relations.

The price of one party to buy the other's promise is said to be **detriment** to that person. So the detriment to P in the example above is the payment for the mowing, the fixing of the car as the case may be. Of course there is a detriment to D as well because he has to mow the lawn. But there are also **benefits** to each so that in ordinary case each person in a contract receives a benefit but suffers a detriment. The definition of consideration is expanded on below.

To try and determine if consideration is present in a given situation judges have developed certain rules. The main ones are:

(a) Consideration is not the equivalent of a moral obligation. For a time in English legal history it was a belief, widely held, that consideration was equal to the requirement to fulfill a moral obligation. This is no longer the case now – some **legal obligation** must be present to constitute 'sufficient' consideration.

(b) The following are definitions of sufficient consideration:

Some right, interest, profit, or benefit according to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

An act or forbearance of one party, or the promise thereof is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

(c) Consideration may be **executed**, i.e. an act/forbearance given for a promise, or executory, i.e. a promise given for a person.

An example of the former is where a person, knowing of a reward offered, finds a lost dog and returns it thereby completing the act in exchange for the promise of a reward. All that is then outstanding is for the owner to fulfil the promises.

Executory consideration is more common, for example where a party promises to sell a car in exchange for the other's promises to pay N500,000.00. The contract is formed at that point and the subsequent hand over of the car and transfer documents in return for the money is the performance of the contract. This may take place much later in time.

In contract of service, a promise to perform work in exchange for a period to pay wages if valuable executory consideration.

In either the executed or executory situation the consideration if valid.

(d) Consideration **need not be adequate** as compared with the promise given. For practical reasons, and as a result of the influence of the laissez faire doctrine, courts have refused to enquire whether the consideration moving from one party is adequate. So long as there is some consideration which the courts regard as **sufficient** there will be no further enquiry to see if each party received a fair deal.

See Chappell & Co. Ltd v Nestle Co Ltd [1960] AC 87. Notice here that the court held that the wrappers around chocolate bars amounted to sufficient consideration.

(e) To be sufficient, the consideration must not be too vague or indefinite. It has been held that an undertaking to lead 'a good moral life' was too indefinite, as was a son's promise not to bore his father. See also *Shiels v Drysdale* (1880) 6 VLR 126 where a promise by a person to transfer 'some of his land' was too vague.

(f) Consideration must move from the plaintiff. As a general rule, only the person who has paid the price for a promise can sue on it. To return to the example used above concerning the lawn mowing, assume that the agreement was that in return for D doing the mowing P agreed to pay D N1,000.00 per week. We now have consideration but only P or D can sue the other on their promise. If for example, P's promise to do the mowing even if she had a strong interest in keeping the house tidy. P's mother has not given anything to buy D's promise to P.

The rule that consideration must move from the plaintiff overlaps with another fundamental principle of contract law known as

privity of contract. In essence privity of contract means that only parties to a contract can sue on it.

(g) Consideration is not valid if it is **past**, i.e. if the plaintiff's act or promise alleged to amount to consideration occurred before the defendant's promise. *See Roscorla v Thomas* (1842) 114 ER 496. Turner, Note that the important point here is that only after the sale was completed did X make the promise about the horses' nature.

An apparent exception to this is the case of *Lampleigh v Braithwaite* (1615) 80 ER 255.

The defendant who had killed a man, asked the plaintiff to try to obtain a free pardon from the king. L incurred expense in his efforts to do this and B subsequently promised to pay him £100 for his trouble. The defendant failed to pay this amount and L sued on the promise. The court, although the consideration for the promise appeared to be past, found for the plaintiff on the grounds that the subsequent promise of the $100 merely acknowledges the indebtedness and defines the amount of compensation, which to that point, has not been defined.

(h) As a general rule consideration is not sufficient if the plaintiff simply carrying out an **existing obligation.** The reason for this rule is that the plaintiff must pay a price for the defendant's promise and this cannot be shown if the plaintiff is only doing what he/she otherwise would have to do anyway. If the plaintiff does something more than carry out an existing obligation then this will amount to consideration.

In this context there are three classes of obligations:

(i) The performance of an existing public or legal duty;
(ii) The performance of an existing contractual duty owed by the plaintiff to the defendant; and
(iii) The performance of an existing contractual duty owed by the plaintiff to a third party.

3.4 Existing Public or Legal Duty

Performance of an existing public or legal duty is not good consideration. See *Collins v Godfrey* (1831) 109 ER 1040. Here because A was under a duty to attend court anyway he did not 'pay' for B's promise to remunerate him for the attendance. However, if the plaintiff does something more than he/she is required to do, then, something more will amount to consideration.

Glasbrook v Glamorgan Council [1925] AC 270

The police force of the council were charged with the protection of a coal mine during a certain industrial trouble. The view of the police was that a mobile guard would provide sufficient protection but the colliery owners insisted on the posting of a stationary guard and the House of Lords held that it was for the police to decide what amounted to adequate protection and that the fact that the police had provided protection of the type over and above that which they considered necessary was sufficient consideration to support the promise of payment which had been made by the colliery owners.

3.5 Existing Contractual Duty

Plaintiff in Contract with Defendant

If a plaintiff is already under a contractual to do something for the defendant, a subsequent promise by the defendant to pay him more to do it will not be enforceable.

If a creditor is owed a sum of money by a debtor then a promise by the creditor to accept a lesser sum in full satisfaction will not be enforceable by the debtor. The question is what consideration has moved from the debtor to buy creditor's promise to forgo the balance? The answer is none because the defendant is simply carrying out an existing contractual obligation. This principle was upheld in *Foakes v Beer* (1884) 9 App Cas 605.

With this type of case you have two (potential) contracts. The first one is the contract, which brings about the original debt; the second one is the promise by the creditor to forgo the balance of the debt in payment of the lesser amount, to, which of course the debtor agrees. If the second potential contract were valid then the creditor would not be able to go to court to claim the balance because the original debt is extinguished by the second agreement. However the second contract to be valid must be supported by consideration. There is obviously consideration moving from the creditor because that person has agreed to forego a legal right (to claim the balance) but the question is what consideration has the debtor provided for this new contract? The answer is none unless the debtor does something more such as pay the lesser amount on an earlier date or in a different place at the convenience of the creditor (*see Pinnel's case below*). If the debtor does provide new consideration then you have what is called an ***accord and satisfaction*** (see below).

The rule in *Foakes v Beer* has been criticized on the basis that a creditor should be able to come to an amount of money less than the total debt

but in full satisfaction and for the debtor to be protected against the creditor claiming the balance at some time in the future.

The rule in Foakes v Beer also does not apply where there is a composition of creditors. It occurs where creditors at a meeting agree to accept so much in the naira for their debts, e.g. fifty kobo in the naira. Here the Bankruptcy Act itself gives the debtor protection against the creditors attempting to recover the balance of the debt. Also even if the Bankruptcy Act is not involved the creditors may be bound by any such arrangement if all the creditors agree. For a creditor to go back on an acceptance of a lesser sum by proceeding for the balance, would amount to a fraud against the other creditors.

Recent case law has suggested a relaxing of this principle. The United Kingdom Court of Appeal considered the issue in Williams v Roffey Bros and Nicholls (Contractors) Ltd [1990] 1 AII ER 512.
This case, a contractor agreed to pay a sub-contractor more than the amount originally contracted for if the sub-contractor, who was experiencing financial difficulties, completed the work on time, the contractor being subject to a penalty clause in the head contract. The court found that the practical benefit and commercial advantage to the contractor of completion as promised constituted consideration in the absence of fraud or duress.

The parties can also avoid a problem with consideration by incorporating their agreement in a deed.

Another alternative is where one party, rather than trying to complete his obligations by offering less than his full performance, offers something different to his/her original obligation under the contract. See Pinnel's case (1602) 77ER 237. If, for example, instead of asking the creditor to accept N80,000 in satisfaction of a debt for N10,000 he/she offers N80,000 plus an antique vase, the original contract may be discharged by the creation of the new contract. This is referred to as **accord and satisfaction.** The **accord** refers to this new agreement and the **satisfaction** to the consideration given for it. The consideration must comprise something different to what the person giving it is already under a legal obligation to do and should be of some benefit to the creditor. Accord and satisfaction also comes up later under the module on Discharge of Contracts.

3.6 Plaintiff in Contract with Third Party

This is the exception to general rule that doing something you are already obliged to do is not good consideration. The leading authority is *Shadwell v Shadwell* (1860) 9C BNS 159 concerning an arrangement between an uncle and his nephew.

In that case the nephew promised to marry his fiancée in return for the uncle's promise of an annuity. The nephew already had an existing contractual obligation to marry his fiancée, who was a **third party,** if not one of the parties to the arrangement under examination, (between the uncle and the nephew). The issue was, whether the nephew gave good consideration to his uncle for the latter's promise to pay him an annual sum when all the nephew did, was carry out an existing contractual obligation to marry his fiancé. The court held that he had enforced the uncle's promise. On its face result goes against the *Foakes v Beer* rule and can only be explained by the presence of the third party (the niece).

3.7 Promissory Estoppel

The courts have also avoided the necessity for consideration by the application of a principle referred to as promissory (or equitable) estoppel.

The notion of 'estoppel' is that a court will in some cases prevent (stop) a person from changing their position where that change will operate to the detriment of another. The point will become clearer when some example are discussed below but for the moment you should just be aware that it is a remedy that (in certain circumstances) one party can use estoppel to stop the other from pursuing a certain course of action. In the present context it means the court will prevent a person from going back on their **promise** which is one form of estoppel. The doctrine came about to try and relieve the harshness of the strict rule of consideration in cases where there is an existing contractual duty, as discussed above.

This is a relatively recent development in the law. Its first modern indication can be traced to *Central London Property Trust v High Trees House Ltd* [1947] KB 130. In this case, and like cases on promissory estoppel, the court is moved by the injustice of one person going back on their word. There are however clearly defined **elements** of promissory estoppel as set out by Graw (1993, pp 92-3).

(a) Some form of pre-existing legal relationship between the parties under which rights either existed or were expected to be created. That relationship can be – but need not be – contractual …

(b) A promise, undertaking or assurance (which may be either express or implied as long as it is clear, unambiguous and unequivocal), by one party that he or she will not insist on his or her strict legal rights. That promise, undertaking or assurance must be given in circumstances which raise in the other party's mind an expectation (or assumption) that promise, undertaking or assurance will be honoured even though it is not supported by consideration.

(c) An actual reliance by that other party on the promise, undertaking or assurance in that he or she subsequently behaves on the assumption that the promise, undertaking or assurance will be honoured;

(d) An element of detriment is that, because he or she acts on the assumption, the promisee is placed in a worse position (when the assumption turns out to be false), that he or she would have been in had the promise, undertaking or assurance never been made at all…

(e) An element of unconscionability. This is necessary because, as Mason C.J. pointed out in Verwayen's case: 'a voluntary promise is generally not enforceable… The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss'. Consequently, before a court will grant any sort of relief, the party pleading promissory estoppel must show that it would be unjust or inequitable to allow the other party to resile from his or her promise, undertaking or assurance. In most cases, as in Verwayen, this can be established simply by showing the twin elements of reliance and consequent detriment. However, it will not be established if the promisee's own behaviour has, itself, been in some way unconscionable or reprehensible.

(Source: Graw 1995, P. 180)

The leading Australia case inthearea is Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387:

Waltons Stores, a retailer, negotiated with Maher for the lease of commercial premises. Under the proposal Maher was to demolish an

existing structure on the site and erect a new building to be leased by Waltons. After discussions between the solicitors for both parties, the necessary documents were drawn up. Certain amendments were proposed by Maher's solicitors. Waltons' solicitors said they believed approval for the amendments would be forthcoming from their client, adding: "We shall let you know tomorrow if any amendments are not agreed to." Some days later Maher's solicitors, have heard nothing about the amendments submitted "by way of exchange" documents executed by their client for signature by Waltons.

Receipt of these document was not acknowledged for nearly two months as Waltons were privately reconsidering their position in view of impending policy changes to their future trading operations. Meanwhile, Maher sought finance for redevelopment of the site, and proceeded to demolish the existing building which Walton became aware of shortly afterwards. Erection of the new building was begun to ensure completion by the required date but when it was 40 per cent completed, Maher was advised by Waltons' solicitor that Waltons did not intend to proceed with the transaction. No binding contact to lease the premises had been concluded between the parties as there had been no exchange of documents. Maher's action for damages against Waltons succeeded in both the New South Wales Supreme Court and the Court of Appeal, whereupon Waltons appealed to the High Court.

It was held that the appeal would be dismissed. The majority of the High Court was of the view that Maher had assumed that exchange of contracts would take place as a mere formality. The inaction of Waltons in retaining the executed documents and doing nothing constituted clear encouragement or inducement to Maher to continue to act on the assumption that the lease was proceeding. It was unconscionable for Waltons, knowing that Maher was exposing himself to detriment by acting on the basis of a false assumption, to adopt such a course of inaction which had encouraged Maher to proceed. "To express the point in the language of promissory estoppel, [Wlatons] is estopped in all the circumstances form retreating form its implied promise to complete the contract" (at 408 per Mason C.J. and Wilson J).

An example of where the doctrine was unsuccessful was austotel Pty Lted c Franklins Selfserve Pty Ltd (1989) 16 NSWLR 582:

This case involved negotiations for the grant of a lease in a shopping complex then in the course of erection. Negotiations were at an advanced stage, F's particular specifications, including hydraulic, electrical and mechanical designs, being used by the builder and F's having ordered much new equipment for installation in the store, F had issued a letter to A's financiers indicating its preparedness to lease the

store. When F learnt that A was negotiating with a third party it sought an order that A be required to grant it a lease, relying on Waltons Stores. The application failed before the Court of Appeal. Crucial to the majority decision was the fact that the rent for the total area had not been finalized because F was found to have been deliberately keeping its options open on this question. The parties to the negotiations were, in the majority's view, playing a cat and mouse game trying to tie the others down without committing themselves. In the words of Kerby "We are not dealing with ordinary individuals invoking the protection of equity from the unconscionable operation of a rigid rule of the common law…nor were the parties lacking in advice either of a legal character or of technical expertise …" Court should be careful to conserve relief of that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of businessmen: 16 NSWLR at 585.

The doctrine of promissory estoppel is an example of the court, placing less significance on the strict requirement for consideration. The doctrine can have wide implication in relation to commercial transactions

4.0 CONCLUSION

In order to constitute a contract, there must be an intention to create legal relation such intention is personal in commercial or business transaction. The reverse is the case in family or social agreements. Consideration is another basic requirement in even simple contract. The courts have ensured a number of rules revolving around consideration. You need to know these rules. Promissory estoppel, in all its ramification, cannot be sufficiently stressed.

5.0 SUMMARY

You have learnt the elements of a valid contract – offer, acceptance, intention to create legal relations and consideration. Other conditions which we shall learn in the next unit are relevant to enforceability rather than the validity of contracts.

6.0 TUTOR-MARKED ASSIGNMENT

1. What is the presumption that applies to:

(a) domestic or social agreements
(b) commercial agreements

How are these presumptions rebutted?

2. A, an accountant promised his nineteen year old daughter B, an accountancy student, that he would pay B N5000 per week if she helped out at the practice on Saturday and Sunday mornings. B worked four weekends in a row before the pressures of study forced her to quit. A has not paid B anything and B wishes to know whether she can legally recover the ₦20,000 accrued. Advise her.

3. In his book, the Discipline of Law; (Butterworths, London, 1979), Lord Denning said the following about High Trees:

> *Looking back over the last 32 years since the High Trees case it is my hope that the principles then stated – and the extension of them – will come to be accepted in the profession. The effect has been to do away with the doctrine of consideration in all but a handful of cases ... it has been replaced by the better precept; 'My word is my bond", irrespective of whether there is consideration to support it. Once a man gives a promise or assurance to his neighbor –on which the neighbor relies – he should not be allowed to go back on it. In stating the principles, and its extension, the lawyers use the archaic word "estoppel',*

(a) Discuss
(b) Do you believe that the role of consideration in the formation of contracts is in decline?

4. …. the post rule is still likely to have some influence on how the common law deals with electronic communications in the future. Discuss.

ANSWER TO SELF ASSESSMENT EXERCISE

1. Point-Form Approach

The following approach is appropriate to a problem in this area.

Point-Form Approach to Intention

Step 1 is the agreement social or commercial

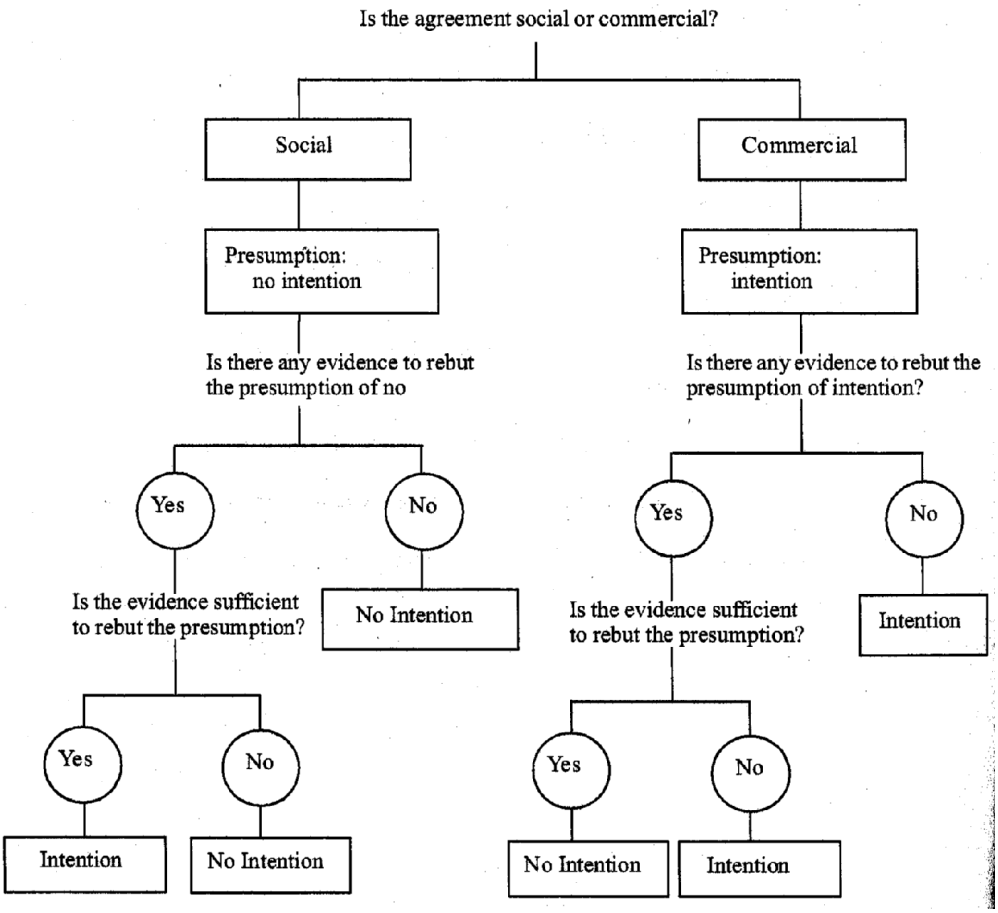
Step 2 (a) If it is **social,** the law presumes **that there is no intention to create legal relations.**

(b) If it is **commercial,** the law presumes **that there is intention to create legal relations.**

Step 3 Is there any evidence to **rebut the relevant presumption?**
Step 4 Is this evidence sufficient to **rebut the presumption?**

Step 5 Therefore the parties did/did not intend to create legal relations.

2. Algorithmic Approach



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UNIT 3 CONSTRUCTION OF TERMS OF A CONTRACT

CONTENTS

1.0 INTRODUCTION

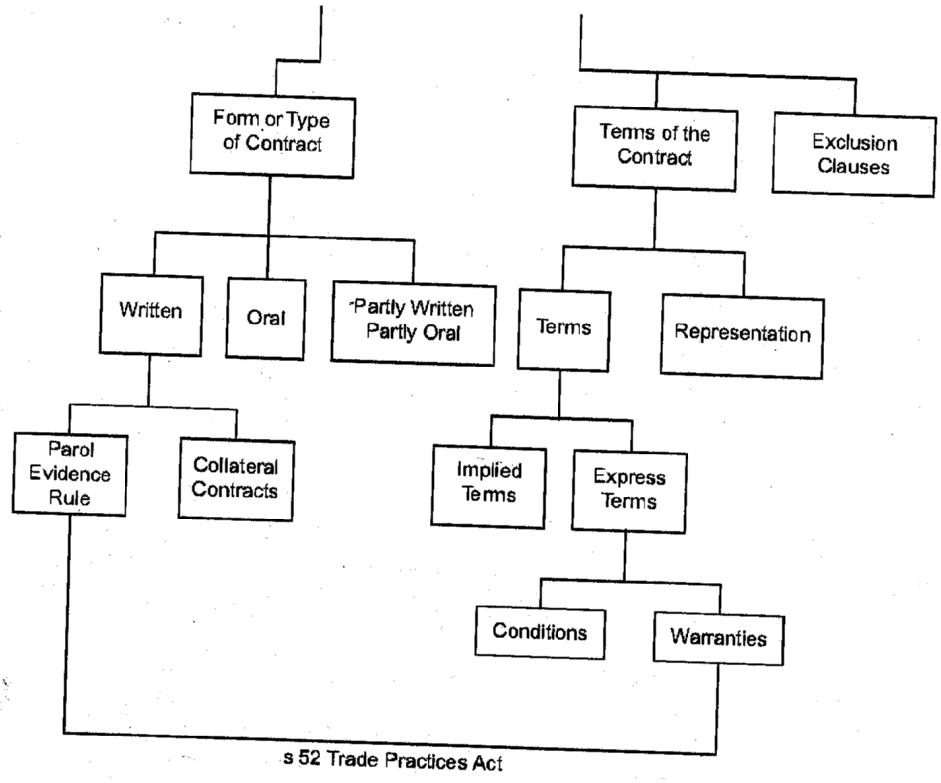
Up to this point, we have been concerned with an inquiry into whether a simple contract has the basic elements which must be present for it to be formed. These basic elements are offer and acceptance, intended to create legal relations and consideration.

It may come as a surprise to you that very little of the court's time is taken up with this enquiry. In the vast majority of cases there is no contest between the parties that an agreement of some sort is in existence, that there is consideration and that there was present, an attention that the contract be legally enforceable.

In most contract disputes which are fought out in the courts, probably none of the matters referred to above will be in issue. What is more likely to happen is that the parties disagree not about the existence of the contract but about its **terms.** The real issue between the parties is what is the correct interpretation to be placed on the agreement. In fact about

forty per cent of the contract cases decided by Courts involved at least one dispute over the meaning of a term.
In this module we look at the steps a court will take in analyzing the circumstances surrounding a contract in order to reach a conclusion about its ambit and the legal effect of terms.

Contract: Construction of the Terms of a Contract



2.0 OBJECTIVES

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

- evaluate which terms (express or implied) fall within the scope of a contract
- assess the legal significance of statements made outside the scope of a main contract
- determine the meaning and effect of terms of a contract, in particular of exclusion clauses.

General Rules of Interpretation

In the discussion that follows reference will be made to an number of specific rules and factors that bear upon the interpretation of a contract. There are however a number of general considerations or approaches that courts adopt when dealing with this area. These are:

a. As a matter of policy the courts' approach to determining whether a contract exists or not is that agreements should be preserved rather than struck down. Courts will prefer a construction that will render a contract effective rather than one which will cause it to fail for uncertainty. This is the justification then for courts implying terms into contract, which is dealt with below.

b. As with statutory interpretation, the contract is interpreted as a whole. Words must be read in the light of the clause as a whole which must also be looked at in the context of the contract as a whole.

c. When a meaning must be attributed to a particular word, the courts look first to the interpretation clause (which is often included in important commercial transactions), and if this does not clarify the matter, they will give the word its ordinary meaning ie that by which it is generally understood. This is subject to the words being used in a technical sense. If they are legal words, they will be interpreted according to the established legal meaning unless a contrary intention clearly appears from the context. Where the words are non legal technical words, the courts will follow the technical meaning which is usually established by oral evidence from experts and reference to trade or technical publications.

d. Where it appears that the parties have only agreed and have not provided a satisfactory mechanism to resolve outstanding issues, the courts will treat the 'contract' as void for uncertainty.

   This does not apply if a commercial transaction is merely ambiguous. As long as a meaning can be attributed, the courts treat an ambiguity as merely a problem of construction and decide upon the most appropriate meaning. Ambiguous terms will be interpreted in accordance with normal rules of interpretation. One rule which can be vital as to the outcome of the case is the *contra proferentum* rule. The effect of this rule is that any ambiguity in a written document will be resolved against the person who drew up or proposed the document and now seeks to rely on it.

e. A term to which no meaning can be attributed is treated as void for uncertainty. It the contract can stand on its own without the clause, the courts will sever the offending clause. Where it involves an essential matter, the 'contract' cannot be found to be complete.

'When I use a word', Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less".

'The question is', said Alice, 'whether you can make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'Which is to be master – that's all.

Approach to be adopted in this Module

When we are faced with the task of interpreting or construing a contract it can be difficult to develop a clear approach because there are a number of overlapping rules and considerations. To assist here four broad headings are adopted which translate into eight steps, which should be used to answer questions in this area. The eight steps are set out at pages 8.10 and 8.11. The headings are:

1. What is the form or type of contract?
2. What are the terms of the contract?
3. What weight should be given to the terms?
4. The impact of Restrictive Trade Practices Act or other Statute.

3.0 MAIN CONTENT

3.1 The Form or Type of Contract

In this context contracts can be divided into three types:

- Oral
- Written; and
- Partly oral and partly written.

As you should be aware by now, few contracts have to be in writing. The vast majority can be, and are, either in an oral form or partly oral and partly in writing. Frequently there is a verbal agreement plus some evidence of the contract in a written form. A simple purchase of goods will usually involve the production of a receipt, which may contain some terms of the contract such as the price, description of the goods etc.

3.1.1 Findings of Fact

At this early stage of its investigation, the court is primarily concerned with discovering what the facts are. There may be no dispute that, the contract is wholly oral but there could be a real dispute about who said

what and whether one party made a promise to the other. The task of the judge is to establish what the scope of the contract is, which is obviously much easier when the contract is in writing. In reaching any findings of fact, the judge will draw upon rules of evidence, reliability of witnesses, corroboration and so on. Some of these issues we touched on earlier. In this course we are not concerned so much about this process of fact finding (it is study on its own) and in any event in any problem or exam question you will be given the facts so this first phase is completed for you.

If a contract is oral or partly written and partly oral, then apart from the process of the court defining the scope of the contract, there are no specific rules that we need to be aware of at this stage.

More importantly from our point of view is the need to realize that there is an important consequence if the contract in question is in writing as district from the contact which is oral or partly written and partly oral. If a contract is wholly in writing then the parol evidence rule comes into play.

3.1.2 Parol Evidence Rule (PER)

The general patrol evidence rule is that extrinsic evidence is unadmissible to add to, vary, or contradict a written document where a judgment, contract, disposition of property or other transaction is wholly written then no oral evidence will be admitted to vary or expand the terms of the written document. So it is not permissible to call witnesses to give evidence of an oral promise. An example of the PER would be if a person (the vendor) agreed to sell their business to another (the buyer) and at the end of the negotiations they signed a contract completely covering the agreement. Suppose in the course of the discussions the vendor gave certain verbal assurances to the buyer about the turnover of the business then unless those assurances were placed in the written contract, no evidence could be called by the buyer about them/ accordingly, the buyer would be limited to whatever the written agreement contained.

Quite frequently to make certain the general rule applies, the person drawing up the contract (who is usually the vendor in the example given above) will include a clause stating ‘that the parties agree that the whole of the contract is contained within the written terms and cannot be varied by oral agreement or representations’ or words to that effect. You should be aware that it is not necessary to have such a clause for the rule to apply, - its just that it makes its application quite clear.

3.1.3 Exceptions to the Rule

There are cases in which extrinsic evidence may be admissible. So whether a contract is wholly in writing or only partly is a crucial matter for the courts to decide number of exceptions the general. These exceptions have been developed by the courts to overcome some of the hardship that can be cause by a strict application of the rule. Extrinsic evidence is admissible in the following cases even through the transaction is embodied in a written instrument.

1. To show that there is no valid transactions e.g. want of consideration
2. To prove a condition precedent to any obligation under a contract or disposition of property
3. To add supplemental or collateral terms contained in a separate oral agreement
4. To incorporate local or trade customs
5. To show a subsequent oral agreement varying or rescinding the written instrument. These are examples only.

You will notice repeated problems in this area the fact that the contract is partly written, partly oral and whether there is a collateral contract are important issues.

3.1.4 Collateral Contracts

The third exception to the general rule arises from the notion of collateral contracts.

A statement may fall outside the main contract under consideration, for example because of the rule, however the courts may still consider that it should have legal effect as a collateral contract.

A collateral contract must have evidence same as the same three basic elements, as in any other contract and consideration in this context, is the making of the main contract. In addition, the statement in question must be a promise.

For example if one party is hesitating about signing the main contract and in order to ‘clinch the deal’, the other may promise that a particular act will be done. In such a situation if the promisor reneges on his/her promise the plaintiff can argue that the promise, should be enforced as, in exchange, he or she entered into the main contract. A good example of a collateral contract is *de Lassalle v Guildford* [1910] 2KB 215.

The consideration for the collateral contract is entry into the main contract. Without that reliance, entry into the main contract would not be good consideration for the collateral contract.

The question that arises is what happens where there is inconsistency between the main contract and the collateral contract, the main contract will prevail over any such collateral promise. However in an appropriate case it appears promissory estoppel may apply.

3.1.5 Other Issues

Two final points are relevant to this phase in the interpretation of a contract:

- Since much depends on what is inside and what is outside the contract, the courts pay particular attention to the exact point at which the contract arises. This is the case whether the contract is oral, partly oral, partly written or even wholly in writing. The obvious point is that once the contract has been formed there is closure on additional terms and promises that might be incorporated within it.
- Many of the problems or issues that arise under the rule, collateral contracts and generally defining the scope of the contract, are swept away by the operation Restrictive *Trade Practices Act* or other statute.

SELF ASSESSMENT EXERCISE 1

1. Distinguish between the following:

(a) a term
(b) a representation
(c) puffery
(d) a Condition
(e) a warranty and
(f) a Collateral Contract

2. What is the effect of a breach of?

(a) a Condition and
(b) a Warranty.

3.2 What are Terms of the Contract?

3.2.1 Terms or Representations

Once a court has decided as matter of evidence, what statements (oral or in writing) were made by the parties, the next step is to decide what is the legal effect of each statement. In deciding this question the courts ask whether the statement is part of the contract (and therefore binding) or are they outside the contract. To be contractually binding they need to be **promissory** in nature in which case they are called **terms** of the contract. Otherwise the statement while designed to induce or encourage the other party to enter the contract, does not form part of the contract and are not legally binding. These statements are called **representations** or 'mere' representations.

Say for example, A sells his business to B. The price, what stock, is included in the price, when B is to take over the business are all terms of the contract. Suppose though that in the course of the negotiations A said to B 'I've been in this business for 10 years' then it is highly likely that such a statement will only be regarded as a representation, if it was relevant at all. The difference between a term and a representation is reasonably clear in this case but frequently the business line is quite blurred. What if, in the example above A said to B that the turnover of the business next year 'will be X', assuming that X is higher then the current figure. Would that be a term of the contract? For a case example of the difference between a term and a mere representation see ***Oscar Chess Ltd v Williams.***

3.2.2 Test and Indicative Factors

To decide between a term and a representation, the courts apply an **objective test** of the intention of the parties. The **test** is whether a reasonable person in the position of the parties would have understood that the statement in question would be enforceable. The test is similar to that encountered in the area of intention to create legal relations. As mentioned above, the dividing line between the term and the mere representation is often quite unclear. To assist here there are a number of **indicative factors** developed by the courts which are useful, however it goes without saying that these factors are not elements. They are:

1. How closer in time to the formation of the contract was the statement made? The closer in time the more likely that the statement was a term.

2. If the statement was oral was it then included in the subsequent written contract if there was one? A failure to do so will be taken

as evidence that the intention was against an intention to regard the matter as a term. Of course if the contract was wholly written then the law of audience would exclude the oral term so this factor will only be relevant where the contract is partly written and partly oral.

3. Did one party have special knowledge or skill relevant to the contract and on which the other party was entitled to rely? This could apply to our example above of A selling his business to B. The seller is likely to have a much greater knowledge of the particular business than the buyer.

4. Does one party indicate that the statement was of importance to them. In one case a person buying a car made repeated requests of the seller to assure him that the car was roadworthy. These requests were interpreted by the court to indicate that the roadworthiness of the car was critical to the buyer and in the circumstances was regarded as a term of the contract.

[Adapted from] *An Introduction to the Law of Contract by S. Graw, 1993. p 148)*

3.2.3 Misrepresentation

If a statement made by a party is a representation not a term this does not mean that the other party has no legal recourse. If the representation is false and it induces the innocent person to enter the contract then that person has remedy in misrepresentation. This area is examined in detail in the next module. For the moment it should be realized that while a remedy might be available for misrepresentation, the right to sue does not arise out of breach of contract because the representation is not part of the contract. Contrast the situation where a person fails to fulfill a term of the contract, then the other party sues on the contract.

3.2.4 Puffs

At this point a further distinction needs to be made. You will recall in the previous module that a puff was distinguished from an offer. A puff was an exaggerated statement not regarded as having any legal consequences. So even if the statement is wrong the person making the statement will not be liable. In the sale of the business by A to B, a puff would be statement for A ‘You would have to go to Bourke to get better value for your money’ In the present context a puff is distinguished from a representation which, if false could give rise to a legal remedy.

3.2.5 Implied Terms

So far we have been discussing the legal effect of statements which have been made by the parties, some of which are classified as terms. Such terms are called express terms. However there are terms which are not spoken of by the parties at all but are still present in the contract. They are implied terms. An example of implied terms would be in a lease where the parties discuss the rental period of the lease and a few other basic details but that is all. Later on there may be a question of who is to pay for the repairs to the premises – a matter which was not spoken of at the outset. This issue is likely to be dealt with by a court implying a term which covers the problem. In this instance the court draws on what is the custom or accepted position within a trade, or, in this case the well known legal relationship of landlord and tenant.

Implied terms are likely to be read into a contract by the court in these circumstances:

(a) because of prior dealings between the parties, see *Hillas v Arsoc (1932) 147 LT 503:*

The appellant company had agreed to buy from Arcos Ltd, '22,000 standard of softwood goods of fair specification over the season 930'. This agreement was in writing and included a term giving the appellant an option to buy a further 100,000 standard during the season, 1931. The question for the court was whether this option agreement was enforceable. The Court of Appeal held that it was not, as it regarded the alleged option as nothing more than an agreement to make an agreement, which is not an enforceable agreement. This view was based on the number of things left undetermined: kinds, sizes and quantities of goods, times and ports and manner of shipment. On appeal however, the House of Lords, in a significant shift in attitude, rejected the view of the Court of Appeal. That view would have excluded the possibility of big forward contracts being made because of the impossibility of specifying in advance the complicated details associated with such commercial contracts. The House of Lords approached the interpretation of the option agreement by reference to the previous year's dealings between the parties. The house reaffirmed the view that the parties, being business men, ought to be left to decide with what degree of precision it is essential to express their contracts, if no legal principle is violated.

(Source: Vermeesch & Lindgren 1995. p 202)

(b) on the basis of custom or trade usage, so long as the custom is certain, well known and reasonable. An example of custom could

be the lease situation mentioned above. When we say well known, this does not mean that it must be known to the parties – it must be well known within the trade.

(c) To give the agreement some business efficacy, see *The Moorcock (1889)* 14 PD 64.

(d) Statute may also imply terms, to 'flesh out' the terms expressed by the parties. *The Sale of Goods Act of 1893* important such statute. (See the statutory interpretation problem in the introductory book for an example of implied terms.) Other statutes may also imply terms into specific types of contract, for example hire purchase agreements or residential tenancy agreements.

3.3 What Weight should be given to the Terms?

Assuming that we have separated out the terms from representations, the next step is to decide what weight to give the terms. Here the law breaks terms into two types: **conditions** and **warranties.** The reason for this is that different remedies are available for these two types of terms.

While the different legal results are clear enough, separating conditions from warranties at the outset is not always easy. In this course you are only expected to know the fundamental distinction between them and the different results that flow. However you should be aware of two cases that bring out the distinction. These are *Bettini v Gye* and *Associated Newspapers v Bancks.*

One may ask why do we have to go through this tortuous path of the common law analysis when construing a contract? These are two reasons:

1. Parties may have been guilty of misleading or deceptive conduct not being merely **a simple failure to abide by a term of a contract.** For example a party might undertake to carry out a certain task in a contract as the opera singe did in *Bettini v Gye.* Her failure to arrive in London 6 days before the engagement was not misleading or deceptive conduct, it was simply a breach of contract. So in that case it is still necessary to traverse the term/representation/condition/warranty steps to see what remedy was available to the other party.

However, let us assume that the singer while being interviewed for the position, had told the other party that she had sung in certain famous music halls in Europe which later turned out to be false. So long as the

other party relied on the misrepresentation then a remedy would be granted. That remedy could be rescission and damages which is equivalent to breach of condition at common law.

2. Contract has its origin in common law.

3.4 Summary of Process in Construing a Contract

Step 1

Decide whether the contract is oral, written or a combination of the two.

Step 2

If it is wholly written then apply the personal evidence rule. A good indication that the rule is relevant is a clause in the contract which state that the parties agree that no oral statements will make the written terms.

Step 3

Apply the exceptions to the PER. Would the parol evidence:

- Explain a custom or trade usage;
- Identify a party to the contract or the subjected matter of the contract;
- Reveal that entry into the written contract was subject to a condition yet to be fulfilled;
- Show a collateral; or
- Prove that the written part was not the full contract.

Step 4

Check whether there is collateral contract in existence. While this possibility is covered in the exceptions to the PER, it is necessary to consider the issue on its own. Remember that the courts will not readily find a collateral contract and there are three prerequisites:

- The statement which forms the collateral contract must be promise and otherwise fulfill the requirements of a contract.
- The party to whom the statement is made must rely upon the statement in entering the main contract. The best guide to a collateral is where one party hesitates before signing a written contract but eventually does so on the basis of a promise made by the other.
- The collateral contract must be consistent with the main contract.

Step 5

Categories the statements that are in dispute in three ways:

- Puffs, (which can be rejected as having no legal significance)
- Representations
- Terms

To decide between terms and representations apply the 4 indicative factors:

1. timing;
2. oral statement followed by writing;
3. special skill or knowledge of one party; and
   importance of the statement.

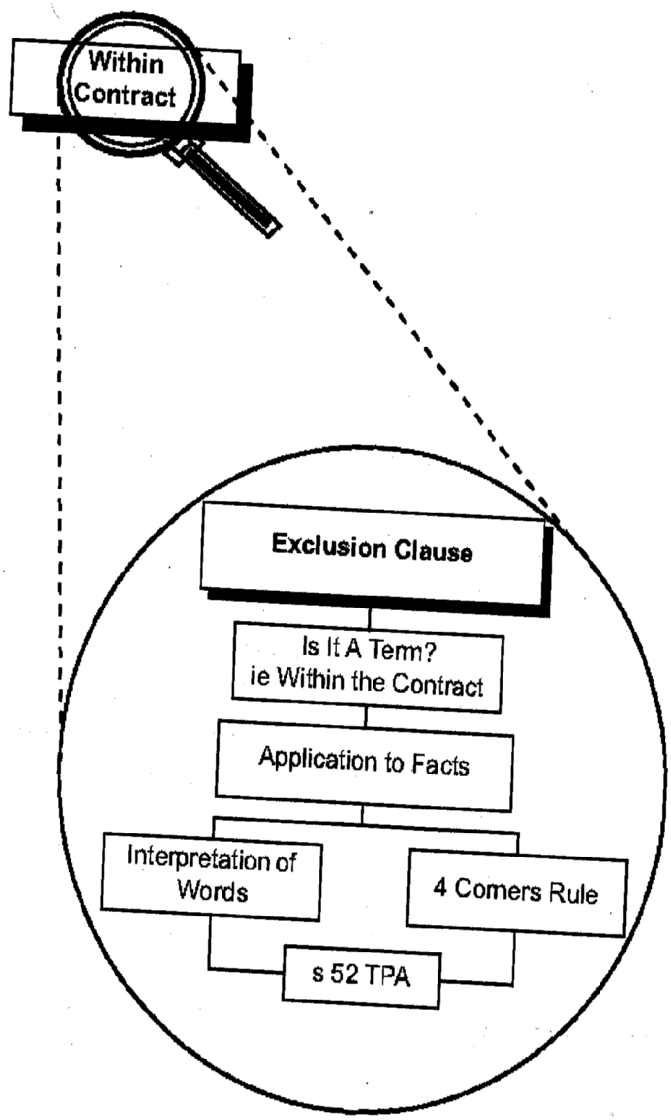
At this point in your answer you should mention that a representation will only give rise to liability if it induces the contract and is false.

Step 6

Assuming that the statement in question is a term, apply the condition/warranty distinction. Remember a condition, if breached, allows the innocent party to rescind the contract and sue for damages, however an unfulfilled warranty only means damages.

Step 7

Check to see if there are any implied terms. In this course you are only expected to recognize, in a problem situation, terms that might be implied through prior dealing between the parties. You need only to be aware that in theory, terms can be implied through custom, to give business efficacy and in some instances by statute.



3.5 Exclusion Clauses

While exclusion clauses are (potentially at least) terms of contracts, they have developed their own body of law and it is usual to treat them separately from the general principles of interpretation of contracts.

Exclusion clauses refer to the presence of a clause in a contract, which purports to exempt one party from certain liabilities. We enter into many contracts which contain exclusion clauses and often we are unaware of their presence.

The growth of exclusion clauses has paralleled the growth of 'standard form contracts'. Most large corporations, particularly when they are dealing with the public, tend to get into contract by means of their own standard contract drawn up by their legal advisors which naturally enough protects their interests. If people who wish to deal with the company object to the contract, they are generally given a 'take it or

leave it' reply. If they 'leave it' they will probably find a very similar contract with the next corporation that they wish to deal with.

This is a far cry from the 19th century situation when the law presented (and mostly it was the case) that the parties entered into the agreement from an equal footing and after proper negotiations. While exclusion clauses are still interpreted against the background of rules laid down before their existence, courts in general terms have shown their dislike of them and have mitigated their effect in favour of the consumer. If the exclusion clause is not upheld by the courts, the court may find that the statements contained in the clause are false or misleading representations.

You should note the following rules:

(a) If you sign a contract containing an exclusion clause you are bound by it, unless there has been misrepresentation; eg as to the nature of the document. *See L' Estrange v F Graucob [1934]* 1 KB 805.

(b) If it is not signed the question is – was the person aware of the existence of the exclusion clause? The test is, would a reasonable person have expected the document to contain contractual terms.

(c) Did the person seeking to reply on the exclusion clause bring it to the attention of the other party? *See parker v South-Eastern Railway Co* (1877) 2 CPD 416; *Thompson v LMS Railway Co* [1930] 1 KB 41. *Baltic Shipping Co v Dillon* (1991) 22 NSWLR1 and Thornton v Shoe Lane Parking Ltd (1971) 2 QB 163 (Turner).

(d) The notice must be given at the time the contract was made, *Olley v Marlborough Court Ltd* (1949) 1 KB 532.

(e) Knowledge from previous dealing will be relevant.

Balmain New Ferry Co v Robertson (1906) 4 CLR 379:

Facts: The appellants ran a harbour ferry from Sydney to Balmain. Fares were not taken on the ferry or on the Balmain side; they were collected at the turnstiles on the Sydney side. A notice was exhibited over the entrance to the Company's Sidney wharf stating that a fare of one penny had to be paid by all persons entering or leaving the wharf whether they had travelled on the Company's boats or not. The plaintiff, leaving from Sydney side, paid a penny, was admitted to the wharf through the turnstiles but, having missed the boat, attempted to leave

the wharf by another turnstile, refusing to pay a second penny. He was prevented from doing so and sued the company for assault and false imprisonment.

Held: *The appellants were not liable. Their actions had been justified by Robertson's breach of the contract of which the displayed condition had become a term. Griffith CJ(at 386) said:*

If the plaintiff were aware of the terms he must be held to have agreed to them when he obtained admission. If he had been a stranger who had never been on the premises it would have been sufficient for the defendants to proven that they had done what was reasonable sufficient to give the plaintiff notice of the conditions of admittance. In this case, however, it appeared that the plaintiff had been on the premises before, and was aware of the existence of the turnstiles and of the purpose for which they were used. It was therefore established that he was aware of the terms on which he had obtained admittance, and it follows that he had agreed to be bound by them.

(f) Exclusion clauses will be strictly construed (against the person relying on them) if they are ambiguous (*contra proferentem rule).* The exemption clause should specify the type of liability which is to be excluded.

White v John Warwvick & Co. Ltd (1953) 1 WLR 1285:

Whired a bicycle from the defendants. The contract contained an exclusion clause stating that 'nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired'. W was injured when the saddle of the bike tipped and threw him on the road. His action against the defendant was based on two alternate counts; one count alleged breach of contractual warranty to supply a bicycle reasonably fit for the purpose for which it was hired; the second count was in tort, alleging negligence, in that the defendant hired a defective bicycle to the plaintiff. The court field for the plaintiff on the grounds that 'the liability for breach of contract is more strict than the liability for negligence. The owners may be liable in contract for supplying a defective machine, even though they were not negligence. In these circumstances, the exemption clause must, I think, be construed as exempting the owners only from their liability in contract, and not from their liability for negligence [1293].

(g) Clauses may be drafted to limit rather then exclude liability.

(h) Four Corners' or 'Deviation' Rule. The Nigeria courts adopt the fundamental term or breach concept in the final analysis on

question of construction of the case may turn the width of the particular clause.

(i) An important inroad into the effectiveness of exclusion clauses again s 52 *TPA*. If one party has misled another then an exclusion clause (as a rule) will not aid the party who has done the misleading.

Take for example, in *a* transaction concerned with the sale of a restaurant business. An argument arose over figures concerning the turnover of the business. The purchaser alleged that the provided figures by the seller were misleading and did not reflect the real situation. The seller denied this but argued that in any event he could rely upon an exclusion clause which said that the seller took no responsibility for figures or other information provided on the question of turnover. The exclusion clause would probably be ineffective to defeat the action.

Based on the foregoing explanation of the law, to determine whether on exclusion clause may be successful, a point form approach is shown as follows:

Step 1: You must first enquire whether the exclusion clause forms part of the contract at all. This will involve an application of the principles dealing with identification of terms ie what is included in the contract.

- The 'notion' given to the consumer of the exclusion clause
- Whether or not the exclusion clause was brought to the attention of the consumer when the contract was made or at some later time
- Have the parties had any previous dealings
- Did the party sign a contract containing acknowledgment of the exclusion clause.

Step 2: If the exclusion clause does form part of the contract then you look at matters of interpretation:

- The width of the exclusion clause
- Whether the type of liability is specified
- The appreciation of the contra preferentem rule
- Does the 'Four Corners' or 'Deviation' principle have any application?

SELFASSESSMENT EXERCISE 2

1a. What is an exemption clause?
b. Name two steps that are involved in the process of determining whether an exclusion clause applies to a given situation.

2a. What happen if the true effect of an exclusion clause is misrepresented?
b. What is the effect of an established prior course of dealing?
c. What is the Contra Proferentum rule?
d. What is the deviation rule?

4.0 CONCLUSION

We have ruled that a contract may be oral, written and partly oral and partly written. In every case, the basic elements are offer and acceptance, intended to create legal relations and consideration. Terms of a contract may be expressed or implied. They may also be written and outside the scope of a contract. We have tried to distinguish one type from the other. We also evaluated their significance and how the courts have interpreted the different terms of a contract.

5.0 SUMMARY

1. If the contract is oral or a mixture of oral and written terms then all representations by the parties' may form part of the contract. Whether they do, depends primarily on the next step in this process described below.

2. If the contract is wholly written, then the rule extrinsic evidence of document rule comes into play.

3. Check if any of the exceptions to the general rule apply.

4. Besides the fact that the form of the contract (between written, oral etc) may vary, there is also the prospect that there is more than one contract. In particular, a collateral contract might have come into existence. Note however that such a contract will not be readily inferred and that there are certain requirements that have to be met in this regard.

1. Distinguish three types of statements:

- A puff, an exaggeration (usually unprovable) which gives no right of legal recourse even if it induces the receiver to enter into the contract. In case of problems in this area, it is suggested that you eliminate puffs first because they are easy to deal with.

- A representation is an inducing statement, which while not part of the contract may give rise to a remedy if it is false.

- Term of the contract which is part of the contract and has that status because it is a legal promise. Once a term is breached by one party, then the other can sue for breach of contract without more. It is not necessary to prove that the term induced the contract etc. Of the three types of statements, clear terms have the highest status, puffs are the lowest and representations are somewhere in the middle.

2. In distinguishing between a representation and a term, use the four indicative factors set out above.

Exclusion clause are terms of a contract, and are commonly found in standard form contracts. In construing exclusion clauses, the court leans in favour of the consumer. Notice if it must be given, or deemed to be given or brought to the attention of the other party. It is also vitiated by misrepresentation. The test is objective.

6.0 TUTOR-MARKED ASSIGNMENT

1(a) Critically evaluate the decision in Thorton v Shoe Lane Parking Ltd (1971).
(b). Would the decision have been different if Mr. Thorton had been a regular user of the car park?

2. X entered into a written contract to purchase a second-hand vehicle which B had previously described as a 1979 Volkswagen. In fact it was a 1978 Volkswagen and therefore worth $200 less than the $1 200 X paid for it. The written contract made no reference to the age of the vehicle. What remedies are open to?

What difference if any would it make if?

(a) B was a used car dealer;
(b) the contract described the car as a 1978 model: or
(c) X suspected the car not to be a 1979 model but did not bother checking? (Graw, 1993).

3. A takes her expensive fur coat to B's dry cleaning establishment. She is handed a ticket, the face of which contains a number, her name, a description of the coat and an annotation to the effect that the coat will be ready the following Friday. On the reverse side in small print are the words: 'we will not be responsible for any loss or damage of whatever nature of howsoever caused.' On A's

return she discovers the coat to be badly torn. Advise her (Graw 1992, P. 191)

7.0 REFERENCES/FURTHER READINGS

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UNIT 4 CONTRACT: VALIDITY/ENFORCEABILITY AND DISCHARGE

CONTENTS

1.0 INTRODUCTION

The first half of this module examines a contract and its surrounding circumstances to see if they contain a feature which might render the contract unenforceable. A party may seek to rely on this feature or deficiency to assist in defending an action taken by the other party under the contract.

These features or deficiencies might cause the contract to be:

- Void;
- Voidable;
- Unenforceable by action; or
- Illegal.

A **void** contract is one which has no legal effect from the beginning. No rights or obligations are created or conferred by it.

A **voidable** contract is valid unless or until it is avoided or rescinded ie one of the parties may elect to affirm, or reject it, thereby either keeping it on foot or bringing it to an end. This termination may be retrospective eg fraudulent misrepresentation or prospective eg where an infant elects to avoid a contract before gaining his or her majority.
An **unenforceable** contract is one which is in substance valid but which cannot be enforced in court because of some technical defect.

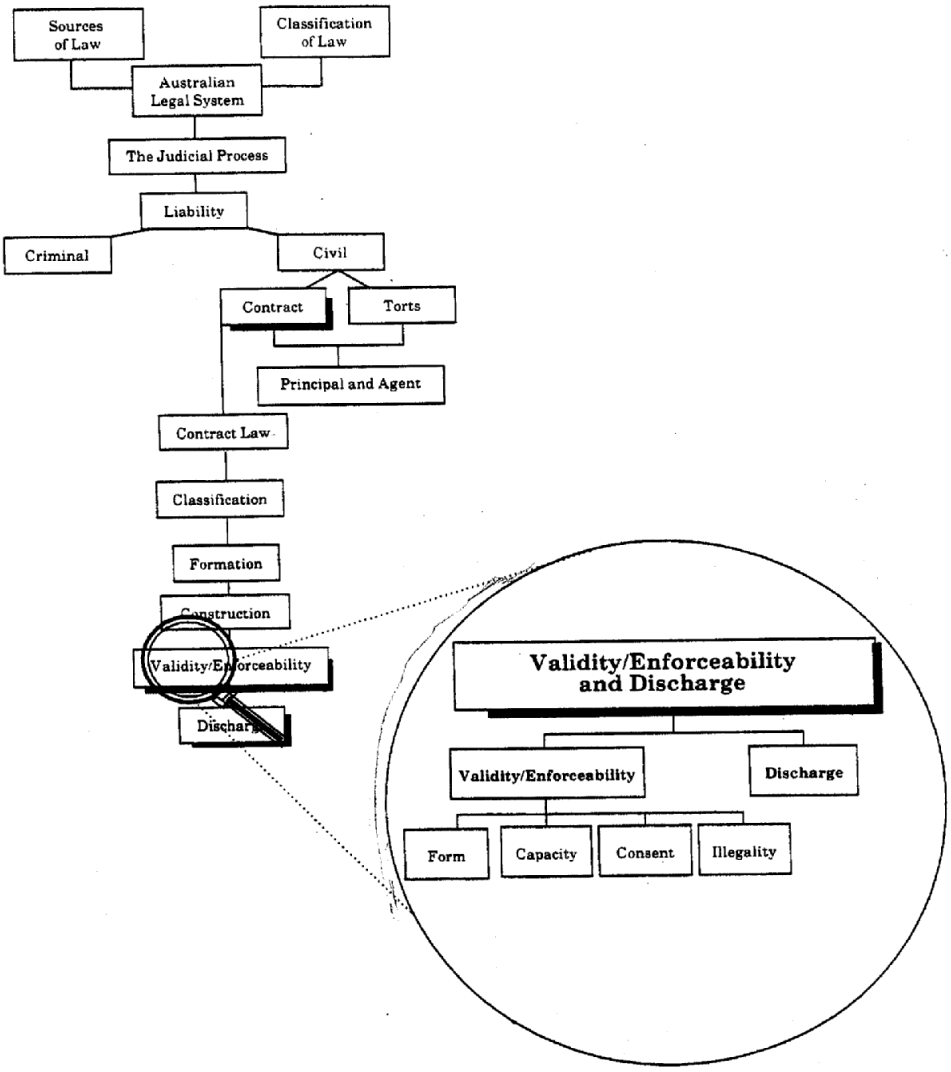
An **illegal** contract is one which contravenes some common law or statutory prohibition. The effect of this contravention varies depending on the prohibition.

It is important that you are able to use terms correctly are when applying the principles in the following topics to a particular contract and that you able to state what their effect is on the contract in question. Many students use these terms interchangeably in examinations and we are left wondering whether they mean what they have written or if in fact they were thinking of, for example, 'voidable' when they wrote 'void'.

The second half of the module looks at discharge of a contract – its termination and the termination of the parties' rights and obligations.

The areas covered in this Unit are quite detailed, however in this course a relatively brief treatment is all that can be accomplished.

Contract: Validity/Enforceability and Discharge
See the General Overview below:



2.0 OBJECTIVES

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

- describe circumstances where a contract which has apparently been validly formed is nevertheless deprived of legal effect
- give examples of contracts which require a particular form to be enforceable
- list categories of persons whose capacity to contract may be limited and describe the basic principles of law applicable to minors, those mentally incapable and drunkards
- describe the different types of misrepresentation and apply them to appropriate factual situations
- list some example of different types of illegality that are likely to render a contract unenforceable
- describe the means by which a contract may be discharged
- determine the effect of frustration and breach of contract on the parties

- describe the remedies available to a party for breach of contract.

3.0 MAIN CONTENT

3.1 Form

Some contracts to be valid and enforceable, are required to be in a particular form. You are not required to know this area in detail but rather, to be aware of the categories of format required and an example of each:

3.1.1 Deed

Certain contracts must be in the form of a deed to be enforceable. For example, an agreement or a promise which is not supported by consideration is not enforceable unless in the form of a deed.

3.1.2 In Writing

Statutes require a variety of contracts to be wholly reduced to writing, such as cheques and higher purchase agreement.

3.1.3 Evidenced in Writing

Other statutes have listed certain contracts as unenforceable unless there is written evidence of the terms e.g. a contract to sell land must have a signed memorandum in writing. In this category, the memorandum does not necessarily contain every single term of the contract, as is required in the contracts in writing category.

> *Many of the emblems of today's legal writing have their origins in the past. Many of these historical influences result in verbosity. Some, as we have seen, are rooted in the development of legal language, others spring from the method adopted for determining fees*

Long ago, court officials derived their income from fees paid by litigants. The fees were based on the length of documents at the rate of so many pence of folio. The longer the document the larger the court fee; the greater the court fee, the greater the earnings of court officials. The fatter the documents, the fatter the fee! Lawyers were paid in like manner, conveyancers being paid by the length of their conveyances. Thus recital upon recital were inserted. Provision was piled upon provision. The length of covenants for title grew. All the time coupling of words grew with vigour until Davidson in 1860 commented, 'this multiplication of useless expressions probably owed its origin to the

want of knowledge of the true meaning and the application of each word, and a consequent apprehension, that if one word alone were used, a wrong one might be adopted and the right one omitted; and to the general disposition of the profession to seek safety in verbosity rather than in discrimination of language'. (Source: Robinson 1973, p 13-14)

3.2 Capacity

Although traditionally the emphasis in the law has been on the freedom of the individual to contract, the courts have always, from earliest times, recognized certain categories of persons whose capacity to enter into a binding contract is in some way limited.

Stephen Graw in his very useful work *An Introduction to the Law of Contract* (at p 94) notes that there are two principal aims underlying the law of capacity to contract. On the one hand there are certain individuals who need protection from others and, on the other, sometimes society needs protection from certain individuals;

The individuals who are generally recognized as needing protection are:

- Minors
- Those mentally incapable
- Drunkards.

Persons from whom society is said to need protection are:

- Convicted felons
- Aliens
- Bankrupts
- Companies (in certain circumstances).

While on the face of it this may appear to extend to quite a wide group of people, in reality this is not so. In fact capacity to contract does not often in practice impact upon the formation or performance of contracts. Having said that, a brief mention will be made of the different classes of persons listed above.

3.2.1 Individuals Needing Protection

(a) Minors or Infants

The approach of the law here is to look at the contract from the minor's point of view and categorize it accordingly. If it is either a contract for necessaries or a contract of employment such as an apprenticeship then it is **valid** – ie it is essentially treated as though the infant was an adult. 'Necessaries' are (as the name suggests) those items needed to sustain life such as food, clothing and shelter. In judging what are necessaries the law takes into account the infant's station in life because what are necessaries to one may not be necessaries to another.

Another group of contracts are those where the infant obtains a long term interest in some item of property such as a lease, partnership or shares in a company. Here the contract is treated as subsisting until the infant decides to terminate or rescind it. This must occur either while the infant is under eighteen or within a reasonable time of attaining her or his majority. The contract is said to be voidable at the option of the infant.

The final group are those contracts not described above where the law presumes they are not to the infant's benefit and they are considered void, i.e. of no effect. This group consists of all contracts not covered by the valid and voidable categories.

(b) Mentally ill and Drunkards

The law treats these two groups in much the same ways as infants. Contracts for necessaries can be enforced against them but generally other contracts are voidable at their option. The law however does not treat a defence of incapacity for this group lightly – especially those who plead they were drunk. So two qualifications or requirements must be met before incapacity sufficient to affect the contract is established.

Those qualifications are:

- The person concerned must have been incapable of understanding the nature of what they were agreeing to at the time that they contracted; and
- The other party must have been or should have been aware of their condition and the consequent incapacity.

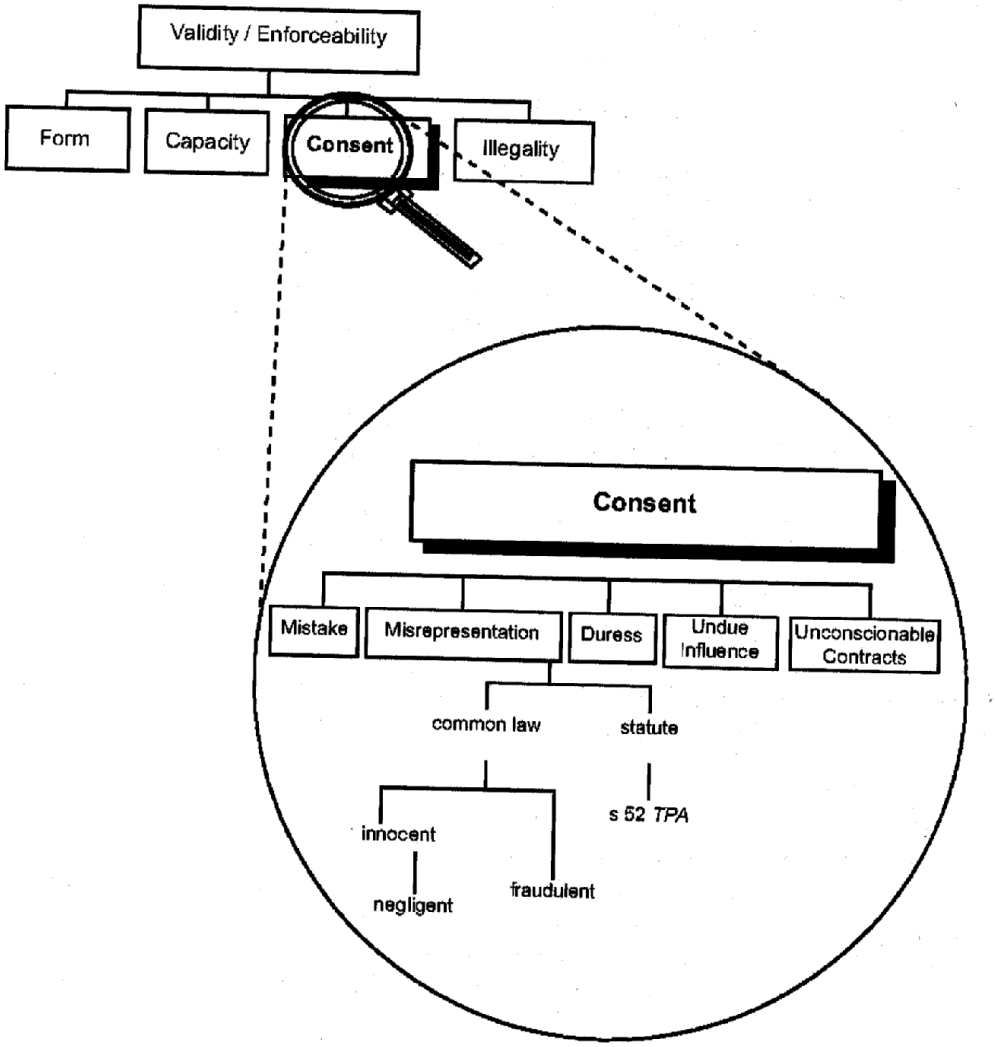
3.2.2 Protecting Society

- **Convicted Felons.** Historically those convicted of a felony that attracted the death penalty had no right to contract. Perhaps strangely the position regarding those convicted of offences that do not carry the death penalty is not clear but in practice the problem does not appear to arise.

- **Aliens** (those not born in Nigeria or naturalized) are only under some incapacity when the alien's country of birth is at war with Nigeria.

- **Bankrupts** and their right to contract, are affected in two main ways. In the first place there are severe limitations on the right of the bankrupt to dispose or property once they have been declared bankrupt. Secondly, up until they are discharged from bankruptcy the bankrupt cannot obtain credit for $3 000 or more without disclosing that they are a bankrupt. Failure to disclose attracts a penalty under the *Bankruptcy Act.*

It should be realized that the treatment given above if very broad and the many qualifications and intricacies of the law have not been explored. These would need to be researched before a problem in this area could be confidently solved. In this course however the broad outline above is sufficient.



SELF ASSESSMENT EXERCISE 1

1(a) What are the three classes of minor's contract?

(b) What two tests are used to determine whether something is a "necessary"?

(c) Yuguda, a sixteen year old, has a job working at the cattle farm. He rides a bicycle covering kilometers to get to work. Yuguda bought a new bicycle from a "Releigh Company" which took his old bicycle as a trade in. Yuguda failed to pay Releigh Co. the balance owed on his new bicycle. Releigh Co. wants its bicycle back or the balance owed.

Advise parties about their respective rights. Give reasons for your answer.

3.3 Consent

This topic covers matters which may affect whether the parties have in fact given real consent to the contract. For example one of them may not have genuinely agreed to that contract.

3.3.1 Misrepresentation

When parties are negotiating a contract, statements are often made by one to the other which later becomes significant as they are found to be incorrect. Courts are often then called upon to decide later what legal significance to attach to these statements.
You will recall from Module 8 that statements made to encourage the other party to enter the contract but not forming part of the contract, are called **representations** and, if later proven to be incorrect, **misrepresentations**.

If instead the statements were **promissory** by nature, they form terms of the contract. If later they are found to be incorrect, the wronged party can then sue for a breach of these terms.

In every case it is a question of degree and often it can be quite a difficult decision for a court to make as to the significance attached to the statements by the parties at the time they were made.

a. Fraudulent Misrepresentation

This involves a false representation of past or existing fact made with a knowledge of its falsehood, or recklessly careless of whether it be true or false, with the intention that it should be acted upon by another party who is, thereby, induced to act upon it to his or her loss.

This statement of law can now be broken up into its six essential **elements.** All these six must be present to establish fraudulent misrepresentation.

(i) The misrepresentation is of fact, not of opinion or intention. A statement of opinion may however amount to a misrepresentation when the maker did not hold the opinion or a reasonable person could not have held the opinion. Also, if an opinion is expressed in such circumstances as to suggest that the maker is aware of the facts which formed the basis of the opinion then misrepresentation can occur.

In *Smith v Land and House Property Corporation* (1882) 28 ChD 7 the vendor of an hotel advertised it as ‘now held by a very desirable tenant’, ‘Mr. Fredrick Fleck, for an un-expired term of 28 years at a rent of $400 per annum’. In fact the tenant had been behind in rent payments and had only paid under pressure. The Court of Appeal held that the statement was not merely an opinion as to the suitability and creditworthiness of the tenant, but an implied statement as to relevant facts.

(ii) The representation must be a false statement.

(iii) The representation must be made:

-. with knowledge of its falsehood, or
- without belief in its truth, or
- recklessly careless of whether it is true or false.

(iv) The representation must be made with the intention that it should be acted upon by the injured party ie it is one of the contributing causes to his/her entering the contract.

(v) The representation must actually deceive – ie it is in fact acted upon by the plaintiff to his/her detriment.

(vi) Resulting in damage to the innocent party.

Remedies

The contractual consequence of fraudulent misrepresentation is that it renders a contract violable. The innocent party may elect to rescind the contract from the beginning or to affirm it and keep it on foot. Although the contract is valid and binding until this right is exercised, once rescission occurs, it has the effect of restoring the parties to the position that they were in prior to the contract. As you would expect then, this right could easily be lost, for example if *restitution in integram* is not possible i.e. if the parties cannot substantially be restored to their pre-contractual position. Another ground for disallowing rescission exists where an innocent third party has acquired rights to the subject matter while the contract was valid, e.g. a bonafide purchaser for value.

Rescission may be by clear words or conduct of the representee which indicates to the other party that the contract is cancelled. Once the election to rescind has been notified to the other party, the act of rescission is complete. If the parties subsequently go to court, it is the court's role merely to ratify the act (or decide that rescission was not justified, as the case may be). Where it is impossible to communicate with the other party, it is sufficient that the representee takes all necessary and reasonable steps to make it known that the contract is cancelled.

Although not a 'remedy' as such, an innocent party may successfully rely on a fraudulent misrepresentation as a good defence against an action for specific performance. This means that if the fraudulent party seeks an order of the court to make the innocent party complete

obligations under the contract, the innocent party may raise the fraudulent misrepresentation as a defence.

Fraudulent misrepresentation also gives rise to a remedy in torts. Although the innocent party cannot seek damages in contract because of the false statement (it not being a term of the contract), the innocent party would have an action for the tort of deceit. The elements of this tort are the same as those for fraudulent misrepresentation. The representee therefore can sue for damages in tort, in addition to exercising the option to rescind in contract. The measure of damages is the 'out of pocket' loss ie how much is the representee out of pocket because of acting on the fraudulent misrepresentation. The plaintiff is to be restored to the position he/she would have been in but for the deceit.

(b) Innocent Misrepresentation

Basically the same elements need to be established to satisfy innocent misrepresentation, except of course that the misrepresentation has been made innocently or honestly. The remedies also differ in that although the contractual consequences of rescission and defence in an action for specific performance still apply, damages are not available as deceit is not involved. *See Redgrave v Hurd* (1881) 20 Ch D 1.

(c) Negligent Misrepresentation

In module 6 reference was made to the cause of action based on negligent mis-statement as a sub-category of negligence. There the focus was upon the circumstances where the court would allow the plaintiff to recover even though there was no contract between the parties. In the context of parties entering into a contract, negligence can be relevant in two circumstances:

1. A person may enter a contract because of the negligence advice of a third person. An illustration of this is *Rentokil Pty Ltd v Channon*

2. More relevant to the present discussion is the situation where parties are negotiating the terms of a contract and one gives information or advice to the other which is relied on by that person but later turns out to be incorrect. There may be no suggestion of fraud by the person giving the information or advice. The courts have been prepared to allow the 'innocent' party to recover for negligent misrepresentation as shown in the case of *Esso Petroleum Co Ltd v Mardon*

It should be remembered that **negligence misrepresentation,** although alleged in the context of a contractual relationship, **is still a tort**. Accordingly, the elements of the tort have to be established. For the duty of care element it is still necessary to make out the 'special relationship' between the parties involved (*see Shaddock's* case module 6). Central to this relationship and the resulting duty of care is the aspect of **reliance** by the plaintiff on the information or advice supplied by the defendant. Much depends on the positions of the parties and the relative knowledge of each in the contract negotiations. In *Esso Petroleum Co. Ltd v Mardon* it was the special knowledge of the manager of Esso on the throughout of the petrol station that gave rise to the duty of care in that case.

Negligence mis-representation is often called a sub-category of innocent misrepresentation because in both cases there if no knowledge by the defendant that the representation is false. However, from the point of view of the remedies available, there is an important difference. For negligent misrepresentation recission is available (as it is with innocent misrepresentation) but in addition, the plaintiff can recover damages for the loss suffered.

You will notice in Turner, a reference to a number of cases on negligent misrepresentation. You only need to know *Shaddock and Esso Petroleum Co.*

Very frequently, negligent misrepresentation overlaps with innocent misrepresentation and since it is now established that damages may be recovered for negligent misrepresentation it has made the differences between fraudulent and innocent misrepresentation less significant.

The previous discussion on misrepresentation reveals a number of difficult areas of law. Some of these are:

1. The difference between a **representation** and a **term** of a contract.
2. The need to identify the six essential elements before fraudulent misrepresentation can be made out;
3. The different remedies that apply if the misrepresentation is fraudulent or innocent; and
4. To establish negligent misrepresentation it is necessary to show that the elements of negligent mis-representation are made out.

Operating Rules

1. It is necessary to identify the relevant section or sections of the public who was or may have been misled. This is important for cases concerning false advertising and the like but is not so critical in a contract situation such as we are concerned with. Here the deception is easily proved. In any event, once the section of the public is identified, you include within it the normal range of people who make up society, i.e. the intelligent and the not so intelligent, the astute and the gentle, the well educated and the poorly educated. By including such a wide cross section, it is easier to prove misleading or deceptive conduct.

2. It is necessary to prove an intention to mislead or deceive, or commit fraud.

3. The rule covers contractual and non-contractual statements, representation and the like. Accordingly, it is not necessary to define what falls within the terms of the contract and the does not, or to consider whether a representation forms part of collateral contract or not or whether the parole evidence rule applies. All these distinctions are irrelevant.

4. Misleading or deceptive conduct can occur through silence where given the circumstances of the particular case, a duty to disclose can be said to arise. An example of this would be where the parties are negotiating the sale of a business which depends upon the availability of a license form the local council to operate a tannery. Assume that the council has notified the seller that it intends to revoke the license because of pollution caused to water courses. A failure to mention this by the seller would probably constitute misleading or deceptive conduct.

At common law silence is not generally regarded a misrepresentation, however the circumstances may require disclosure. In this area the courts are more easily persuaded that the silence has misled.

5. One of the elements of actionable misrepresentation at common law is that there must be a misrepresentation of fact, not opinion. Thus forecasts, prediction or other situations where an opinion given are caught unless it can be shown that the statement or misrepresentations was made on reasonable grounds.

6. As a general rule a person who has been misled will not lose their remedy by reason of their failure to check the accuracy of the representation.

7. The final point to note is the wide range of remedies. The three most important of these remedies are damages, rescission and injunctions. One essential point to note here is that if damages are being claimed then it must be shown that the misleading conduct caused the loss., this will, frequently be established by showing that the injured party relied upon the misleading or deceptive representation but reliance is not the only means by which the causal link between the conduct and the loss can be established.

SELF ASSESSMENT EXERCISE 2

1a. What are the elements of an actionable misrepresentation?

b. In what circumstance may the following constitute an actionable misrepresentation:

i. a statement of opinion
ii. silence

c. What remedies are available for each category of misrepresentation?

3.3.2 Duress

Duress occurs where a person has been pressured into entering a contract because of actual or threatened violence to or unlawful imprisonment of the person or near a relative.

The duress need not only be the only reason why the plaintiff entered the contract as demonstrated by:

Barton v Armstrong(1973) 3 ALR 355:

There B claimed that certain commercial contracts had been entered into by him because of A's duress and sought an order setting them aside. The trial judge found, after a trial lasting 56 days, that B had been justified in treating serious death threats made against him by A. But the judge also found that A's threats had not coerced B and that the reason why B had executed the documents in question was his belief in the commercial necessity of doing so. B was also unsuccessful in the Court of Appeal, where a majority of the court held that B could not succeed unless he could show that but for A's threats he would not have signed the agreement. The Privy Council found for B, by a majority. Their view of the facts was that 'though it may be that B would have executed the documents even if A had made no threats…the threats and

unlawful pressure in fact contributed to his decision to sign':: at 367. Their view of the law was that, by analogy to developments in respect of fraud, the court should not allow an examination into the relative importance of contributory causes and that if A's threats were 'a reason' for B's entering into the contracts then he was entitled to succeed.

(Source: Vermeesch & Linggren 1992, p 242)

Duress is quite a narrow remedy and in recent times it has been recognized by the courts that equally real in the world of commerce, is economic pressure which may be exerted by a dominant party in a contractual or pre-contractual situation. Also the old remedy of duress required violence or the threat of it, which is not particularly relevant where the party suffering the duress is a company since companies are artificial structures. This is not to say that the violence could not be directed to an officer or manager but in any event the courts have increasingly been prepared to grant a remedy for **economic duress** which is available to both companies and natural persons.

The requirements for economic duress are posed by Turner in the form of two questions and an example of a case where those requirements were met is provided in the case of *North Ocean Shipping Co Ltd v Hyundai.*

3.3.3 Undue Influence

Undue influence may also force a person to enter a contract. Where a relevant relationship of influence exists between two persons, with one person being in a position of ascendancy or dominance over the other, equity will void a contract or other legal arrangement between them pursuant to which the dominant person obtains an advantage. The dominant person will have a good defence if it can be established that the weaker party was not subject to under influence at the time of entering into the arrangement.

There have been a number of recent decisions on undue influence concerning the relationship between a banker and its customer. *See Lloyds Bank v Bundy* [1975] QB 326.

3.3.4 Unconscionable Contracts

Unconscionable Conduct

This remedy is best demonstrated by *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

In that case, the respondents were elderly migrants with poor business and English language skills. They were induced to execute a mortgage and guarantee in favour of the appellant bank to secure an overdraft facility that had been granted to their son's building company. At the time of execution, they believed that the company was in a solid financial position and that their liability was limited to both $50 000 and a period of only six months. To the knowledge of the bank, all of these beliefs were incorrect. The Amadios applied to have the mortgage and guarantee set aside.

Held: *The contract was set aside. The majority to the court found that guarantee had been entered into as a result of the bank's unconscionable conduct and, as a result, could not be enforced.*

The reasoning adopted can be found in the judgment of Deane J. (at 475 et seq). He listed three requirements necessary to make our plea.

(a) the weaker party must have been under a special disability vis-à-vis the stronger;
(b) the stronger must have been aware of that special disability; and
(c) it must have been unfair or 'unconscientious' of the stronger to procure agreement in the circumstances in which it was procured.

In Amadio's case all three were present. The Amadios were under a special disadvantage because of their age, lack of business background, limited knowledge of English and total reliance on their son. The bank was aware of those 'disabilities' and yet had then execute the mortgage and guarantee without any independent advice or the opportunity to obtain it. The fact that there was no 'dishonesty or moral obliquity' on the part of the bank's officer was immaterial – the guarantee was unenforceable.

To satisfy a court that there has been unconscionable conduct all three elements, as set out above, need to be satisfied. After *Amadio's case,* one element in particular, namely the need to show a 'special disability', was the subject of considerable debate within the legal community. If a very onerous test was applied by the courts then clearly the scope for

litigants to argue unconscionable conduct would be considerably reduced.

The response from the High Court indicates that the 'special disability' requirement will not be especially onerous at all. In *Louth v Diprose* (1992) 110 ALR 1 it was held that emotional dependence can be a significant factor in proving the disability. There a solicitor successfully set aside a gift of a house that he made to a woman with whom he was infatuated. In a more recent decision of the High Court a failure by the defendant's nephew to obtain separate and objective legal advice for his uncle from whom the nephew was obtaining a benefit was relevant to the disadvantage of the uncle. Other factors were the advancing years of the uncle (he was 84 years old) and the emotional attachment for, and dependency on the nephew. In that case the uncle sold one property to the nephew at a considerable discount and gave the nephew an option to purchase another again at a much reduced value. In a general sense the uncle was a willing participant in the transaction and the case shows how difficult it is to assess unconscionable conduct. In that instance the trial judge and Court of Appeal by a majority (2-1) found for the nephew whereas the High Court, again by a majority (3-2) found against him.

Allied to unconscionable conduct are the doctrines of duress and undue influence.

SELF ASSESSMENT EXERCISE 3

Chukwu has been nominated for a ministerial appointment. In his youth, Chukwu committed several indiscretions which would embarrass him in the committee before the senate committee if they became known during the screening exercise. Okafor, by chance, became aware of Chukwu's past and threatened to expose him unless Chukwu sold him Chukwu Plaza, at Wuze Abuja at a substantial undervaluation. Chukwu reluctantly agreed and signed a contract. He later reconsidered that matter and now wishes to get out of the contract. Advise Chukwu. Would your answer be different if Okafor had threatened instead to send his associates to Chukwu's house to "persuade" him?

3.5 Discharge of a Contract

Thankfully the vast majority of contracts ate properly performed by both parties and no cause arises to go to litigation. Depending upon the mode of discharge of the contract however there may be continuing obligations of one or other party following discharge.

3.5.1 By Performance

A party's obligations under a contract may be discharged by performance. However its effect on the party's right and obligations will depend on the degree of performance. The party will be discharged by performance only if his or her performance is precise and exact. That is, it must comply strictly with the terms of the contract. A purported performance which falls short of that required by the contract does not discharge the performing party who is bound to perform precisely or be liable for breach of contract.

3.5.2 By Agreement between the Parties

The parties are at liberty at any time to put an end to their contract by mutual agreement (eg accord and satisfaction), or parties may agree to discharge a contract without reaching a new contract (eg through waiver or abandonment). The parties may themselves provide in their agreement that the contract shall be terminated at the will of either party or that it shall terminate on the occurrence of a particular event (a condition subsequent).

3.5.3 Operation of Law

We are not concerned with this mode of discharge but one comon example is what is known as merger. Merger occurs where there is a substitution of a higher grade of obligation for a lower. A common example is where one party to a contract sues another and receives a judgment by the court. Here the cause of action merges in the judgment which is a higher grade of obligation which can be used against the defendant. Another example is the *Statute of Limitations* which provides that debts are automatically extinguished within six years from the date they were contracted.

3.5.4 By Frustration

Where a contract originally valid, subsequently becomes impossible, performance of it is said to be discharged by frustration. The question of whether or not performance has become impossible is primarily one of construction of the contract in question.

> *Frustration occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performance because the circumstances in which the performance is called for*

would render it a thing radically different from that which was undertaken by the contract.

The circumstances or event must not be provided for in the terms of the contract.

In *Taylor v Caldwell* (1863) 122 ER 309, the contract was discharged because the subject matter of the contract which was essential to its performance was destroyed. In *Codelfa Construction Pty Ltd v state Rail Authority of NSW* (1982) 149 CLR 337 (see Truner) the majority upheld that a contract should be discharged by frustration where there has been a fundamental or radical change in the surrounding circumstances and in the significance of the obligations undertaken. Government interference may cause such a change.

The effect of frustration on contractual rights and obligation is that they are terminated prospectively. Obligations in force the frustration eventually must be fulfilled. Thus any money paid under the terms of the contract cannot be recovered unless there has been a total failure of consideration.

3.5.5 Breach of Contract

Breach of contract always give rise to a right to claim damages. It does not always discharge a contract. A breach will only give rise to grounds to terminate a contract where the guilty party's actions amount to repudiation. As a general rule this entitles the innocent party to choose between terminating or affirming the contract. If the innocent party accepts the repudiation and terminates the contract, contractual rights and obligations are terminated prospectively. Of course the innocent party may decide to affirm the contract in which case it remains on foot with both parties obliged to carry out future obligations and the guilty party being liable for damages resulting from the breach.

The exception to the general rule occurs where the reputation is such that the innocent party has no right of election. For example, the guilty party may before the time for performance arrives indicate that he/she will not paint the innocent party's portrait. The innocent party has no option to affirm the contract as the court would not make an order forcing the guilty party to perform the services contracted. In the circumstances the contract is at an end and the innocent party only has a right to damages.

Repudiation occurs:

- Where there is anticipatory breach ie the guilty party indicates before the contract is due for performance that he/she will not complete his/ her contractual obligations;

- After performance has commenced when the guilty party indicates he/she is abandoning performance of his/her contractual obligation:

- By failure to perform an essential term (condition); and
- By conduct constituting substantial reputation.

It follows from the foregoing that:

- The right to damage of contract remains after discharge by breach;
- Obligations which occurred before termination can be enforced by either party; and
- Money paid or property transferred in pursuance of the contract be recovered unless there has been a total failure of consideration.

SELF ASSESSMENT EXERCISE 4

1. What is the difference between actual and anticipatory breath?

2. A contracted to supply B with floral arrangements for B's restaurant. A miscalculated the cost to her and subsequently wrote to B advising that she would be unable to supply at the contract price. B replied that she would get her flowers elsewhere, made arrangements with C and later sued A for the difference between the contract price and what she had, had to pay C. Advice A

3.6 Remedies

If a citizen feels aggrieved by the actions of another whether it raises out of contract, tort or any other branch of the law factor which is going to be crucial to that citizen is the remedy that the law avails him or her to redress the wrong. Clearly of course it is pointless to consider remedies unless the party has standing (*locus standi),* a good cause of action and the evidence to prove his or her case.

You will recall that one of the principal reasons that equity courts developed in England was to overcome the vary narrow range of remedies available through the common law – there was little else available except damages. While equity and common law courts fused in the 19th century the different remedies available are still discussed under the equitable and common law headings. Statutory remedies are also becoming more prevalent.

3.6.1 Common Law

At common law the two major potential outcomes are termination of the contract because of anticipatory breach or breach of a condition or an award of damages for breach of warranty.

(a) Termination

At common law, anticipatory breach and breach of condition enable the innocent party to terminate the contract and sue for damages. Repudiation means the innocent party has a right to treat the contract as discharged. The right is however optional and the innocent party may choose to allow the contract to continue. In such a case the contract remains in existence and its provisions must be complied with by both parties, although the innocent party will still have the right to sue the defaulting party for damages for breach (as if it were a breach of warranty only).

Where the innocent party elects to treat the contract as discharged:

- He or she is thereupon released from any further liability of obligation under the contract, and
- He or she may sue the party in breach for damages for the repudiation of the bargain or on a quantum merit for the value of work done or goods supplied by him or her under the contract.

(b) Damages

The only remedy available for a breach of warranty is an award of damages. The object of awarding a sum of money to the successful plaintiff has been to compensate him or her for damages arising from the other party's breach.

The questions to be decided by a court in assessing the damages are:

- For what loss should the party in breach be liable? It should not be too remote see *Hadley v Baxendale* [1854] 156 ER 145. As with the law of tort the courts have had to find a mechanism for limiting the plaintiffs' right to damages as a breach of contract can affect many people for many years. The defendant is liable for:

- Losses arising **naturally** from the breach

- Losses **actually** contemplated as a probable result of the breach. Turner shows how those principles are tested in *Hadley v Blakendale*
- What amount is payable by that party to compensate the innocent party? The general rule is:

That the plaintiff is entitled to recover such an amount as will put him in the same position so far as money can do so, as if the breach of contract had not taken place.

The plaintiff also has an obligation to mitigate or minimize the loss suffered as a result of the defendants' breach. This requires the plaintiff to take reasonable steps in the ordinary course of business although the onus lies on the defendant to prove the plaintiff has failed to do so, rather than the plaintiff having to prove that he has done so. *See Payzu Ltd v Saunders* (1919) KB 581.

3.6.2 Equitable Remedies

Equity recognized that monetary damages may not always be appropriate and there developed two other remedies which may be available in the event of breach of certain contracts, namely:

- The decree of **specific performance** is a court order requiring the defaulting person to carry out his/her contractual obligation eg to complete the transfer of a piece of land.

As with all equitable remedies, this is only discretional and the court will not make such an order if it considers damages to be adequate compensation.

Also the court will not make such an order in relation to contracts requiring personal services. *In Lumley v Wagner* (1852) 1DM and G604 the defendant had undertaken to sing at the plaintiff's theatre for a period of three months. It was held that specific performance was not available to compel her to sing as promised.

- An **injunction** is a court order restraining a party from doing an act or continuing to perform an act eg to stop a person trading, is breach of a valid restraint of trade clause.

In *Lumley v Wahner* the defendant has also promised not to sing anywhere else during the three month period and the court did grant an injunction to prevent her from breaching this clause.

An injunction is not only available in cases involving contract. It is often sought in the tort of defamation to prevent from continuing to defame the plaintiff by publishing the offending material.

SELF ASSESSMENT EXERCISE 5

1a. What is mitigation?
b. Where there is anticipatory breach of contract, when does the duty to mitigate arise?
c. Which party has the burden of proving mitigation?

2a What is specific performance?
b. When will it be ordered?

3. A agrees to sell B a consignment of goods which b contracts to sell to C at a profit. A fails to deliver and B loses the profit. Advise B. How would your answer differ if:

(a) B's Contract with C was especially lucrative because C had agreed to pay well over the market price.
(b) B was to process the goods before selling them to C and the profit was largely attributable to the added value created by the processing.

4.0 CONCLUSION

In this unit, we discussed about forms of a contract, the capacity of parties to a contract, misrepresentation and how a valid contract can lose its legal effect. We also discussed how a contract is performed or dissolved, their effects and remedies. Contract law is basic to all laws, this concludes our outline of law of contract. Congratulation.

5.0 SUMMARY

Most contracts are simple, expressive or implied and require no particular form, but the elements must be present. Some form is prescribed for contracts under seal, recognition or letters of credit. Statues also demands that some contracts must be manifested by some writing signed by the party against who it is sought to be enforced. An example is a contract for sale of interests in land. Contract by one who lacks capacity are generally avoidable by the minor only. Contract for necessities bind the minor and may be liable in quasi contract for reasonable value. In other cases he may be compelled to make restitution if the property is still in his/her possession. The adult must return any consideration he has received. A contract is vitiated by duress, undue influence and illegality.

A contract is illegal if it is contrary to statute or public policy. An illegal contract is void, and unenforceable. But it is severable, the blue pencil rule applies. A contract is discharged on performance or by agreement, breach, and operation of law. Remedies for breach at law and in equity range form damages (special, exemplary, nominal or liquidated), rescission, restitution to specific performance, injunction, reformation or quasi-contract. Damages may be mitigated, waived or stated.

6.0 TUTOR-MARKED ASSIGNMENT

1a. A vendor of a service station is aware of plans for a highway which will bypass his station and reduce his number of customers. In the course of negotiations, it becomes apparent to him that the purchaser is ignorant of the plans. Should the vendor make disclosure?

b. An experienced employee of a petrol station owner grossly over estimated the petrol sales expected from a particular site to a prospective purchase of the site. The overestimation was innocent although negligent and influenced the purchaser to purchase the petrol station outlet.

Can the purchaser recover damages for the financial loss? Give reasons.

2. C is 16 and has been unemployed for twelve months. An acquaintance offers him a position in used car yard where C will be taught to do the business. C agrees not to leave without six months' notice in writing, to be present on each day between 8.30 and 5.15 and to attend to all tasks assigned him. Payment was on no fixed basis, and after four months of washing cars and sweeping the office, he has earned only N25,000. He wants to repudiate the contract. Advise.

3. A has a contract to build a house and shed for B at a cost of N20million. A three-quarter completed the house and refused to complete the rest. B advised he would waive the requirement to build the shed which represented N3million of the total contract if A completed building the house and B would pay him the N17million. A still refused to build the house.

Can A claim three-quarters of N17 million?

7.0 REFERENCES/FURTHER READINGS

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UNIT 5 PRINCIPAL AND AGENT

CONTENTS

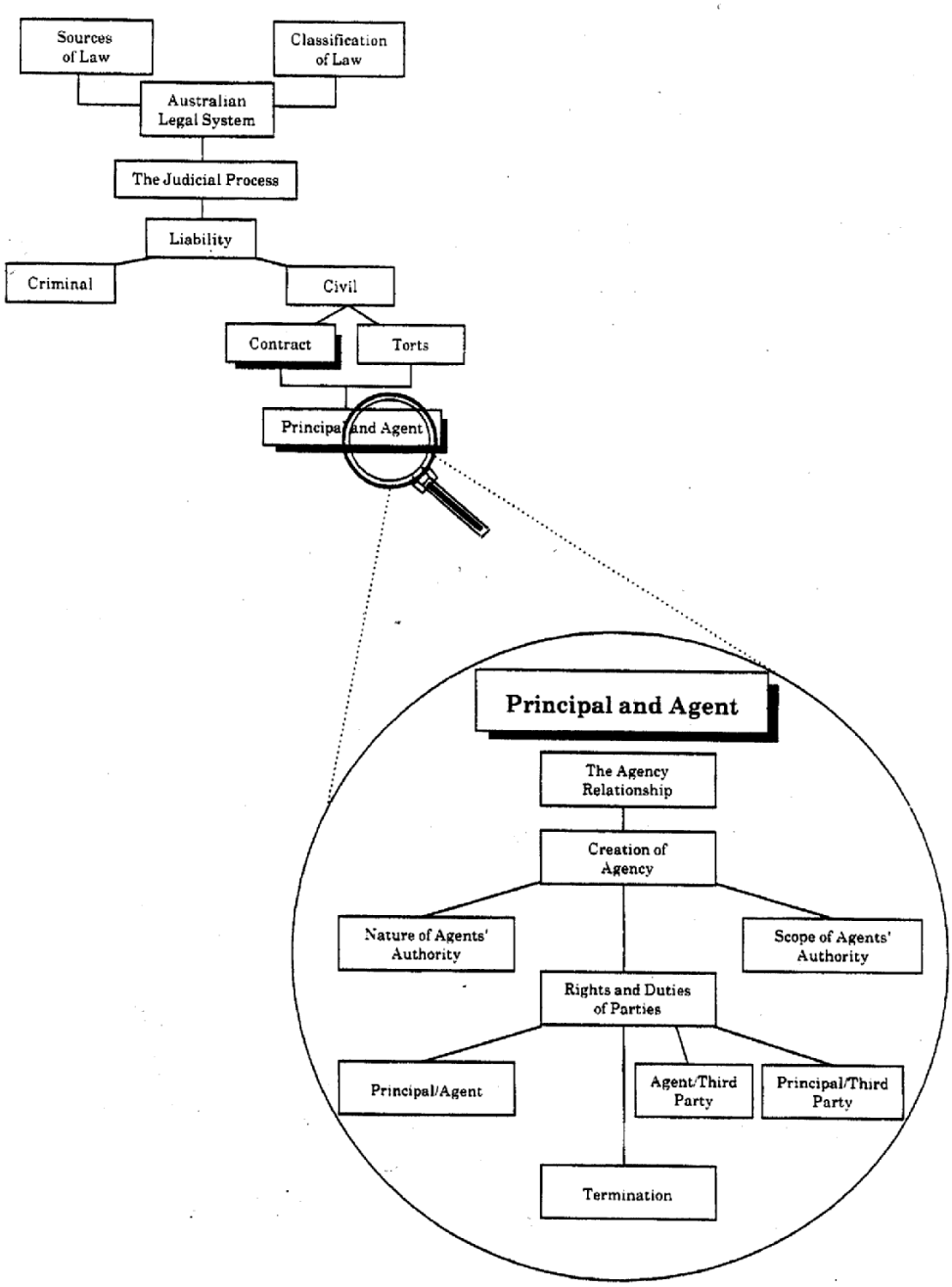
1.0 INTRODUCTION

The law of agency deals with the consensual relationship that arises when one person (called Agent) is used by another (Called Principal) to perform certain tasks on his/her behalf. Agency is a representative relationship. It is different from those of employment or independent contractors. In the contract law, two parties are directly connected in the law with each other either by the unilateral act of one or the mutual acts of both. In Agency Law, the Agent introduces a third party with whom he deals and whose conduct can affect the legal position of his principal. The use of a representative or agent enables one person to conduct multiple business operation and the problem and complication arising from the introduction of a third party that the special law of agency is

directed to regulate and this is the subject matter of the last unit of the course.

Overview

Principal and Agent



2.0 OBJECTIVES

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

- define an agency relationship
- differentiate between the principal/agent relationship and other relationships
- describe the methods by which agency can be created and terminated
- define the terms ‘actual’ and ‘apparent’ authority, and distinguish between them in case examples
- explain the methods by which an agent can contract and the liability of the agent to the principal and third parties
- list the duties an agent owes to the principal and a principal owes to an agent, and the consequences of a breach of those duties;
- explain the rights of action a third party has against an agent for breach of warranty of authority
- recognize major components of secret commissions legislation
- demonstrate skill in applying the case and statute law studied to the solution of factual problems.

3.0 MAIN CONTENT

3.1 Principal and Agent

3.1.1 The Agency Relationship

Countless transactions in the commercial world are carried out through agents. Any decision to buy real estate, shares, commodities, goods, plant. Etc will almost invariably involve the use of agents by either the vendor or purchaser or both. Even in our personal lives agents are important, such as when we arrange a holiday through a travel agent, the agent will act on our behalf to make such bookings for hotels, airlines and tour operators, a we desire.

Bowstead on Agency (1985, p 1) defines agency as follows:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf, and the other of whom similarly consents so to acts or so acts.

(Source: Bowstead on Agency 1985.p1)

The one on whose behalf the acts to be done is called the principal.

The one who is to act is called the agent.

Any person other than the principal and agent is referred to as a third party.

(For ease of reference we shall refer to the principal as P, agent as A and the third party as TP.)

With regard to the acts which P consents that A shall do on P's behalf, A is said to have authority to act and this authority constitutes a power of affect P's legal relations with TP(eg bring about a contract between P and TP). Once this accomplished. A generally fades out of the picture. However, if A has acted improperly (eg by exceeding his authority or otherwise breaching a duty owed to P), A may be involved in subsequent litigation.

The agency agreement between P and A need not be contractual (eg there may be no provision for commission). Thus, A can act gratuitously. However, as we are studying agencies in a business law context we shall be concerned mostly with contractual agency.

3.1.2 Terminology

Often a true agent. Legally speaking, might be described by another term such as 'broker', 'factor' or 'representative.

Conversely, some persons described as 'agents' are not really agents in the legal sense of the word but are rather dealers, consultants or intermediaries. For example, a car dealer is often referred to as the 'agent' or 'sole agent' for the maker of a particular model of car. However, usually the dealer is not an agent in the legal sense because if he sells a car to a buyer, no legal relationship is thereby established between the buyer and car maker. Rather, the dealer buys the car from the maker and then sells it on to the buyer: the dealer does not sell the car on behalf of the maker. This is the substance of the relationship which is the determining factor as to whether or not one is an agent. Such a situation exists in:

B had purchased from S a hay baler manufactured by T. Earlier, B had discussed about the hay baler at the Sydney Easter Show with a representative of T who suggested B discuss the matter further with T's local 'agent'. After further enquiries for S, B signed an order form for S

to supply the hay baler. The order form made no reference to T. the baler proved unsatisfactory and B made repeated complaints to S but S went into liquidation before B could obtain redress. B then sued T alleging inter alia that S had acted as T's agent in selling the baler to B. Held – the High Court rejecting this – it was clear on the facts that S purchased T's equipment and resold it as principal to S's own customers. T's references to S as 'agent' were of no effect because, as the joint judgment observed for 'almost a century cases have appeared .. in the law reports illustrating the fact that the word 'agent' is often used in business as meaning one who has no principal but who, on his own account, offers for sale some particular article having a special name… no one supposes that the 'distribution agent' or 'exclusive agent' in a particular territory' for a commodity or specific kind of article or machine is there to put a 'consumer into contractual relations with the manufacturer'.

Thus, it is the substance of the relationship which is the determining factor as to whether or not one is an agent.

3.2 Creation of Agency

The relationship of P and A may be created by:

- Express Agreement:

- By deed or 'under seal'
- By writing
- By word of mouth

- Implied Agreement
- Holding Out or Estoppel
- Ratification

3.2.1 Express Agreement

By deed or 'under seal'
This formal form of appointment is termed a 'power of attorney'. Appointment by deed is necessary if P wishes to empower A to execute a deed on P's behalf. If A is to deal with land on P's behalf then the power of attorney is required

- **In Writing**

While generally there is no legal requirement that agency agreement be in writing, it is clearly preferable that they are, so that disputes can be reduced. Also should statute requires that some agency agreements be in

writing for example appointment of all auctioneers real estate agents and motor dealers must be appointed in writing before those agents may sue for their commission.

- **By Word of Mouth**

For whatever purpose A, may, in general, be appointed orally subject to statutory exceptions such as those referred to above.

3.2.2 Implied Agreement

Agency agreements, whether contractual or otherwise, may be inferred by the court from the circumstances. The test is whether a reasonable man, when assessing the conduct of the parties have agreed to act in relation to one another upon a basis that can be characterized as an agency.

While agency must ultimately derive from consent, the consent need not necessarily be to the relationship of principal and agent itself (indeed the existence of it may be denied) but it may be to a state of fact upon which the law imposes the consequences which result from agency.

(Source: Lord Wilberforce in *Branwhite v Worcester Work Finance Ltd* [1969] 1 AC 552 at 587.)

Morgans v Launchbury [1973] AC 127

A family car was registered in the wife's (W's) name although the husband (H) often drove it to work. H assured W that when he stayed out late drinking, he would not drive the car, but would arrange for a friend to drive. On such an occasion, the car was involved in an accident and both H and K, the friend who was driving, were killed. The three survivors sued W, alleging that K had acted as her agent in driving the car.

Held: by the House of Lords that on the facts, K was acting on behalf of H but not of W. But there was general agreement that a request from the owner of a car to do something on the owner's behalf (not being something the driver should do in any case, eg return a car borrowed without permission) would be sufficient to create an agency relationship. Lord Pearson observed at page 140 that for 'creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary there should be an instruction or request from the owner and the undertaking of the duty or task by the agent.

In addition to the general principles mentioned above there are three specific uses where agency will be implied.

- **Cases of Emergency**

See Great Northern Railway Co. v Swaffield (1874) LR 9 Ex 132.

Sachs v Miklos [1984] 2 KB 23 where the plaintiff had been allowed by the defendant to store some furniture in a room belonging to the defendant. The plaintiff was not seen again for a long time. Wishing to let the premises, the defendant made repeated, but unsuccessful, attempts to contract the plaintiff by telephone and letter. The defendant then sold the furniture by auction. In answer to an action for conversation, the defendant attempted to claim a power to act as agent of necessity. This defence failed. Clearly there was no emergency threatening the safety of the furniture.

- **Married women**

This is an agency of necessity which applies to the position of a wife living apart from her husband as a result of his misconduct. She has implied authority to pledge his credit for necessities.

- **Cohabitation**

A wife, either legal or de facto, is presumed to have authority during cohabitation to pledge her husband's credit for household necessities suitable to her husband's style of living for such dependants in the household as the wife usually has under her control. Refer to the text for instances which may rebut this presumption.

3.2.3 By 'Holding Out' or 'Estoppel'

Where a person, by words or conduct represents or permits him/herself to be represented, that other person is his agent, he will not be permitted to deny the agency as against any third party dealing, on the faith of such representation, with the person held out as agent.

The representation must come from the alleged P. TP is not entitled to rely on a representation of authority from the alleged agent only. Thus, by operation of the doctrine of 'estoppel' or 'holding out', TP is entitled to assume from the conduct of the alleged P that the supposed A has authority even when this is not really so.

Most cases concern persons who already have some authority to act as A but who are allowed by P to appear to have even more authority than

they actually have. Another common instance is where P and TP have been dealing with each other in the past through A. P dismisses A but, in the **absence of notice** of the dismissal, TP may still deal with A and bind P to the deal even though A no longer has any real authority at all.

Cases do arise where a person not hitherto an agent for P may bind P under the doctrine of estoppel. They are comparatively rare in contract situations.

However in one American case, *Lucken v Buckeye Parking Corp* 68 NE 2d 217 (1945) a company was held responsible to a car owner who left her car with a person standing on a parking lot which the company had recently vacated, but over the entrance to which the company's sign was still displayed. Although the defendant had never authorized the person at the car park to act on their behalf, the fact that they had for some time operated the car park, coupled with their failure to remove the sign, constituted a representation to the plaintiff that they still operated there, and that anyone apparently working there was employed on their behalf.

3.2.4 Ratification

Where A has acted **without P's authority**, but has nevertheless **purported to act as P's agent**, it is open to P subsequently ratifying the transaction. Ratification operates **retrospectively**, thus ratification relates back to the moment A and TP entered into the contract so that P is entitled to enforce the contract against TP.

Note the requirements of ratification concerning both A and P and note the interrelationship between this principle and that of non-disclosed principals.

SELF ASSESSMENT EXERCISE 1

1. Distinguish an agent's actual, implied authority and apparent authority. Give an example of each.
2. For ratification to be effective, there are certain prerequisites, name them.

3.3 Nature and Scope of Agent's Authority

After deciding that agency has been created by one or more of the above modes of creation, it is now important to consider the nature of A's authority and the scope or extent of that authority.

Being appointed, A now has power to affect P's legal position in relation to TP. However, P will only be bound by those acts of A which

fall within the scope of A's authority. P will not be affected by what A does in excess of A's authority, unless P subsequently ratifies A's unauthorized act. Furthermore, if A acts outside his or her authority, A may be liable to P for breach of the agency contract, or to TP for breach of implied warranty of authority. Thus, it is of vital importance to be able to determine the nature and extent of A's authority.

3.3.1 Nature of Agent's Authority

The type or nature of A's authority may be:

- Actual Authority, ie either:

- Express actual authority; or
- Implied actual authority; or
- Apparent or Ostensible Authority

Actual Authority

Actual authority arises from the agency agreement between P and A. It is termed **express actual authority** where P has given the authority to A expressly, that is, by word of mouth, deed or otherwise in writing. Thus, the same process by which P appoints A as agent, e.g. by power of attorney, will also delineate much or all of A's express actual authority.

However, in addition to the express actual authority contained in the agency agreement, A may also have **implied actual authority.** *Bowstead on Agency* (1985) states that the most obvious cases of implied authority arises as incidental authority (to do whatever is necessarily or normally incidental to the activity expressly authorized), usual authority (to do whatever that type of agent would usually have authority to do), customary authority (to act in accordance with such applicable business customs as are reasonable) and an implied authority arising from the course of dealings between the parties and the circumstances of the case. Thus, implied actual authority is often said to arise to gibe 'business efficacy' where a contract may be silent. For instance, P may give A (a real estate agent) express actual authority to find a purchaser for P's house at $X. A will also have implied actual authority to describe the property and state any fact which may affect the value of the property so as to bind P.

In *Australia and New Zealand Bank Ltd v Ateliers de Constructions Electriques de Charleroi* (1966) 39 ALJR 414:

The plaintiff company carried on business at Acarleroi in Belgium as manufacturers of heavy electrical equipment. The company (the

'principal') appointed an Australian company (the 'agent') as in sole agent in Australia. There was a written agency agreement between them. The agent negotiated a contract with the Sowy Mountains Hydro Electric Authority for the supply, delivery and supervision of erection of seven transformers of 56 MVA and auxiliary equipment. Under this contract the price was payable in Australia, in Australian currency to the foreign principal. Progress payments were made at times by order cheques in favour of the principal its Australian agent. The agent endorsed them and paid them into its own bank account at the A & NZ Bank. In the course of time the agent failed to remit the amounts of some cheques so banked to its principal. Eventually the agent went into liquidation. The principal sued the bank on the basis that it has wrongly credited the amounts of these cheques (£55,540 18s 7d) to the agent's account, there being no authority, express or implied, for the agent to endorse and bank to its own credit, cheques drawn in favour of its principal.

The Privy Council held, after carefully considering all the facts (for example, the prescribed place and currency of payment and the fact that the principal had no bank account in Australia), that the agent could justifiably be taken by an outsider such as the bank to have had implied authority to bank the cheques. 'It would not have been supposed that they would be sent to Belgium to be endorsed, and the plaintiff company had no bank account of their own in Australia. Apart from exchange control difficulties, the only practical plan from a business point of view was for [the agent] to endorse the cheques and pay them into [the agent's] account. This became the only possible plan when the total amount of the cheques exceeded the sum which exchange control permitted to be exported, or when it becomes proper for [the agent] to retain part of the sum in any cheques to pay local expenses. Implied authority was necessary to give business efficacy to the transaction': at 420.

Apparent or Ostensible Authority

Apparent or Ostensible Authority (the two expressions are synonymous) is 'the authority of an agent as it appears to others': *Hely-Hutchinson v Brayhead Ltd* [1967] 3 ALL ER 98 at 102 per Lord Denning MR. It comes not from the internal aspect of the relationship between P and A as does actual authority, but is an external matter affecting P and TP. Thus A may affect the legal position of P because P's conduct has made A appear to have authority which in fact A lacks.

As TP is generally unaware of the terms of the agency agreement, TP will usually rely on A's apparent or ostensible authority in order to bind P.

For an illustration of the operation of ostensible authority *see Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 3 AIIER 16. (See Turner).

A common instance of ostensible authority created by representation by conduct is where P permits a person to act in the management or conduct of P's business so that TP is led to believe that the person has authority to contract on behalf of P.

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB is a leading case on this point. Here K and H formed the defendant company to acquire and develop certain land. The board of directors comprised K, H and a nominee of each. K engaged the plaintiff firm of architects who later sued the defendant company for payment of their fees for work they had carried out. **Held**: by the Court of Appeal that, although K had no actual authority to employ the architects, he did have apparent or ostensible authority such as would be within the usual authority of a managing director and the plaintiffs did not have to enquire whether he was properly appointed. The company was therefore stopped from denying K's agency.

3.3.2 Scope of Agent's Authority

With **actual authority,** the **scope** or extent of A's authority is ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.

With **ostensible authority**, A is taken to have as much authority as agents of that type **usually** have. Also *see Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964) 2 QB 480 and *Panorama Developments (Guilford) v Fidelis Furnishin Fabrics* (1971) 2 QB 711.

Although actual authority and apparent authority are independent of each other, in certain circumstances they may co-exist. In such a case, A's ostensible authority is likely to be wider than A's actual authority which may be limited by the terms of the agency agreement. Nonetheless, P is bound by those acts of A which fall within the scope of A's apparent authority even if A has acted outside the terms of A's actual authority.

SELF ASSESSMENT EXERCISE 2

1. What is a break of Warranty of Authority?
2. Suggest three circumstances where a person would be wise to appoint a power of attorney and briefly explain the function of the attorney.
3. Douglas, aged 15, purchased a gun for N50,000 from Hunter stores, Port Harcourt, Douglas placed the purchase on his fathers account. Enumerate the issues and discuss them.

3.4 Rights and Duties between Principal and Agent

3.4.1 Agent's Duties to Principal

These duties may be expressly enumerated in the agency agreement (as in a standard form of power of attorney) or they may be implied into the agency agreement. They may vary according to the nature of the agency and the terms of the agreement. Breach of the terms of an agency contract will lead to A being liable to P for breach of contract.

A's major duties include:

- A duty to follow P's instructions.
  Failure to comply with P's instructions, except where they are illegal, will render A liable for the loss suffered by P as a result of the breach. Gratuitous agents would not be liable under this head.

- A duty not to exceed his/her authority
  If A has exceeded his/her actual authority having apparent authority only, A will be liable to P for any loss caused thereby.
- A duty to exercise reasonable care, skill and diligence.

An illustration of a duty of care owed (and breached) by a gratuitous agent is found in *Chaudhry v Prabhakar* [1988] 3 AIIER 718:

The plaintiff had recently passed her driving test and knew nothing about the mechanical aspects of motorcars. She asked a friend to find a suitable second-hand motorcar for her to buy, stipulating that it should not have been in an accident. He found one and recommended that the plaintiff buy it which she did. A few months later it became clear that the car had been involved in a very bad accident, had been poorly repaired and was unroadworthy. The plaintiff sued the friend as first defendant in tort for damages for negligence, and the seller as second defendant for damages for breach of the implied term of the contract of sale that the car was of merchantable quality. The trial judge awarded her damages against both defendants.

On an appeal by the first defendant, the English Court of Appeal held that a gratuitous agent in the position of the first defendant was under a duty to exercise the degree of care and skill 'which may reasonably be expected of him in all the circumstances': at 721c. His duty was not, so the court held, merely a duty to be honest or to exercise that degree of skill which he in fact possesses. Where the gratuitous agent has represented that he has a certain degree of skill, that representation will, assuming that P believed it, be the measure of his duty. Absence of a remuneration is a factor tending to reduce the degree of care and skill reasonably to be expected.

If A breaches this duty, P may recover the loss by using A for breach of contract if there is an agency contract, or for negligence. If a duty is imposed by statute, P might also sue A for breach of statutory duty. For example CAMA, 1990 provides that directors and other executive officers of corporations shall at all times act honesty and exercise a reasonable degree of care and diligence in the exercise of powers and discharge of duties.

- **A Duty to Act in Good Faith**

The relationship between P and A is a **fiduciary** one. Because A has bound him/her self to act in the interests of P and because of the peculiar trust and confidence P reposes in A, equity has seen fit to supervise this relationship basically to prevent A from misusing A's position for A's own advantage. There is also authority that fiduciary duties are based on terms implied into all agency contracts. Thus is imposed on A a duty to act in good faith or honesty, loyally and single mindedly in P's interest.

Hence A must:

(a) Not Make a Secret Profit or Take a Bribe

Ay gain made by A whilst carrying out P's work which gain is kept from P, is a secret profit and recoverable by P. A will also lose his right to commission. However, if A has acted bone fide, A may retain his commission.

In Hovenden & Sons v Millhaff (1990) 83 LT 41 at 43, Romer LJ said, 'If a gift be made to a confidential agent with a view to inducing the agent to act in favour of the donor in relation to transactions between the donor and the agent's principal and that gift is secret as between the donor and the agent – that is to say, without the knowledge and consent of the principal – then the gist is a bribe in view of the law.'

A payment by TP to A still, a bribe although it does not succeed in inducing A to show any preference to TP. If P's agent has been bribed P may recover the bribe or sue A and TP for damages in the tort of deceit; dismiss A without notice; refuse to pay A commission or recover any paid; repudiate the contract with TP who has paid the bribe.

The taking and giving of a bribe by A and TP may also amount to a criminal offence under statutes Criminal Code or other State.

(b) Not Allow A's Own Interest to Conflict with P's

If there is a risk of conflict A must make full disclosure to P and obtain P's informed consent, otherwise A should decline to act as agent. A's duty is to disclose only material facts – those which a reasonable business person would consider material in the ordinary course of business.

Breach of this duty may again render A liable to disgorge the profit as an alternative to paying damages for breach of contract. Alternatively, P may rescind any contract with A. A also loses his/her right to commission on the transaction.

If A breaches this duty A may be liable in an action for damages or an action for an account of the profits and/or subject to injunction.

In Robb v Green [1895] 2QB 315 the court granted an injunction against a former manager of a business to prevent him using, for his own purposes, a list of customers of a business obtained whilst he was manager of the business. After leaving the business, he used the list to set up his own business.

- **A Duty to Act in Person and not to Delegate Authority**

Exceptions include accepted trade or business usage, ministerial duties not involving the exercise of A's discretion or skill. If A delegated authority without P's permission, A will not be entitled to commission for the delegated acts and may be liable for any loss suffered through breach of contract. P will not be obliged to accept the contract.

- **A Duty to Keep Accounts**

A must accurately and properly account to P for any money received or spent on behalf of P and must have any books of account available for inspection. With professional agents, legislation often reinforces this duty.

3.4.2 Principal's Duties to Agent

These include:

- **A Duty to Remunerate for his/her Services**

This duty only arises pursuant to the express or implied terms of the agency contract. Otherwise the agency is gratuitous.
Before A is entitled to receive remuneration, there must be at least substantial performance of all work A undertook to do. Failure to pay will give rise to an action for breach of contract by A against P. As stated, some agents are statute barred from suing for commission if their appointment is not in writing.

- **A Duty to Indemnify and Reimburse A**

While acting for P, A may incur certain liabilities or may certain payments on behalf of P. In these circumstances, P is obliged to indemnify A against such liabilities and reimburse A for any payments made. Unless otherwise agreed, P is not liable to indemnify or reimburse A where A has acted outside the scope of his/her actual authority, where A has suffered loss through his/her own negligence or default or where the transaction is obviously or to A's knowledge, unlawful. Breach of this duty will usually render P liable for breach of contract or, if there is no agency contract, then the law of quasi – contract where A's claim is for restitution.

- A May Exercise a lien over such Property of P's as in A's Possession

For recovery of remuneration due and reimbursement of expenses.

3.5 Liabilities of Agent (and of Principal)

A's purpose is to bring P into legal relations with TP. Once this is achieved, A retires from the transaction and, at that stage, the only parties with rights under the transaction are P and TP.

However, there are occasions when A may not simply retire from the transaction and the agency (after collecting his/her commission if any) but may find liability attach either towards TP or P.

3.5.1 Liability of Agent (and of Principal) to Third Party

Agent Acting with Authority

This will depend on A's method of contracting. Where A has authority and:

- A discloses the name of P.

Normally only P and not A may sue and be sued on the contract.

- A discloses the existence but not the name of P.

A's liability is the same as above provided A contracts as an agent.

- A does not disclose the existence of P,

i.e where A acts as if s/he were P. In this event, A becomes personally liable on the contract – **but** when TP discovers that TP has really contracted with A acting for an **undisclosed principal,** TP may elect to hold either A **or P** liable on the contract – although P is not liable if P has paid A. TP is bound by his/her election. Where TP sues and recovers judgment from A, that is taken conclusively as an election. Merely commencing an action is evidence of election but not conclusive.

Undisclosed P may sue TP unless the transaction is entirely inconsistent with agency.

The doctrine of undisclosed principal only operates where A has **actual** authority.

Breach of Warranty of Authority

This applies only where A acts in excess of, or otherwise without, actual or apparent authority. It follows that TP can not sue P on the contract but only A for breach of warranty of authority.

In Collen v Wright (1857) 8 E&B; 647 the court found that where a purported agent represents either expressly or impliedly, that he or she has authority to enter into a particular transaction and TP relies on that representation of authority, the 'agent' is taken to warranty that such representation is true.

Whether the representation is made innocently or knowingly. A will be liable to TP.

3.5.2 Liability of Agent – Principal inter se

See duties of agent and principal.

3.6 Termination of Agency

The appointment of A may be terminated:

- By act of the parties – by express revocation of authority by P or express remuneration by A;
- By death, unsoundness of mind, or bankruptcy of P or of A;
- By supervening illegality eg P becomes an enemy alien;
- Where appointment was for a specific period, by the effluxion of that period;
- By A becoming 'functus officio' i.e. having completed the assignment A was engaged to perform; or,
- By destruction of the subject matter of the agency rendering performance impossible.

4.0 CONCLUSION

In our discussion of The Law of Agency, we attempted a definition of agency relationship. Principal/Agent relationship was differentiated from masters aberrant or employer-employee relationship. You saw how agency can be created, or terminated and the remedies for breach. You should be able to distinguish actual form apparent authority, and the rights, duties, and liability owed by one to the other and Vice Versa. Try to domesticate what you have learnt by relating them to factual problems.

5.0 SUMMARY

Principal/Agent relationship is fiduciary wherein an agent acts on behalf of and instead of a principal in a contract or other multiple business transactions. In such a process, the agent may bind his/her Principal with a third party. It is important that the principal must have capacity, but the agent needn't. Agency may be created by agreement, ratification or by operation of the law. In the same way it may come to an end by the action of the parties (provided that notice is given by the party seeking to terminate it) and by operation of law. Principal may expressly or impliedly confer authority on her Agent (Actual Authority) or hold out his agent as possessing certain authority (ostensible authority). Duties, to rights and liabilities are in per agreement or implied. The principal is entitled for material information, loyalty (and any secret profit), reasonable skill and diligence and any special skill his agent possesses.

On the other hand, he must cooperate with the Agent and provide him with safe working condition. The agent may or may not disclose the existence or identity of his principal where there is breach, remedies lie in remedies for breach of contract, indemnification and ratification.

You have come to the end of the course "Introduction to Law". Have you enjoyed it? We hope you did. Well done. Now attempt the following questions.

6.0 TUTOR-MARKED ASSIGNMENT

1(a). If you engaged a plumber to come and replace the taps in your sink and you gave him no more specific instructions than that, would he be acting as your agent when he purchases taps from the local plumber wholesale to complete the job?

(b). would your answer be different if you handed the plumber N20,000 and instructed him that you wanted to install gold plated taps, advertised for sale in the latest Myer catalogue?

2. Antonio had picked his last crop of tomatoes for the season. He saw them safely onto Con's truck which was to transport them to an interstate market. In keeping with his promise to his wife and family Antonio flew out the next afternoon for the family holiday in Italy.

Half way to his destination, Con's truck broke down and was unable to be repaired for a week. Con tried to contact Antonio to get instructions regarding the tomatoes but Antonio had left no contact address. In desperation con wired another carrying company speedy delivers to get the tomatoes to market on time?

7.0 REFERENCES/FURTHER READINGS

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