ANALYSIS OF THE LIABILITY REGIME FOR TORTS AGAINST PROPERTY IN NIGERIA

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A THESIS SUBMITTED TO THE SCHOOL OF POSTGRADUATE STUDIES, AHMADU BELLO UNIVERSITY, ZARIA-NIGERIA, IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY-PhD (LAW)

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DECLARATION

I declare that the work in this thesis titled *A Critical Analysis of the Liability Regime for Torts Against Property in Nigeria* has been performed by me in the Department of Private Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at this or any other institution.

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CERTIFICATION

This thesis titled: "**A CRITICAL ANALYSIS OF THE LIABILITY REGIME FOR TORTS AGAINST PROPERTY IN NIGERIA"** by Dahiru Muhammad SANI (PhD/Law/42820/202-2013), meets the regulations governing the award of the degree of Doctor of Philosophy of Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to the memory of my late father, Malam Muhammad Sani Kaya and my mother, Malama Hauwa'u Sani Kaya

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ABBREVIATIONS

ALR	Australian Law Reports
DLR	Dominion Law Reports (Canada)
LJQB	Law Journal Queen's Bench
App. Cas.	Appeal Cases
AC	Appeal Cases
H.L Cas.	House of Lords Cases
CLR	Common Wealth Law Reports
L.T.	Law Times
Ex. D	Exchequer Division
WRNLR	Western Region of Nigeria Law Reports
Lloyd's Rep.	Lloyd's Reports
TR	Times Report
NWLR	Nigeria Weekly Law Reports
ALJR	Australian Law Journal Reports
ALL FWLR	All Federation Weekly Law Reports
JCA	Justice of the Court of Appeal
JSC	Justice of the Supreme Court
CJN	Chief Justice of Nigeria
ALL ER	All English Reports
ALL NLR	All Nigeria Law Reports
QB	Queen's Bench
KB	King's Bench
Ch. D	Chancery Division

CLC	Commercial Law Reports
ASTL	Anambra State Torts Law
ER	English Reports
WLR	Weekly Law Reports
NRNLR	Northern Nigeria Law Reports
WACA	West African Court of Appeal
WSCA	Western State Court of Appeal
LRN	Law Reports of Nigeria
QBD	Queen's Bench Division
UILR	University of Ife Law Reports
CCHCJ	Selected Judgments of the High Court of Lagos State
B & Ad	Barmwell & Adolphus (Commercial Law Series)
Bing	Bingham Law Reports
NMLR	Nigeria Monthly Law Reports

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ABSTRACT

Torts dealing with property which include trespass to land, nuisance, keeping dangerous objects (the rule in *Rylands vs Fletcher*), conversion and detinue, that have significant role in protecting the interest of owners or possessors of both moveable and immoveable property. Over the years, these torts have passed through some modifications in the common law jurisdictions, especially England, Australia, Canada and even the United States of America. This change in character and landscape which the torts have witnessed is more or less associated with the change in development of societies. In Nigeria however, these torts have either remained static without incorporating recent developments in the areas or confused by the courts in applying the principles applicable to them wrongly. This research, using a doctrinal method, has taken an in-depth analysis into liability regime which governs torts against property, more specifically, trespass to land, especially the doctrine of trespass ab initio, new development in the application of the tort of nuisance and the rule in *Rylands vs Fletcher* (keeping dangerous objects) and their application by the court in Nigeria as well as the application of the torts of conversion and detinue in Nigeria. The research has through an examination of the relevant literatures and decisions of courts, shown that the principles of liability in those torts have either been modified, such as in nuisance and under the rule in Rylands vs Fletcher, or abolished as in the case of detinue. In Nigeria however, the research finds that, the court could not measure up with new developments in those torts by still applying the old principles governing them, while at the same time applying the law governing the tort of trespass ab initio wrongly. With regards to the application of the rule in *Rylands vs Fletcher*, the court in Nigeria, has equated the rule with negligence thereby giving the impression that liability under the rule could also lead to liability in negligence, which is not correct because the two are governed by different rules. This is notwithstanding the fact that recent developments indicate that negligence in some way, plays a significant role in attaching liability under the rule in *Rylands vs Fletcher*. The problem here is that the court in Nigeria is not categorical as to whether or not, it has abolished the rule and therefore, merge it together with negligence even though in some instances, the approach of the court moves towards that direction. It has therefore, been recommended that the court in Nigeria should take pro-active measures towards addressing the anomalies associated with the application of relevant principles of law governing trespass ab initio, private nuisance, the rule in *Rylands vs Fletcher*, conversion and detinue, by for example reversing itself in the case of Alhaja Silifatou Omotayo vs Co-operative Supply Association (2010)16 NWLR (pt. 1218) 22, take a stand by abolishing the rule in Rylands vs Fletcher and merge it with negligence for the sake of consistency and clarity in the law as well as re-examine its approach to the issue of liability in the tort of private nuisance by allowing "reasonableness of the defendants conduct", to take centre stage in determining whether the defendant is liable or not.

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CHAPTER ONE:

GENERAL INTRODUCTION

1.1 Background to the Study.

Liability in torts dealing with property such as trespass to land, nuisance, conversion, detinue and the rule in *Rylands vs Fletcher*[1](keeping dangerous object) have over the years witnessed some transformations in the course of their application by the court and as a result of changing times and developments in the various spheres of human existence. While these situations led some of these torts to change their character and landscape from what they were when they first emerged, some have become abolished entirely. The transformation which some of the torts witnessed was largely, due to the encroachment into their territories by one or more torts. A typical example here is the encroachment by negligence into the territories of nuisance and the rule in *Rylands vs Fletcher*[2] which made them to change their original character. This changing character has also made the basis for liability under the torts dealing with property to change, as some of the ingredients required to establish the torts have also changed. The tort of trespass to land though still maintains its original character substantially, its application by the courts in Nigeria has generated some confusion into believing that some of its doctrines like trespass *ab initio* have also been modified. Also, in applying the rule in *Rylands vs Fletcher*, the court in Nigeria has taken a path which equates negligence and its corollaries with the rule in *Rylands vs Fletcher*[3], thereby giving an impression that liability under the two torts could be based on the same ingredients. Although this is partly correct in view of the fact that the modern application of the torts is now going towards that direction but the court in Nigeria has not taken a position as to whether the two torts have been merged together or

[1] (1868) L.R 3 HL 330
[2] Supra
[3] ibid

not. Under the rule in *Rylands vs Fletcher*, if a person keeps a dangerous object on his land, which escapes and damages the property of his neighbour, is liable on a strict basis. This is without proving negligence on the part of the landowner from which the dangerous object or substance had escaped. The torts of conversion and detinue are torts that have emerged and applied side by side with each other for several centuries until recently when the two have been merged in some countries because they were considered to be more or less duplication. This was facilitated by the manner in which conversion has encroached into the territory of detinue and made it almost redundant, with the only remaining aspect of the latter that may be relevant today, being the case of bailor-bailee relationship. With this encroachment, conversion can be committed by detention, of someone's chattel, through conversion by detention, which has the same character with detinue. In Nigeria the two are up till this moment separate even though practically they are substantially the same because even courts do mix up the two in terms of definition and application. In the same vein, some judicial decisions in Nigeria recognised that detinue is one of the circumstances through which conversion can be committed.[4]

The doctrine of trespass *ab initio* is one fundamental doctrine in the tort of trespass to land which makes one liable for trespass from his initial entry, where he was permitted to enter premises with the authority of the law but in the process did something against his initial permission. This doctrine found its basis in the *Six Carpenters* case.[5] In that case, Six Carpenter's were served with wine and bread at a tavern which they paid for but requested more wine and bread afterwards, which they refused to pay after they were served. John Vaux, the claimant in the case brought an action in trespass against the Six carpenters. It was held *inter alia* that when an authority or license is given anyone to enter a a land and he abuses it, he shall be a trespasser ab *initio*. It was also held that, it will not

[4] *Henry Stephens Engineering Ltd vs S.A. Yakubu (Nigeria) Ltd* (2009) N.W.L.R (pt. 1149) 416 at 432
[5] (1610) 77 E.R 695

be a trespass where the entry or authority is given by the party and abused. Subsequent application of the doctrine suggests that it applies in the main, to persons who entered premises under the authority of the law, especially, law enforcement officers. The law in Nigeria seems to have deviated from the principle of law established in the above case and other common law cases that followed it. This can be gleaned from the decision of the Supreme Court of Nigeria in the case of *Alhaja Silifatu Omatayo vs Cooperative Supply Association*[6], which has in a way changed and confused the jurisprudence established under the doctrine.

The forgoing gave a summary of the issues to be dealt with in this work with a view to conducting an in depth analysis into aforementioned areas of law, with a view to making some contributions for the development of the law of torts in Nigeria.

1.2 Statement of the Research Problem

The judiciary in any society is responsible for interpreting and applying the law in that society; and in the process the law will become robust and stand the test of time. Law of torts is the end product of judicial decisions given over time in England. However, with independence, Nigeria's judiciary also developed further on its laws. But some of the development in Nigeria seemed to have changed the philosophy and effects of the common law dealing with torts against property.

Firstly, trespass to land is the commonest tort which affects land that could be committed in numerous ways, i.e by entering the land physically, by remaining on the land and by placing something on the land without the permission of the person in possession. The tort also has other doctrines which play a significant role in protecting possession of land, among which are the doctrines of trespass by relation, continuing trespass and

[6] (2010) 16 N.W.L.R (pt. 1218) 1 at p. 22,

trespass *ab initio*. The doctrine of trespass *ab initio* is of great importance in attaching liability, depending on the person responsible for it. The doctrine of trespass *ab initio* is somehow peculiar in its application as it only applies to persons who enter a land in exercise of a duty authorised by law, after which they abuse their term of entry by causing damage to property.[7] This type of trespass applies mostly to persons such as police officers and other security agents as well staff from power, water companies or health inspectors.[8]

In Nigeria the court seems to have departed from the spirit of the application of the doctrine, and applied it as a normal case of trespass that can be applied to all persons as against what the doctrine stands for. This has happened in the case of *Alhaja Silifatu Omotayo vs Cooperative Supply Association*[9] and adopted in the case of *Ekweazor vs The Registered Trustees of the Apostolic Church of Nigeria*[10]. In the case of Omotayo, the respondent sued the appellant in the High Court of Lagos State claiming the sum of Five Hundred Thousand Naira as general damages for trespass on its land and an injunction. The respondent based its claim to the title of the disputed land and the Deed of Conveyance dated 21st July, 1985, executed by the Ajao family. The respondent alleged that the appellant was a licensee of the respondent having been allowed to occupy the disputed land by a caretaker of the land and engaged by the respondent. She was permitted to mould blocks for sale on one of the plots of land. It also alleged that the appellant extended the area granted to her to cover for the plots of the respondent. The Appellant on her part claimed title and ownership of the land and contended that her Deed of Conveyance was extended by an Attorney, who claimed through Oloto family. At the end of hearing, the trial court found in favour of the respondent and the appellant appealed to the Court of

[7] https//:trespass.uslegal.com visited on 19th January, 2019 by 1:50pm
[8] *Cinnamond vs British Airports Authority* (1980) 2 All ER 368
[9] *Supra* at p. 2
[10] (2014) 16 NWLR (pt. 1434) 1 at 473

Appeal and the appeal was unsuccessful. On further appeal to the Supreme Court, it was held *inter alia* on the question of what constitutes trespass *ab inito* that:

> Where a person who initially entered upon land lawfully or pursuant to an authority given by the true owner or person in possession, subsequently abuses his position or that authority, he becomes a trespasser *ab inito*, his misconduct is relating back so as to make his initial entry a trespass. In the instant case, the appellant not only challenged and denied the agents of the respondent, she also obstructed the agents and workers of the respondent. On the basis of denial being a licensee of the respondent, she became a trespasser *ab initio.*

The above position was adopted by the Enugu division of the Court of Appeal in the case of *Ekweazor vs The Registered Trustees of the Apostolic Church of Nigeria*.[11] But one thing that is common in both cases is that the law was misstated by the courts, a situation which led to its wrong application. The law was somehow modified by the Nigerian courts as the doctrine only applies where the defendant had access to a land by virtue of an authority of the law not an "authority of the owner" as stated by the Supreme Court in *Alhaja Silifatu's* case[12]. It is a doctrine that applies only to those who enter into premises by authority of the law not that of a party that could be liable under the doctrine not to trespassers generally as claimed by both the Court of Appeal and the Supreme Court in the two cases. One can rightly say that the doctrine of trespass *ab initio* only applies where there is misconduct by security agents or persons who are under authority of the law to carry out certain official duties, such as officials of the electricity or water corporations, who may be in a particular compound to carry out their official assignments. The doctrine does not apply to all entries with the leave of the owners or persons in possession. This has been confirmed by Kodilinye where says "the doctrine applies where there is a misconduct, such as willfully damaging property or committing an assault by a security agent in the cause of carrying out an arrest or executing a search warrant".[13]

[11] supra
[12] supra at p. 29
[13] Kodilinye, O and Aluko, O, op cit at p. 192

The application of the doctrine by the Supreme Court in the case of *Alhaja Omotayo*, is a wrong one. This is simply because of the fact that in that case, the appellant would have been treated like any other ordinary trespasser hence based her liability under 'trespass by remaining on the land' but not under the doctrine of trespass *ab initio* since her entry was based on the authority of the person in possession not authority of the law. After all, both parties in that case are claiming title to the land and therefore, could not have been a case for trespass; even where it is assumed to be so. The claim should not have been for trespass, since the appellant was not in the property to carry out any official assignment. Support for this assertion could be found in the case of *Chic Fshions (West Wales) Ltd vs Jones*[14], where though Lord Denning criticized the use of the doctrine as a valid principle of law, but typifies a clear case where the doctrine could be validly applied. In that case, Police Officers armed with a warrant were sent to search the Plaintiff's premises to look for some stolen goods. They could not find those goods but in the process cart away some goods, hence they were held liable for trespass *ab initio* because of the misconduct which they did in the process, by taking away something different which was not the subject of their search. This is clearly different from the scenario in the case of *Alhaja Omotayo*, which was no more than two parties claiming title to premises, for which each and every one of them had to produce evidence to prove its title, at the end of which the respondent succeeded. In the same vein, the definition of trespass *ab initio* provided in the Anambra State Torts Law supports the argument of the researcher which is at variance with the decision of the Supreme Court in the case of *Alhaja Silifatu Omotayo*. The law provides that:

> Subject to the provision of this law, where a person enters on the land of another under the authority given to him by law or otherwise and while there, uses the land in a manner that is not authorised or otherwise abuses the authority by an act which amounts to a misfeasance, he shall be deemed

[14] Supra. See also the American case of *Cline vs Tait* (1942) 129 (2d) 89

to be a trespasser ab *initio*, and may therefore, be sued as if his original entry was unlawful.[15]

Therefore, a cause of action in trespass *ab initio* must satisfy the following Conditions:

(a) The authority abused must be an authority granted by law and not by an individual

(b) There must be some positive act of misconduct and not a mere omission or neglect of duty.[16]

What may be gleaned from the decision of the Supreme Court in the above two cases is that the law was misapplied thereby negating the above conditions necessary for the application of the doctrine as it was applied to persons who committed trespass as ordinary persons not as officers of the law.

Secondly, the tort of nuisance is a creation of common law and it could be private or public in nature. It is private where the kind of infringement committed affects the right of a single individual but becomes public where it affects the interest of the public or a section of it. Private nuisance being one that deals with the use and enjoyment of land is only actionable where the interference is substantial. Although substantial interference with use and enjoyment of land is the pillar upon which private nuisance stands, this has not received favourable treatment from the appellate courts in Nigeria. *Cases such as Helios Tower Ltd vs Isiaka Bello & Anor*[17] and *Registered Trustees of the Living Bread Christian Centre vs Colonel S.T. Oluborokun*[18] are typical example of instances where the court interprets the requirement of substantial interference with use and enjoyment against the claimants. This is against the decision of the lower courts in the same cases, which held *inter alia* that the rights of use and enjoyment of land of the claimants were indeed

[15] Section 62, Anambra State Torts Law, op cit
[16] https//trespass.uslegal.com visited on 23/11/2018
[17] (2017) 3 N.W.L.R (pt. 1551) 9
[18] (2017) 1 N.W.L.R (pt. 1545) 40

substantially interfered with. Although determining what kind of interference is substantial is a question of fact, and not amenable to a universally acceptable definition, the approach adopted by the courts, especially at the appellate level, puts the rights of the claimants in jeopardy. This is largely due to the manner in which the courts handled the issue of whether the act of the defendant was reasonable or not, which is the major guide to determining whether a particular interference is is substantial or not, for the purpose of liability in cases of private nuisance which dwells on use and enjoyment of land. In the case of *Holios Tower Ltd vs Isiaka Bello & Anor*[19] the claimant/respondent is the owner of a three bedroom bungalow at No. 3 Adebayo Street, Ado-Ekiti. He sued the appellant/defendant in 2012 before the Ekiti State High Court of Justice claiming for trespass, nuisance and wrongful interference with the claimant's use and enjoyment of his land. He also claimed damages for the nuisance and the imminent negative biological effects caused by the appellant/defendant, who operated a mobile phone transmission mast installed near the respondent's/claimant's residential building. He claimed that the said mast made it difficult for him and members of his family to sleep as a result of the emission of noise and micro-wave from the transmission mast. The claimant told the court that he had to relocate to another residence due to the noise. The trial judge entered judgment in favour of the respondent/claimant and awarded two million Naira damages.

Dissatisfied, the appeallant appealed to the Court of Appeal and it was held that no nuisance was proved by the respondent. It was further held that the whole aim of nuisance is to protect one's right to peaceful enjoyment of property and damage to that right.[20] The law of private nuisance is designed to protect individual owner or occupier of land from substantial interference with his enjoyment thereof. That where an action is founded on interference with his enjoyment of land such as where a plaintiff complains of

[19] (2017) 3 NWLR (pt. 1551) 93
[20] Ibid at p. 115

inconvenience, annoyance or discomfort caused by the defendant's conduct the interference must be shown to be substantial.[21] The court went further to hold that in view of the findings of the lower court it cannot be said that a case of nuisance has been made out by the respondent and that the respondent must show actual damage not speculation.[22] The question is whether a nuisance which made someone to abandon his house and relocate to another area is not enough to amount to substantial interference?

In another case of *Registered Trustees of the Living Bread Christian Centre vs Lt. Col. S..T Oluborokun*[23] the respondent sued the appellant at the High Court claiming for an injunction restraining the appellant and all the members of the church from further noise generated by their activities in conducting worship services at their premises which is adjacent to the respondent's residence and Five Million Naira damages for the nuisance generated due to the said activities of the appellant. The respondent complained that the rowdy manner in which the appellants carry out their activities, himself and members of his household are subjected to extreme panic and absolute sense of insecurity. It was further contended by the respondent that his household has been subjected to a lot of stress and trauma which have rendered them restless and that their house had become inhabitable as most of the activities of the appellants were conducted indiscriminately, ranging from sessions very early in the morning, afternoon and evening which rendered his children not being able to rest after school; and that sometimes those activities were carried out very late into the night leading to the next morning in the name of night vigils. The trial court gave its verdict in favour of the respondent and the appellant appealed to the Court of Appeal where the court *inter alia*, held as follows:

1. That nuisance is a branch of the law of torts which is closely connected to the environment. It covers areas such as pollution by oil spillage or noxious fumes and other offensive smells from premises or noise generated from

[21] ibid
[22] Ibid at p. 116
[23] Supra at p. 2

industrial concerns and other human activities, obstruction of public highways etc,[24]

2. That private nuisance…may be described as an unlawful interference with a person's use and enjoyment of land or some right over or in connection with such right; private nuisance could therefore be in the form of physical injury to the plaintiff's property. It could also be in the nature of interference with use and enjoyment of land such as where the plaintiff is subjected to unreasonable noise or smelling emanating from the defendant's neighbouring land.[25]

From the above two decisions of the Court of Appeal two questions come into mind, the first being whether use and enjoyment of land which is one of the pillars upon which the tort of nuisance stands has been relegated to the background? Secondly, what amounts to substantial interference, especially in view of the fact that excessive noise could be a ground for an action in private nuisance? In answering these twin questions one must bear in mind that use and enjoyment of land is the essence of private nuisance despite the fact that where an alleged nuisance affects that use and enjoyment of land by individuals, it has to be substantial. With regards to the second question even the courts did not define when a nuisance could be said to be substantial though the court acknowledged the fact that an inconvenience or annoyance in the form of noise or smell is enough to ground an action in private nuisance where it has become substantial.[26] Despite that the court in both cases cited above, refused to grant an injunction or the damages sought even where someone and members of his household were caused discomfort of such a magnitude that denied them peaceful sleep which ordinarily is a corollary of quiet enjoyment of one's property.[27] This is in spite of the fact that the court has acknowledged in the *Trustees of the Living Bread's* case that:

> The crucial issue in the law of private nuisance has always been how to strike a balance between the right of the defendant to use his land as he wishes and the right of the plaintiff to be protected from interference with

[24] Ibid at p. 40
[25] ibid
[26] Ibid at p. 40
[27] See for example the case of *Registered Trustees of the Living Bread Christian Centre vs Oluborokun*, supra at p. 4

> his enjoyment of his own land. To strike a balance between the contending and conflicting rights of the parties the courts have held the view that if the injury or interference complained of is with respect to damage to land or use of such land, the injury or interference must be sensible, while if it is a case of interference with the plaintiff's enjoyment of his land the interference must be substantial. This is so because the law on private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof.[28]

Despite the court's acknowledgement of substantial interference as the foundation of the tort of private nuisance in the form of interference with enjoyment of land, it still went ahead to allow the appeal in the two cases mentioned above on the ground that substantial interference was not proved. Although enjoyment of land is an abstraction that is not physical in nature, certain parameters are necessary to know when interference is unlawful and therefore actionable. In this regards, one may say with all sense of modesty and humility that the court did not put into consideration the enormity of the noise that emanated from the defendant's premises to such an extent that the claimants were denied reasonable comfort in their residences and prevented from sleeping. The fact that the discomfort caused by the nuisance made one of the claimants to relocate to another area should have been enough evidence that there was actionable nuisance and at least award damages to him even if it would not grant the injunction he sought. The court should ordinarily have adopted the approach of the High Court of Lagos in the case of *S.O. Odugbesan vs I. O. Ogunsanya & Ors*,[29] where Adefarasin J held that:

> owners or occupiers of premises are entitled to use such premises for any purpose for which it may, in the ordinary and natural course of the enjoyment of land, be used but they are not entitled to apply such property or premises to extra-ordinary and unreasonable uses or purposes which would impose upon their neighbours burdens which in the ordinary course of things, they are not called upon to bear.[30]

The above case was decided in a circumstance similar to that of *Registered Trustees of the Living Bread* but the court agreed in the former that the noise emanating from the

[28] Ibid at p. 42
[29] Suit No LD 354/67/2/1970 (unreported)
[30] ibid

defendant's church was enough nuisance that could inconvenience the claimant and it granted an injunction to stop it. In arriving at his decision, Justice Adefarasin held further that:

> It must be made clear that the defendants are entitled to conduct their worship in any manner they believe. They are entitled to their own beliefs however much these beliefs may be disagreeable to persons of other religious persuasion. However, much as the plaintiff may disbelieve or dislike the manner in which the defendants prayed or spoke in tongues or prophesised or were possessed of the spirit, he has no right to complain against the things…I find that the noise which the defendants make especially in the dead of the night and when they claimed to be possessed of the spirit was such as not only disturbed the comfort of the plaintiff but were so excessive as they would disturb any reasonable person in the neighbourhood, having regard to the standard of the locality…Although it is expected that everyone in an organised society must put up with a certain amount of discomfort from the legitimate activities of his neighbours, it is too much to expect any reasonable person to put up with an excessive noise in this case which goes on every day of the week to the extent that the plaintiff could hardly hear people talking in his house and it goes on from midnight to the morning on more than two nights in any one week.[31]

The above principle enunciated by Adefarasin J for determining when a nuisance could be substantial or not should have been the guiding principle for courts to adopt, by determining whether the act of the defendant is reasonable or not in each circumstance. But the two recent decisions of the Court of Appeal held otherwise because the court did not in its opinion believe that the discomfort which the defendants suffered in the two cases were not grievious enough to amount to an actionable nuisance. Perhaps it also did not consider locality as a factor in determining liability for private nuisance in the form of the abstraction "use and enjoyment", which is not physical in nature.[32] Locality or character of neighnourhood is also as important a factor as reasonableness when it comes to attaching liability in private nuisance because that is what will guide the court to be able to strike a balance between the interests of different land users with respect to the use and enjoyment of their respective lands. The fact that the locality is a residential area presupposes that the

[31] ibid
[32] *Tebite vs Nigerian Marine & Trading Company Ltd,* supra at p. 72

noise which ordinarily one could put up with should be limited, especially in the middle of the night where people should be sleeping. It has in fact been held that even in a noisy area, one does not have the free license to make excessive noise that surpasses a tolerable level that could constitute a nuisance in the area.[33]

Thirdly, the rule in *Rylands vs Fletcher*[34] (which deals with keeping dangerous object on one's premises) as a tort dealing with interference with use and enjoyment of property has since its inception in 1868, passed through some transformations. The transformation which the rule has witnessed watered it down in some jurisdictions and even abolished in some.[35] This transformation has in a way changed its character from inception to date, largely due to the encroachment into its territory by the torts of negligence and nuisance. To this extent, for liability to arise under the rule in *Rylands vs Fletcher,* the defendant must have subjected his land to a use that is non-natural and injury must have been foreseeable.[36] This is in addition to other ingredients enunciated earlier by Lord Blackburn in the *Rylands*' case. This transformation does not however, make it the same with negligence as it is suggested by some of the cases decided by the courts in Nigeria. The courts in Nigeria treat everything that ought to be negligence sometimes, as one applicable under the rule in *Rylands vs Fletcher*. The court adopted this approach in the cases of *National Oil and Chemical Marketing Plc vs Adewusi & Ors*[37]. In that case, the first respondent was one of the thirty four people whose properties were destroyed by fire caused by oil spillage from a tanker driven by the 4th respondent. The tanker was owned by the second respondent which he gave to the third respondent and the latter employed the 4th respondent as a driver of the tanker to distribute petroleum products. The 2nd respondent

[33] *ibid*
[34] (1868) 1 H.L
[35] This is the case in places like The United States, United Kingdom and Singapore. In Australia the rule has been abolished and made part of negligence in the case of *Burnie Port Authority vs General Jones Property Ltd* (1994) 68 A.L.J.R 531
[36] *Transco Plc vs Stockport Metropolitan Borough Council* (2004) 2 A.C 1
[37] (2009) All FWLR 1669

and the appellant entered into haulage contract for the appellant to use the tanker to transport petroleum products to the appellant's filling stations. The name of the appellant's company was also inscribed on the tanker in compliance with NNPC directive. The tanker had accident and summersaulted thereby spilling oil which led to a fire that destroyed the respondent's shop.

The 1st respondent claimed that the accident occurred due to the negligence of the 1st respondent and therefore prayed the High Court of Lagos State to award him general and special damages against the appellant, 2nd – 4th respondent, jointly and severally. Other people whose properties were affected gave evidence to buttress the 1st respondent's claims but the appellant denied the ownership of the tanker, claiming she was only the employer of the 4th respondent and was therefore, not vicariously liable for his negligence. The trial court entered judgment for the 1st respondent and the appellant appealed to the Court of Appeal. In delivering its judgment, the Court of Appeal stated the rule governing the application of the rule in *Rylands vs Fletcher* as stated by Lord Cairn more than one hundred and forty years ago. It also stated that for the rule to apply "there must be an accumulation of things such as water, gas, petrol, chemicals or explosives; and there must be an escape of the accumulated material from the defendant's land to a place outside that land.[38] The court held further that in the instant case the rule applies and the trial court rightly held the appellant vicariously liable for the damage caused by the 4th respondent.[39] Also, in another case of *MTN (Communications) Ltd vs Ganiyu Sadiku*[40] the question for determination was whether the trial court was right to have made out a case of strict liability for the respondent without allowing the parties to address it on it. The summary of the facts of the case were that by writ of summons filed at the High Court of Ondo State,

[38] Ibid at p. 1681
[39] ibid
[40] (2014) 17 NWLR 382. See also, *Shell Petroleum Development Company vs Anaro* (2015) 12 NWLR (pt. 1472) 122 and *Shell Petroleum Development Company vs Edamkwe* (2009) ALL FWLR p. 807

Akure, the respondent commenced an action against the appellant seeking forfeiture by the appellant of the lease agreement between him and the appellant in respect of his land situate at No.23, Isinkin Street, Akure, for fraudulent breach by the appellant of the conditions of the lease to keep the land in good condition. He also sought an order directing the appellant to vacate and give up possession of the land because of the breach, and a perpetual injunction restraining the appellant either by itself, agents or servants, from further polluting the land. The respondent also claimed that at some point his water well became polluted by the diesel which was escaping from the appellant's tank situate at the site. The appellant on its part denied the possibility of diesel escaping from its storage tank which it claimed was built underground and in accordance with specification of the Nigeria Communications Commission and the World Health Organisation. After hearing witnesses, the trial court granted all the reliefs sought by the appellant but awarded the sum of Fifty Thousand Naira as damages. The trial court further held that although there was no scientific report from the respondent to substantiate his claim that his wealth was polluted by the diesel from the appellant's land or that it was the diesel that escaped from the appellant's tank that caused damage to his well, it was an offence of strict liability which is based on the breach of an absolute duty to make something safe and that the maxim of *res ipsa loquitur* was applicable. Dissatisfied, the appellant appealed to the Court of Appeal, and unanimously allowing the appeal, the Court of Appeal held *inter alia*:

> What is required to succeed in a claim for negligence primarily is to prove the existence of a legal duty of care and to go further to establish that there was breach of such duty of care consequent upon which damage, injury or economic loss was suffered…On the purport of the rule in *Rylands vs Fletcher*, the rule is that: where an occupier of land who brings upon it anything likely to do mischief if it escapes, is bound at his peril to prevent its escape even if he has not been guilty of negligence. By this rule, a person who is in control of substance which can easily escape and cause damage is placed under strict liability. In the instant case, with or without negligence on its part, the appellant was under a duty of care to ensure that there was no

> spillage of diesel from its storage tank to the extent of polluting the water well and or causing any form of damage to the vegetation on the land[41].

The same problems which characterised the previous decision are still manifest in the one just cited in that, the court assumed that liability under the *rule in Rylands vs Fletcher* and that in negligence are founded on the same elements or that the rule is an aspect of negligence. This is notwithstanding the fact that the court as evidenced in the above ratio agrees that liability under the rule is strict as against negligence which is predicated on a fault element. The problem with this approach is that it is asking a claimant who is claiming under the rule in *Rylands vs Fletcher* to prove his case, which is more difficult than where liability is strict. Also, the court in arriving at its decision, applies the same old rule in the case of Rylands, which was enunciated on the basis of "bringing dangerous objects unto someone's land that escapes and causes damage to the claimant". This case should have been perfectly decided as a case of negligence because of the absence of fundamental ingredient of the element of "non-natural use", which is the foundation of the modern application of the rule. The use of storage tank is natural in telecommunication business, especially in Nigeria where there is no constant power supply and on the basis of this there could be no liability under the rule.

The last authority to consider on this is that of *D.N.N Ltd vs Chief Joel Anor & Ors*[42]. In that case the appeal was instituted on the basis that in 1983 the respondents instituted four separate actions against the appellant at the then Bendel State High Court in Warri, seeking among others, compensation for damage done to their farmlands, crops and rivers due to oil spillage pollution but the suits were consolidated by the trial court. The trial court in its reserved judgment entered in favour of the respondents as appellants in each of the four consolidated suits for various sums. The trial court accepted evidence

[41] Ibid at p. 416
[42] (2015)

called by the respondents' witnesses but rejected those of the appellant's on the ground that the team of experts called by the appellant carried out their work three years after the spillage had occurred. Consequently, the trial court awarded damages in favour of the respondents in respective sums. Dissatisfied, the appellant appealed to the Court of Appeal which dismissed the appeal. Still dissatisfied, it appealed to the Supreme Court, which also unanimously dismissed the appeal and held *inter alia*, that:

> On the application of the rule in *Rylands vs Fletcher*...an occupier of land…will be liable for all the direct consequences of its escape, even if he has been guilty of no negligence. In the instant case, the Court of Appeal in affirming the finding of the trial court was right in holding that the rule was applicable. The appellant knew that it was keeping crude which would be regarded as dangerous to the environment if allowed to spill and there was in fact, a spillage.[43]

One thing which is common to the above three decisions of the Nigeria's appellate courts is that the courts based their decisions on the old rule in *Rylands vs Fletcher* fashioned out since 1868, when the law has in 2019 passed through some modifications due to the invasion into its territory by both nuisance and negligence, especially with the introduction of reasonable foreseeability as a major ingredient for determining liability under the rule. The decisions have also given an impression that both negligence and the rule in *Rylands vs Fletcher* are the same or the two can be used interchangeably. This confusion was made more prominent when the Supreme Court in the instant case held further that:

> A single act of a defendant may give rise to liability under the heads of tort in negligence and the rule in *Rylands vs Fletcher*. Thus, where a plaintiff pleads damage from the escape of oil waste, give particulars thereof in his pleadings and the trial court finds in his favour on the issue, the defendant would also be liable in negligence for damages resulting from the escape of the oil waste.[44]

Although escape is one of the pillars upon which the rule was built, that enough cannot make a defendant liable unless the type of injury occasioned is reasonably

[43] Ibid at p. 185
[44] Ibid at p. 175

foreseeable, he will not be held liable under the rule. His liability would now be in negligence but not *Rylands vs Fletcher*. So, the instant case would have been decided under negligence, but not under the rule in *Rylands vs Fletcher*. It should however, be noted that the idea of reasonable foreseeability envisaged under the rule in *Rylands vs Fletcher* is not similar to what is envisaged under negligence. The major distinction between liability under the rule in *Rylands vs Fletcher* and under negligence is that while the former is based on no fault (strict liability), the latter is based on a fault (negligence as an element of a tort), which is negligence. Therefore, the introduction of "reasonable foreseeability" into Rylands does not in any way, makes it the same with the tort of negligence. The application of the phrase under Rylands is limited only to foreseeability of the kind of injury occasioned.[45] As one writer rightly observed:

…In short, *Rylands vs Fletcher* is not subject to an explicit test for fault as negligence is, but it has features which at least, overlap with a test for fault. The main procedural difference is that the claimant (under Rylands), does not have the burden of proving that the defendant was at fault (liability is strict) - this is assessed by the court with regards to the "reasonable user" and "remoteness" considerations.[46]

So going by the above, the main distinction between Rylands and negligence is that while the former makes a defendant liable, whether or not, he is at fault, the latter only makes a defendant liable only when he is at fault (through negligence). In addition, the defendant in negligence must also prove the three major ingredients of negligence (duty, breach and damage). This is despite the fact that, there might be a very thin dividing line an ordinary mind may not discern. This is in fact, the reason why the tort was abolished in Australia. But in Nigeria the two still remain separate and no matter how synonymous they might look, they can never be one, even though from some of the authorities cited above

[45] Per Lord Goff in *Cambridge Water Co vs Eastern Counties Leather* Op cit at p. 50
[46] Santiago, J (2012) Distiction Between the rule in Rylands vs Fletcher and Negligence, retrieved from www.scribd. Com on 24th October, 2019 by 4:00 pm

that is the approach of the courts in Nigeria. Although the Nigerian Courts dwell their decisions on the age long ingredients necessary for the application of the rule, especially accumulation and escape, it has been observed thus:

> Today the courts of law look upon the rule with a squinted eye like a step-mother, and tend to restrict its application mainly through non-natural use...As it is now interpreted, this excludes from the ambit of the rule those accumulations which in the judgment of the court (there being no objective test), do not involve an unreasonable risk or an extra ordinary use of land. Such an interpretation allows the court to hold that a common activity such as the collection and storage of gas or water does not constitute a non-natural use of land even though the injury potential is high.[47]

It is now settled that no matter the quantity of water, gas or chemical is accumulated, it will not lead to liability under the rule in *Rylands vs Fletcher*, because accumulation of those substances is considered to be natural but keeping of explosives may be considered non-natural and hence could lead to liability under the rule.[48] Although the law on the application of the rule in *Rylands vs Fletcher* has developed and even went through some transformation in Australia and other common law jurisdictions, in Nigeria one may say it is still wearing the same garb when it was first enunciated in the 19th Century.

Fourthly, the torts of Conversion and Detinue are two torts that have to some extent, emerged and developed as a 'twin'. Though detinue was the first in time in term of existence, it had been consumed over time by conversion due to change in societal development and other factors. The continued existence of the two torts in Nigeria is another problem which this research seeks to address. Both Conversion and Detinue are torts that can be committed against the possessory rights vested in someone's chattel. While conversion means dealing with someone's property in a manner that is inconsistent with the right of the owner or person in possession, detinue on the other hand refers to a

[47] Zahid, A.M.D, *Rylands vs Fletcher and the Modern Trend*, op cit at p. 13
[48] ibid

common law action where a person (plaintiff), entitled to an immediate right in goods seeks to recover it from another who is in actual possession and refuse to deliver them up.[49]

Although Conversion by detention and Detinue are in all respect, similar, question now arises as to whether the two torts can continue to coexist as independent torts despite all the similarities? In Nigeria unlike in other jurisdictions, the two still remain the same despite attempts by courts to distinguish them. Even recent judicial pronouncements and definitions of detinue suggest that it is similar to the definition of conversion by detention which in other jurisdictions, would have been Conversion[50]. After all, in defining the tort of conversion the court in some cases is more concerned with conversion by detention as it is the case in *Henry Stephens Engineering Ltd vs S.A Yakubu (Nig) Ltd.*[51] In that case, the respondent sued the appellant at the High court of Lagos state claiming the sum of N750,000 (Seven Hundred and fifty Thousand Naira) being due and payable to the respondent for the wrongful conversion of its concrete mixer and for damage suffered for the loss of the mixer. The respondent told the court that he had delivered the concrete mixer together with a compressor to the appellant. The respondent after delivery of the items to the appellant demanded the payment of a deposit which the respondents had obliged instalmentally at three different occasions, with the last being made on October 21, 1986. That between 1988-1992 when this action was filed at the Supreme Court the respondent orally, demanded the return of the concrete mixer and the compressor on numerous occasions but the appellant failed to return them to the respondent. After general demands, the respondent averred further that the appellants wrote a letter pledging the return of the machinery in due cause; which they did not do so; as a result of which this action was instituted for conversion of the said items. Part of the decision of the Supreme

[49] Hawes, C (2010) *Tortious Interference with Goods in New Zealand: The law of Conversion, Detinue and Trespass,* (Doctoral dissertation, University of Canterbury, England), p. 10
[50] This is the position in England and Australia
[51] Supra at p. 1, per Tabai JSC

Court in the instant case is that the detention of the plaintiffs' (appellants') chattel becomes conversion only if it is adverse and inconsistent with the rights of the owner or other person entitled to its possession. Therefore, to be liable for conversion, the defendant must be shown to have demonstrated an intention to detain or withhold the chattel in defiance of the plaintiff. The usual mode of establishing that a detention of a chattel by a defendant is adverse to the right of the owner or other person entitled to its possession and therefore, constitutes the tort of conversion is demand by the plaintiff and refusal to deliver up by the defendant.

Another instant which can both qualify as the case of detinue and conversion was also illustrated by the case of *N.A.C.C.E.N (Nig) Ltd vs B.E.W.A.C. Automotive producers Ltd.*[52] In that case the appellant, a business partner of the respondent bought two tippers from the respondent. At some point the appellant took the tippers to the respondent for repairs and the tippers remained in the possession of the respondent for sometimes. When the appellant sent its staff to collect the vehicles it was discovered that the engine of one of the vehicles was replaced with a strange engine as such the respondent was no longer in a situation to deliver the vehicles and the appellant sued the respondent and claimed the sum of 1,319,464.94k being the price for a brand new vehicle, insurance and freight duty as well as clearing charges and for loss of use over a period of time. The court granted the claims of the appellant. On appeal to the Court of Appeal the judgment of the trial court was set aside. The appellant appealed to the Supreme Court where it was held *inter alia* that detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and this continues until the delivery up or judgment action in *rem* which the plaintiff may sue:

(a) For the value of the chattel as assessed and also damages for its detention, or

[52] Op cit at p. 17

(b) For the return of the chattel as assessed and also damages for its detention; or

(c) For the return of the chattel and damages for its detention.

A critical look at the facts and holding of the above two cases reveals that one thing is common among them; goods of the defendants were wrongfully taken and despite several demands by the plaintiff the defendant refused to deliver them up. This is despite the fact that the two cases deal with different torts, the first dealing with conversion and the second dealing with detinue. Also, the case of NACCEN is the perfect illustration of the last remnant of the tort of detinue; because the relationship which gave rise to the cause of action is that of bailor and bailee. In that case the respondent was an automobile sales and services company and the appellant was one of its customers. Both parties had been doing business for many years. The appellant bought two tippers from the respondent as brand new. Later the appellant took the two vehicles to the respondent for repairs. The two tippers were in the possession of the respondent when the appellant sent its staff to retrieve the vehicles, but it was discovered that the engine of one of them was replaced with a "strange engine", and as such the respondent was no longer in a position to deliver the vehicles. The appellant sued the respondent and claimed the price of brand new vehicles, insurance, freight duty and clearing charges as well as for loss of use for the period the vehicles were in the possession of the respondent. The trial court granted the claim of appellant. Aggrieved, the respondent appealed to the Court of Appeal and the Court of Appeal set aside the decision of the trial court on the ground that there was no evidence in respect of the value of the vehicles and also there could be no damages for the loss of use. The trial court therefore, ordered the trial of the case *de novo* before another High Court. The appellant appealed to the Supreme Court, which unanimously allowed the appeal. On the nature of detinue where the cause of action accrues and remedies available, the court held that "the cause of action in the tort of detinue is a continuing cause of action which

accrues at the date of the wrongful refusal to deliver up the goods and this continues until the delivery up or judgment action in *rem* which the plaintiff may sue:

(d) For the value of the chattel as assessed and also damages for its detention, or

(e) For the return of the chattel as assessed and also damages for its detention; or

(f) For the return of the chattel and damages for its detention.

However, the argument of this researcher is that in view of the widening of the scope of the tort of conversion to the extent that it has virtually consumed detinue, there is no need of maintaining detinue as a tort separate from conversion, just as it is the case in England and other jurisdictions. Had the position in England been adopted in Nigeria the case of NACCEN would have been the case of conversion by detention.

However, the Supreme Court of Nigeria had in the case of *NACCEN vs BEWAC Automotive Producers Ltd*,[53] attempted to justify Professor Kodilinye's distinction between conversion and detinue, when it stated that:

> Unlike an action for conversion which is purely a personal action and judgment is for single sum which is the value of the chattel at the date of the conversion detinue is in the form of an action in rem whereby the plaintiff seeks specific restitution of his chattel resulting in judgment for the delivery up of the chattel or payment of its value as assessed at the time of the judgment or damages for its detention.[54]

Despite the above attempt at distinguishing the two torts, the distinction can only remain valid in jurisdictions like that of Nigeria; But in jurisdiction where detinue has been categorically abolished, the distinction will not stand, especially in view of the arguments earlier canvassed in the chapter to the extent that conversion can be committed by detention, sharing the same character and features with detinue. It is for this reason that the present researcher is of the opinion that there is no reason for the continued existence of detinue as a separate tort since virtually the territory of detinue has been covered by conversion by detention. It will therefore not be out of place to highlight the reforms

[53] ibid
[54] See p. 209

carried out in other jurisdictions which abolished detinue as a tort in order to make comparison, and show how Nigeria's should be.

he Nigeria's Supreme Court made the following pronouncement:

> the usual mode of establishing that a detention of a chattel by a defendant is adverse to the right of the owner or other person entitled to its possession and therefore constitutes the tort of conversion is to prove that the plaintiff demanded the delivery of the chattel and that the defendant refused or neglect to comply with the demand. Thus, a demand by the plaintiff and refusal by the defendant are the essential ingredients of conversion.

Although the court defined conversion but the definition is in many respects, similar to that of detinue given by the Court of Appeal in the case of *Ogunsola vs Ibiyemi.*[55] In that case, the plaintiff was a customer of the second respondent (Ilaro Community Bank Ltd). The first respondent was the second respondent manager. The plaintiff took an overdraft of N40,000 from the second respondent in addition to the amount he had in his account to enable him purchase a motor vehicle. He bought the vehicle, which within two weeks of purchase, had a mechanical fault. He approached the second respondent for another overdraft to enable him carry out necessary repairs.. The first respondent instead of advancing further overdraft to the appellant, requested him to hand over the vehicle and the particulars to him so that he could take it to Lagos for repairs on behalf of the appellant. The appellant handed over the vehicle and the particulars to the first respondent. The appellant later wanted to have the vehicle returned to him but his request was turned down. The respondents on their own, used the vehicle as a taxi and changed the colour from Lagos hackney colour to brown. The appellant through his solicitor, wrote a letter of demand for the return of his vehicle but it was not released to him. The respondent later borrowed the sum of N6,200 from one Ologbonori and made a promissory note so as to convince the second respondent to

[55] (2008) All FWLR (Pt. 400) 731 at p. 744-745

release the vehicle to him. But instead of releasing the vehicle to the appellant, the respondents paid the loan on behalf of the appellant to Ologbonori. The appellant's vehicle and the particulars were handed over to the respondents between April and May, 1994 while the overdraft which the appellant took was due to mature for payment in August, 1994. The respondents refused to release the vehicle when the overdraft had not matured for payment. No payment was demanded from the appellant for the overdraft. The vehicle of the appellant was only released in 1997 by order of the court. The appellant called witnesses to show to testify on the several efforts made by him to ensure that the vehicle was released by the respondents after the respondents had changed the colour of the vehicle to brown. In its decision the Court of Appeal awarded damages to the respondent for loss of use of his which was unlawfully detained by the respondents. Fabiyi JCA, when he defined Detinue to mean:

> An action to recover personal property wrongfully taken by another... A claim in detinue lies at the suit of a person who has immediate right to the possession of them and who upon proper demand, fails or refuses to deliver them up without lawful excuse. The plaintiff may desire the specific restitution of his chattel and not damages for their conversion.

In the case of *J.E Oshevire vs Tripoli Motors*,[56] it was also held that the gravamen of the tort of detinue is the wrongful retention of the chattel. Mere retention is enough to ground a cause of action in detinue. Even the ingredients of the tort of detinue as outlined by the Supreme Court of Nigeria in the case of *N.A.C.B vs Achagwa*,[57] can still qualify as conversion by detention. The ingredients are:

a) That the person suing must be the owner of the property (goods or chattel).

b) That the property was detained by the defendant.

c) That the plaintiff demanded for the release of the property.

[56] (1997) 5 NWLR(Pt. 503) 1
[57] (2010) 11 NWLR (Pt. 1205) 339 at 366

d) That the defendant refused or neglected to release the property.[58]

On the foregoing analysis, it has become clear that there is no much difference between the torts of Conversion and Detinue. This is despite some differences that are considered to exist between them as highlighted by authors such as Professor Kodilinye and Professor Patricia. Another instance which can both qualify as the case of detinue and that of conversion has been illustrated by the case of *N.A.C.C.E.N. (Nig.) Ltd vs B.E.W.A.C. Automotive Producers Ltd*.[59]

Based on the above the following research questions have been formulated:

1. Whether the law on the doctrine of Trespass *ab initio* in Nigeria as represented by the case of *Alhaja Silifatu Omotayo vs Cooperative Supply Association*[60] is the correct position of the law?
2. What is the proper method of determining substantial interference with use and enjoyment of land for the purpose of establishing the tort of private nuisance?
3. Does the application of the rule in *Rylands vs Fletcher* by the court in Nigeria represent the modern approach to the rule set out by the judiciary in common law jurisdictions, such as England?
4. Whether the tort of Detinue can continue to exist side by side with Conversion in Nigeria, in view of the encroachment into its territory by conversion?

[58] Property here refers to moveable property. The last two ingredients mentioned above are the same mentioned by the Supreme Court as in the case of *Henry Stephens Engineering Co. v S.A. Yakubu (Nig.) Ltd* (supra) at p. 1
[59] (2011) 11 N. W.L.R. (Pt. 1257) 193
[60] *Supra* at p. 2

1.3 Aim and Objectives of the Research

The aim of the research is to critically analyse the law which governs the attachment of liability in the torts against property and the legal bases for doing that, with a view to achieving the following objectives:

1. To appraise the manner in which the doctrine of trespass *ab initio* is applied by the Nigerian courts.
2. To analyse the principle governing liability in the tort of private nuisance
3. To examine the application of the rule in *Rylands vs Fletcher* by the court in Nigeria and determine whether the rule is the same with the tort of negligence and whether the same ground could lead to liability in both.
4. To examine whether the torts of conversion and detinue can continue to exist simultaneously in Nigeria, in view of recent development in the law governing the two torts

1.4 Justification of the Research

The laws which operate in Nigeria today are substantially, a creation of English Law which was received during colonialism. Majority of these laws have from that time till date remained the same as they were received. The principles of common law which were enunciated several centuries ago in the area of law of torts, have seen radical transformation and in some cases, extinction due to changes in societies and public policy issues.

The research is therefore important as it was able to:

1. Carry out a comprehensive and in depth analysis of some principles of law on trespass to land, nuisance, conversion and detinue as well as the rule in *Rylands vs Fletcher*, and analysed their application by the courts in Nigeria.

2. It also showed how some of these principles being applied in Nigeria have transformed over time in other jurisdictions, especially England where the principles originated from.
3. The research also re-awakened the law applicable to nuisance, trespass to land and other torts related to property.
4. The research will assist lawyers, teachers, students and the law reform commissions of the various states in the course of their assignments in order to re-shape their law of torts to be in consonance with modern trend.

1.5 Scope of the Research

This research cuts across the major torts of trespass to land, conversion, Detinue, Nuisance and the rule in *Rylands vs Fletcher*. It also looked at the historical development of these torts as well as analysed their application in Nigeria. At some point, reference was made to England, being the home of the common law, Australia, Canada and New Zealand, being some of the few countries that have undertaken amendments in their law of torts, especially, as they affect the torts discussed in the research. Reference was also made to these countries not for the purpose of making comparison but for the purpose of showing, with cogent evidence that Law of Torts is a dynamic area which changes over time with a change in societies.

1.6 Research Methodology

The methodology adopted in the research is purely doctrinal, which involved the analysis of both primary and secondary sources such as books written by renowned authors in the area of Law of Torts, statutes and cases decided both in Nigeria and the other common law jurisdictions, such as United Kingdom, Canada and Australia.

1.7 Literature Review

An array of literatures have been written in this area majority of which were not written by Nigerian authors; that notwithstanding, Nigerian law of torts being largely based on English law, some of the literatures written even by English authors will be relevant to the present discussion.

In distinguishing between the rule in *Rylands vs Fletcher* and the tort of nuisance, Lunney and Oliphant,[61]expressed the view that *Rylands* is unlike most cases of nuisance because it deals with 'isolated escapes' (more akin to the typical one-off event covered by the majority of negligence cases), and it deals with cases of actual damage rather than general interference. As such it provides a direct alternative to negligence in some circumstances.[62]In their discussion of nuisance, the authors expressed the view that nuisance is a tort that protects proprietary and possessory interests instead of personal interest (though this is a subject of debate).[63] Also, a claimant in an action for nuisance can claim one or two major remedies; damages or an injunction.[64] When the claimant seeks an injunction he is asking the court to stop that part which amounts to nuisance rather than to have the conduct stopped altogether.[65] But what the authors did not say is that depending on the circumstance, where the conduct can cause serious discomfort the court may stop the entire nuisance even if it is for a while. On the rule in *Rylands vs Fletcher*, the authors have it that foreseeability of the kind of injury suffered is relevant for liability to arise under the rule, but this does not mean that the manner of the escape must be foreseeable. [66] The real test is whether, if there was an escape the damage would have been of a type or

[61] Lunney, M and Oliphant, K (2008) *Tort Law, Text and Materials* (3rd Edition), Oxford University Press, New York, p. 159
[62] Ibid at p. 165
[63] Ibid at p. 633
[64] Ibid at p. 632
[65] ibid
[66] Ibid at p. 684

kind that was reasonably foreseeable is a consequence of the escape.[67] As to whether liability in nuisance could arise as a result of negligence, the authors quoted with approval, the statement of Lord Reid in the case of Wagon Mound (No.2)[68], where he said:

> It is quiet true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious acts and omissions, and in many, negligence in the narrow sense. An occupier may incur liability for the emission of noxious fumes or noise, although he has used the utmost care in building and using his premises. The amount of fumes or noise which he can lawfully emit is a question of degree, and he or his advisors may have miscalculated what can be justified. Or he may deliberately obstruct the highway adjoining his land, which may often be the result of proof of negligence. On his part there are many cases…where precisely the same facts will establish liability both in nuisance and in negligence. And though negligence may not be necessarily, fault of some kind, is almost always necessary and fault generally involves foreseeability.[69]

In summation, the above reasoning point to the fact that although negligence could be a basis for liability in nuisance, liability in both torts cannot be founded on the same elements. On the argument as to whether liability in the rule in *Rylands vs Fletcher* and nuisance could be founded on the same principle of law, the authors were of the opinion that *"Rylands vs Fletcher* derives from general (if vague) principle of the medieval legal system of strict liability for causing harm. This was quite different from private nuisance which was intimately connected to the protection of the rights in land".[70]

Writing on the tort of trespass to land, James Philips and Letham-Brown,[71] defines the tort as any voluntary intrusion upon land without the consent of the person having either possession or the right to immediate possession.[72] The tort is actionable *per se* without proof of damage, hence it is a trespass for a lessor during the currency of the lease to enter and interfere with the property, such as removing a door unless the terms of the

[67] ibid
[68] (1967) AC 617
[69] Ibid at p. 646
[70] Ibid at p. 683
[71] James, P.S and Letham0Brown, D.J (2010) *General Principles of the Law of Torts*, Butterworths, London, p. 168
[72] ibid

lease permit his presence.[73] With regards to trespass *ab initio*, the authors explained that: "anyone who enters the land of another by lawful authority, is subject to the doctrine of trespass *ab initio*".[74] This means that if the person exceeds his legal license by committing a positive act of trespass, the effect of which is to revoke his right of entry, he is deemed to have been trespassing from the moment of entry.[75] Although the authors did not say clearly what legal license is all about, they have however, explained that the doctrine does not apply at all to an entry with the leave of the party in possession.[76] This in essence means the doctrine will not apply to ordinary citizens who enter into premises at the instance of the person in possession.

On private nuisance, the authors explained that "the very concept of private nuisance connotes some degree of continuity and although there are age-long instances to the contrary, there is a strong judicial authority to the effect that a private nuisance must be something which continues or is repetitive."[77] With regards to nuisances which affect personal comfort or convenience, the authors added, some account must necessarily be taken of the general character of the locality concerned.[78] That even in a noisy environment one can complain about nuisance as circumstance determines what a nuisance is and what is not.[79] With regards to the appropriate plaintiff in the tort of private nuisance, the authors agreed that since private nuisance is primarily a wrong to the enjoyment of land, the general rule is that whereas a person who is in actual occupation of land can usually sue, neither an owner who is not in occupation nor anyone whose interest in the land is less direct than actual occupation normally can.[80] They also explained that in

[73] ibid
[74] Ibid at p. 170
[75] ibid
[76] ibid
[77] Ibid at p. 181
[78] Ibid at p. 183
[79] ibid
[80] Ibid at p. 186

keeping with the principle that it is the effect of nuisance upon the plaintiff's use and enjoyment of the land that must be considered, an owner or anyone else who has a lawful interest in the land will have a right of action even if he is not in occupation, where the nuisance affects his reversionary interest.[81] What the authors did not say is whether children living with their parents in a family house can sue by virtue of their occupation and since the tort is one that protects use and enjoyment of land.

Comparing and at the same time distinguishing between negligence and the rule in *Rylands vs Fletcher* (strict liability), Gandhi, stated that strict liability differs from the liability which arises on account of negligence or fault in this way, ie the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions.[82] He stated further that tort created by this rule is neither trespass nor negligence nor nuisance; it stands in the area between the hinterlands of nuisance and negligence.[83] With regards to trespass to land, being a tort against possession a tenant can sue both strangers and even a lessor for disturbance of his possession during the tenancy.[84] On the doctrine of trespass *ab initio*, the author explains that "he who enters the land of another by authority of the law (not of a party), and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance against that other person is deemed to have entered without authority and is therefore, liable as a trespasser *ab initio* for the entry itself and for all the things done thereunder not otherwise justified".[85] Thus, the initial legal authority is not only terminated but it is treated as having never existed.[86] The author did not however, explain what amounts to a legal authority and the categories of people bound by it.

[81] ibid
[82] Gandhi, B. M. (2011) *Law of Torts* (4th edition) Eastern Book Company, Lucknow, India, p. 346
[83] ibid
[84] Ibid at p. 237
[85] Ibid at p. 240
[86] Ibid at p. 241

On private nuisance, the author expressed the view that the tort concerns with competing uses of private land and it is particularly connected with invasions by intangible things like noise, smoke, fumes, gases, vibrations and the like.[87] The gist of the tort is interference with an occupier's interest with the beneficial use of his land, including incorporeal hereditaments, i.e easements and *profits-a-prendre*.[88] The author did not give detailed explanation of what incorporeal hereditaments are even though he gave two examples of same. The starting point of private nuisance the author added, is interference and based on action in interference, the claimant must prove that the interference goes beyond that which a reasonable occupier would be expected to suffer.[89] On conversion, the author expressed the view that mere removal of property from one place to another is no conversion but if there is an intention to convert, it is of no consequence whether it was committed before the demand or after.[90] But the author did not mention that even though mere moving a chattel from one place to another, does not amount to conversion, it could amount to a tort of trespass to chattel, which is normally committed before conversion. Similarly, although the author discussed conversion by detention under the heading 'abusing possession by detention', he did not discuss the position of the tort of detinue in modern times in view of the various transformations the tort has witnessed after the encroachment into its territory by conversion.

Patricia Enemo[91] also brought another dimension to the tort of trespass to land with the effect that before the promulgation of the Land Use Act in 1978, there was no difficulty in the institution of action for trespass to land because the right of ownership of the land was distinctly identifiable[92]. This statement may not be wholly correct in view of the fact

[87] Ibid at p. 331
[88] ibid
[89] Ibid at p. 332
[90] Ibid at p. 259
[91] Enemo, P. I(2011) *The Law of Tort*, Chaenglo Press Ltd, Enugu, p. 28
[92] P. 202

that the tort of trespass to land is a tort against possession not ownership[93]. For this reason, there seems to be a mix up if comparison is being made between the issue of ownership and possession of a land.

On conversion, the learned Professor also made mention of the abolition of the tort of detinue in England[94]. Although no detailed discussion was made on the Act which abolished detinue, the author was of the opinion that the defence of *jus tertii* could not be raised by a defendant in conversion cases in England[95], but with the enactment of *Torts (Interference with Goods Act)* 1977[96], such a defence could avail a defendant. She also gave example of the innovation brought about by the Anambra State Torts Law of 1986, with regards to when *jus tertii*[97], as a defence could avail a defendant in the tort of conversion. The author also did not discuss the position of detinue in the light of the encroachment into its territory by conversion. On the tort of nuisance, the author gave detailed analysis of the modification of the law governing public nuisance in Nigeria by both Sections 6(6) (b) and the decision of the Supreme Court in the case of *Adediran vs Interland Transport Ltd*[98]but she also agreed that anybody can bring an action for public nuisance by virtue of that decision but did not advert her mind to the issue of whether as claimed by the Supreme court in the case of *Adediran vs Interland Transport Ltd*, that by virtue of Section 6(6)(b), the distinction between public and private nuisance has been abolished.

Ezeani and Ezeani,[99] in their discussion of the tort of trespass to land explained that the Land Use Act which is the principal legislation dealing with land and matters related

[93] *Kopek Construction Ltd vs Johnson Koleola* (2010) 3 NWLR (pt. 1112) 618 at 648
[94] Ibid at p. 792
[95] *Jefferies vs Great Western Railway co.* (1956) 5 E and B 502
[96] See Section 8(1)
[97] *Jus tertii* simply means, a third party has better title to it.
[98] (1991) 1 N.W.L.R (pt. 214) 39
[99] Ezeani, A.O.N and Ezeani, R.U (2014) *Law of Torts (with Cases and Materials*), Odade Pubishers, Abuja , p. 244

thereto, has brought radical changes not only to land tenure in Nigeria but also to the jurisdiction of the courts on matters affecting land, like trespass.[100] In this regard, the appropriate court with jurisdiction to try cases of trespass to land depends on whether the land, the subject of the dispute relates to customary or statutory rights.[101] The authors having reported numerous cases dealing with the tort of trespass to land including possession did not discuss in clear details the centrality of possession in an action for trespass to land. On nuisance however, the authors stated that private nuisance, before it is actionable, must have been an existing state of affairs and there must be an element of continuity because an isolated instance will not ordinarily be treated as nuisance.[102] The authors have also discussed the new trend in the tort of public nuisance where individuals affected by public nuisance do not need to seek the leave of the Attorney General before instituting a civil suit with respect to the same nuisance. But they did not discuss whether the distinction between private and public nuisance has been abolished based on the provision of section 6(6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). With respect to the rule in *Rylands vs Fletcher*, the authors restricted their discussion of the rule to the 'traditional' position of the law as enunciated by Justice Blckburn in 1868 without incorporating the modern position of the law which redefines the element of natural user of land.

On trespass *ab initio*, Kodilinye and Aluko[103] explained that, "if the defendant having entered the plaintiff's premises under authority of the law…then abuse his authority by doing some positive wrongful act…the doctrine of trespass *ab initio* applies"[104] Although the authors gave instances where a defendant could be said to have abused his terms of entry under the authority of the law, such as willfully damaging property or

[100] Ibid
[101] ibid
[102] Ibid at p. 406
[103] Kodilinye, G and Aluko, O (2009*) The Nigerian Law of Torts*, Spectrum Books, Ibadan at p.
[104] Ibid at p. 192

committing an assault by a security agent, they did not say whether, the doctrine could apply to ordinary citizens or not. On nuisance, the authors did not discuss the current trend with regards to public nuisance covered under section (6)6) (b) of the constitution, even though they have discussed the various categories of nuisance.[105] With respect to who can sue in private nuisance, the authors explained that private nuisance is essentially an interference with the use and enjoyment of land and a person affected is entitled to bring an action.[106] Thus, an owner in fee simple, a lessee under a lease or a person having a statutory right of occupancy, will have a sufficient interest in land to maintain an action.[107] They also added that, a person having no legal or equitable interest in the property such as a guest, a lodger or a member of the owner's family cannot sue for private nuisance.[108] Their only cause will be to sue in negligence in respect of any damage they may have suffered personally.[109] But the authors did not say categorically whether a member of the owner's family can sue where he did not suffer personal injury, only that he was denied the use and enjoyment of the property by the nuisance, since the tort is against use and enjoyment relating to land.

The authors of *Clerk and Lindsell on Torts*[110] have agreed with the age-long established principle of law which is to the effect that an occupier of land may sue for trespass to land above a land in his possession, subject to certain limitations.[111] But whether a leasee can sue for such a trespass, the authors were of the opinion that everything depends on the construction of the lease.[112] Their position was predicated on the decisions in *Gifford vs Dent*[113] and *Kelsen vs Imperial Tobacco Co. Ltd*[114]. In the Dent's case for

[105] ibid
[106] Ibid at p. 106
[107] ibid
[108] ibid
[109] ibid
[110] Dugdale, A.M (Ed) (2006) *Clerk and Lindsell on Torts*, Sweet and Maxwell, London, p. 1110
[111] ibid
[112] ibid
[113] (1926) W & N 336

example, it was held that the tenant of a forecourt had possession so as to sue for a trespass committed by the tenant of the second floor in hanging a sign which projected over the forecourt. One thing which is clear from these decisions especially, the one in *Kelsen*, which the authors did not bring to the fore is that a tenant or anybody in possession of land, also has possession of the air space, hence can sue for any trespass committed against that air space, particularly where the air space is an open air space (not one above which there is a storey building as envisaged in the Dent's case). Question may only arise where there is a storey building on top of the land, to which he is not the tenant. In that case, the court may make inquiries into who owns or possesses the land for the purpose of a claim in trespass, i.e lessor or lessee.[115]

As part of the remedies for trespass to land, the authors have adopted the view that self-help may be adopted because to them, self-help may be safely employed when the right title owner acts with prompt response as soon as he is aware of the wrongful intrusion.[116] In this respect, "he may break open the outer door or use such force as is necessary to effect an entry. Such an entry by the trespasser is to be treated, as if it were a forcible resistance of an intrusion upon a possession which he had never lost.[117] They also explained that one remedy which a possessor has for an expulsion by a trespasser is at once to turn out the intruder and reinstate himself and for this purpose, the law sanctions resort to force. Such an entry by the possessor is to be treated as if it were a forcible resistance of an intrusion upon a possession which he had never lost.[118] Except in cases of emergency, the use of force will usually be inadmissible since legal process by order for possession is available with minimum lapse of time from service on an unlawful occupier. The question here is what is an emergency and can lack of shelter by the possessor who had been thrown

[114] (1957) 2 Q.B 334 at 341
[115] *Kelsen's* case supra
[116] Op cit at p. 1118
[117] Ibid at p. 1119
[118] Ibid at p. 931

out by a trespasser amounts to an emergency, especially during the rainy season? The authors however, had no discussion on the doctrine of trespass *ab initio.*

With regards to who may sue in trespass to land, the authors explained that trespass is actionable at the suit of the person in possession of land who can claim damages or injunction or both.[119]A tenant in occupation can sue but not a landlord except in cases of injury to the reversion but a person in possession can sue although he neither is the owner nor derives title from the owner and indeed may be in possession adverse to the owner.[120] The authors did not explain who the person in possession adverse to that of the owner could be. This is in view of the statement of the authors which is to the effect that that "a trespasser who enters and expels the person in possession does not obtain possession so as to enable him to maintain trespass against the evicted person seeking repossession unless the person expelled has submitted to the expulsion by delaying to re-expel the intruder within a reasonable time"[121].

On private nuisance, the authors expressed the view that modern control has had an effect in diminishing the role of private nuisance as a regulation of duties between neighbours. Also, refusal of planning permission may prevent activities which would otherwise be a nuisance, but the tort of nuisance still provides sanctions against activities which are not in themselves unlawful or unpermitted by public control over the use of property.[122] They added further that for a private nuisance to be actionable it must be such as to be real interference with the comfort or convenience of living according to the standard of the average man.[123] Who then is an average man has not been explained by the authors.

[119] Ibid at p. 927
[120] ibid
[121] Ibid at p. 931
[122] Ibid at p. 977
[123] Ibid at p. 979

Emphasizing the importance of the character of neighbourhood in private nuisance, the authors went further to state that a person who lives in a noisy neighbourhood can never complain of any traditional noise; but he can do so if an increased volume of noise is judged by local standard so substantial or considerably to detract the standard of comfort previously prevailing.[124]With regards to the relevance of planning permission to the tort of nuisance, the authors were of the opinion that the grant of planning permission can change the character of neighbourhood for the purpose of nuisance[125] Where planning consent is given for a development or change of use, the question will therefore, fall to be decided by reference to a neighbourhood with that development or use and not as it was previously.[126] They were however, quick to add that this principle is open to doubt in view of the fact that planning authorities have no jurisdiction to authorise nuisances.[127] The authors may be did not advert their minds to the fact that once a law is passed it overtakes all common law rules in the area unless interpreted by the court afterward to retain the common law position. On public nuisance they also did not bring anything new, instead, they preferred to follow the path of majority of the English authors, which is to the effect that public nuisance is both a tort and a crime; and where an individual wants to claim under the tort he must have suffered a peculiar damage, in which case, he can only file a relator action.[128]

On the rule in *Rylands vs Fletcher*, the authors said after it was enunciated by Justice Blackburn, the rule was taken up and applied by the later Victorian judges with a considerable vigour but increasingly in the present century, it has undergone dilution.[129] Also, the rule has attracted a large number of exceptions or defences for liability which have limited its general scope and force; and cases in which it has been applied have

[124] ibid
[125] Ibid t p. 982
[126] ibid
[127] ibid
[128] ibid
[129] Ibid at p. 1041

become infrequent.[130] Although the authors have agreed that a defendant would only be liable under the rule where he is a non-natural user of his land, they added that a person who accumulates water by way of a non-natural use is bound to keep it from doing damage at his peril.[131] The manner in which the water is accumulated they added, is immaterial; whether it is collected in a reservoir, a pipe, a canal, a drain or in mound of water in houses or for irrigation purposes.[132] But the question is whether accumulating water for domestic purposes in houses or even in the farm for irrigation purpose can be said to be a non-natural use, in view of the fact that life cannot be sustained without water, thereby making the keeping of water in reservoirs very common in major cities across Nigeria which in itself becomes natural due to inability of governments at all levels to provide portable water to the populace.

On Detinue, the authors stated that the former action of detinue which was abolished (in England), by the *Torts (Interference with Goods) Act 1977*, lay at the suit of a claimant having a right to immediate possession for the wrongful detention of his chattel by the defendant's refusal to deliver up on demand, and the redress claimed was therefore, the return of the chattel or payment of its value, together with damages for its detention.[133] But what is worthy of saying here is that the authors have agreed that the expansion of the tort of conversion has covered almost every case of detinue as a result of which detinue had become largely redundant.[134] They did not however, go to the extent of saying with precision, whether detinue is still relevant as a tort or not. This is despite their agreement that it has some remnant of it in the bailor-bailee relationship, where if a bailee wrongfully allows the goods of a bailor to get lost or destroyed liability could arise in detinue.[135] But

[130] ibid
[131] Ibid at p. 1057
[132] ibid
[133] Ibid at p. 727
[134] ibid
[135] ibid

this situation may also be covered by the tort of negligence as it is the case of the existence of a duty of care, which has been breached and results to damage (loss of the chattel).[136]

Steele Jenny explained that trespass to land protects against interference with the right to possession even if this falls short of a right to exclusive possession and it is actionable by a mere licensee, who would not be able to bring an action in private nuisance.[137] Also, such invasions are actionable without reference to reasonableness and there is no question of permitting minor invasions on a principle of "live and let live".[138] The author did not give detailed discussion on the forms which the tort of trespass to land may take and did not also discuss doctrines of trespass such as trespass *ab initio* and continuing trespass and the role they play in attaching liability in the tort of trespass to land. With regards to nuisance, the author attempted to explain the distinction between nuisance and negligence, where she said that the two are different in more than one way because the definition of protected interests in nuisance is both narrower (relating only to interest in or rights over land), and within that field in some sense broader.[139] In terms of relevant conduct, the author added, there is no requirement that the conduct of the defendant should be careless (in nuisance), although it is often said that reasonableness of conduct plays a part in nuisance.[140] The author explained further that the non-natural user criticism has become the main mechanism for setting some appropriate limits to the rule in *Rylands vs Fletcher*, He said that this approach is quiet independent of the idea of natural in the sense that its content may now be developing in a manner uncluttered by confusion over the origin, nature and purpose of the rule.[141] She however, asserted further that the said limitations are largely due to its association with torts like nuisance and the defences

[136] *Donoghue vs Stevenson* (1932) A.C 1
[137] Steele, J (2007) *Tort Law: Text, Cases and Materials*, Oxford University Press, United Kingdom, p.696
[138] ibid
[139] ibid
[140] Ibid at p. 801
[141] Ibid at p. 682

evolved made it somehow too late to convert *Rylands vs Fletcher* into a workable rule of strict liability.[142] The author did not however, address her mind to the possibility of subsuming the rule in *Rylands vs Fletcher* into the tort of negligence as it was done in Australia due to the similarity between the two.

Pitchfork[143] in his discussion on the doctrine of trespass *ab initio*, was able to state the circumstances under which it could be applied; and state the criticisms against it, especially by Lord Denning. Although the author was of the opinion that despite the criticisms, it was unlikely that the doctrine would be abandoned, he did not take position as to whether it is a good law or not. On the tort of conversion, the author mentioned the *Torts (Interference with Goods) Act*, which abolished Detinue as a tort in England but did not provide detailed discussion on the application of the Act[144]. The author, though Briton, also discussed both Conversion and Detinue as two separate torts despite the fact that the latter is no longer a separate tort in England, as it is the case under Common Law which still remains applicable in Nigeria.

Cooke in discussing the tort of trespass to land brought another dimension to it under which a case of trespass could lead to a claim in Negligence. This is where for example a land adjoining the highway is unintentionally entered as a result of car accident[145]. The problem with this analysis is more or less one that may not necessarily be the basis for any claim in trespass to land. This is simply because once the ingredients for the tort exist; a claim could easily be made in negligence, rather than trespass to land[146]. On trespass by a co-owner against another co-owner, the author asserted that a tenant in common or Joint tenant of land cannot sue his co-tenant in trespass unless the defendant's

[142] ibid
[143] Pitchfork, E.D. (1996) *Law of Torts,* (10th ed) HLT publications, London. p. 331
[144] Ibid at p. 408
[145] Cooke, .J. (2005) *Law of Tort*, Pearson Longman (7th edition) London, p. 295
[146] All that is needed to establish Negligence is the existence of the three ingredients of Duty, breach and Damage. But where any of the ingredients is absent, there will be no liability in Negligence. See *Aluminum Manufacturing Co. Nig. Ltd. vs Volkswagen of Nig. Ltd.* (2010) 7 NWLR (Pt. 1192) 97

act amounts to the total exclusion or ouster of the claimant or destructive waste of the common property; each of the co-tenants is entitled to possession of the land[147].One thing derivable form this is that no explanation was given where the ouster happens not to be total; for example, where a co-tenant close the premises after certain hours or locks out a co-tenant who has no access to entry.

Steve Hedley[148] did not discuss in details issues which border on the tort of trespass by relations, trespass *ab intio*, etc. On nuisance, the author raised the concern that it is not always clear where the tort of nuisance ends and that of trespass begins[149].Referring to the old case of *Gregory vs Piper*, the author was of the view that if a defendant lets a pile of rubbish to fall on the plaintiff's wall, it is trespass, but the modern position is unclear.[150] The author also provided no discussion on the torts of conversion, Detinue and Trespass to chattel.

On private nuisance the authors of *Winfield and Jalowicz on Torts*[151], are of the view that the crucial issue is the question of the reasonableness of the defendants conduct. This is perhaps because in modern life, people have to tolerate the inconveniences caused to them by others to certain limited extent as it is about give and take. They however, gave distinction between reasonableness envisaged under the tort of negligence and the one thought of in nuisance. That in negligence, there is the element of an injury to the claimant being reasonably foreseeable which is not the same in nuisance.[152] In nuisance, reasonableness signifies what is legally right between the parties, taking into account all circumstances of the case[153]. But the authors did not provide any precise formula for determining when a particular conduct of the defendant could be reasonable and when it

[147] Cook, J. Op. cit at p. 297
[148] Hedley, S. (1998) *Tort* (Butterworth's Core Text Series), London
[149] Ibid at p. 179
[150] Ibid
[151] Rogers, W. V. H (Ed) (2010) *Winfield and Jalowicz on Torts,* Sweet and Maxwell, London at p. 648
[152] Ibid at p. 649
[153] Ibid at p. 650ibid at p. 648

could not. Though this may be done through considering factors such as character of the place, time of the nuisance, seriousness of the harm it poses, the presence or otherwise of malice etc. The authors however, discussed three factors for determining reasonableness, such as nature of locality, utility of the defendant's conduct and abnormal sensitivity[154]which may not in all circumstances be enough.

Owen[155] on his part decided not to go into the debate surrounding the doctrine of trespass *ab initio*, but stated the interest which the tort protects, which is the Plaintiff's interest in the peaceful enjoyment of his property.[156] In discussing the main ingredient of the tort, which is possession, the author is of the opinion that the Court will look for possession in fact not possession in law.[157] This assertion is substantially correct but not in all circumstances. The reason is simply because, where the circumstance is such that there is no dispute as to who is in actual possession, the author's position would be adopted. Where however, it becomes difficult to establish who is in real possession (*de facto* possession), the idea of possession in law will be adopted. This is more or less going beyond *de facto* possession to the issue of radical title, which was defined by the Supreme Court of Nigeria, as possession in law.[158]

Hawes[159] in her discussion of conversion by detention, explained that conversion may arise where a defendant who has lawfully obtained possession of goods is shown to have the intention to keep them as against the plaintiff who has right of immediate possession.[160]But detention constitutes possession only when it is adverse to the person claiming possession, so that the person detaining the goods must show an intention to keep

[154] Ibid at p. 648
[155] Owen R. (2000) *Essential of Tort Law*, Cavendish Publishing Ltd, London, p. 97
[156] Ibid at p. 121
[157] ibid
[158] See *Ameen vs Amao* (2013) 9 NWLR (pt.1358) 59 at p. 178
[159] Hawes, C Op cit at p. 53
[160] Ibid at p.53

them in defiance of the plaintiff.[161] The author did not however, state categorically, whether conversion by detention can stand in place of detinue by virtue of recent developments in the law in England and Australia, where detinue has been abolished.

Fordhma in her discussion of the modern application of the rule in *Rylands vs Fletcher*, expressed the view that when the rule was first formulated by Blackburn J in the middle of the 19th Century, it looked set to play a significant role in tort law but with the advent of the tort of negligence and judicial concern about the imposition of strict liability in any but the most extreme circumstances meant it never fulfilled its early promise.[162] By 1994 the rule has become so marginalized that the court in Australia held that the rule should cease to exist and cases which would previously have fallen within its ambit should in future be dealt with under the umbrella of negligence.[163] The author further argued that there has been too great a willingness on the part of the courts in recent years to cast aside the concept of strict liability in general and the rule in *Rylands vs Fletcher* in particular, in order to make way for advancing the tide of negligence.[164] This, the author admitted did not happen but concedes that even though the rule has survived the tide in England, it is more or less a shadow of its former self.[165] In her opinion, one of the major hurdles facing claimants under the rule in *Rylands vs Fletcher* action has always been the need to overcome the reluctance of the courts to impose strict liability, a point that is apparent from the narrow assessment of what constitutes a non-natural user by the court.[166] Alhough the author is in favour of the retention of the rule, she warned that the attitude of English courts to *Rylands vs Fletcher* in general and to the definition of non-natural use in particular during the next decade or so, is likely to prove decisive in determining whether the rule

[161] Ibid
[162] Fordham, M (2004) Surviving Against the Odds-The rule in *Rylands vs Fletcher* Lives on: Transco Plc vs Stockport Metropolitan Borough Council. *Singapore Journal of Legal Studies*, 7(1), 241-250
[163] ibid
[164] Ibid at p. 247
[165] Ibid at p. 248
[166] Ibid at p. 247

survives as a valuable basis for imposition of strict liability or becomes nothing more than an insignificant footnote to the tort of nuisance.[167] The author did not however, explain how the above situation could be addressed or even averted.

Goldberg has in his article; "*Strict Liability in Fault and the Fault in Strict Liability*"[168] tries to show that the demarcation between the torts where liability is attached based on fault and the ones where liability is attached strictly, is a fallacy[169]. His reason for this assertion is that torts such as battery, libel, negligence and nuisance, are wrongs, yet all of them are strictly defined in the sense of setting objectives and thus quiet demanding standards of conduct.[170] The author also explained that, according to prevailing academic usage, strict liability is liability without wrongdoing; a defendant subject to strict liability must pay damages irrespective of whether he has met or failed to meet an applicable standard of conduct once a harmful action can be established[171]. But he was quick to add that by contrast, fault-based liability is conceived as liability predicated on some sort of wrongdoing, hence the liability of the defendant rests on him having been at fault.[172] In an apparent disagreement with this position, the author said that the treatment of strict liability and fault as opposites is a monumental mistake because to him, torts liability is almost always simultaneously, fault-based and strict.[173] His reason is that for torts ranging from battery, libel and negligence to trespass, liability is imposed on the basis of wrongdoing, yet, it is also imposed strictly...in a demanding or unforgiving manner.[174] Based on this, the author holds the view that in so far as the rule in *Rylands vs Fletcher*, and its progeny impose liability without anything that would qualify as wrongdoing, they create an

[167] Ibid at p. 250
[168] Goldberg, C.P. (2016) The Strict Liability in Fault and the Fault in Strict Liability. *Fordham Law Review*, 85 (2), 744-786
[169] Ibid at p. 757
[170] ibid
[171] ibid
[172] ibid
[173] Ibid at p. 745
[174] ibid

interpretative problem for anyone who claims that torts are wrongs.[175] The author further opined that *Rylands* can be seen more or less as a common law parallel, applicable to private reservoir where the builder stands ready to pay for the injuries that flow from it and the same is probably true of many instances of liability for abnormally dangerous activity.[176] Despite the argument put in place by the author, it is clear that liability still remains strict in some torts and even under the rule in *Rylands vs Fletcher*, especially when it is compared with the tort of negligence for example, where the defendant is under a duty of care between him and the claimant and if he breaches the duty resulting in damage, he would be liable. Without this fault element there is no way liability could be attached in negligence. The author did not also discuss recent developments in the jurisprudence of the rule in *Rylands vs Fletcher*.

Writing on the relevance of nuisance to solving the problem of water pollution, Akanle, expressed the view that there is a paucity of case law on the subject of water pollution and most of them come via the torts of nuisance, negligence or the rule in *Rylands vs Fletcher*.[177] He criticised the approach of the Nigerian courts to cases of public nuisance where the right of the individual is involved, in which they held that an individual who does not suffer special damage cannot bring an action without moving the Attorney General.[178] He further explained that the classification of cases involving merely a large number of people as public nuisance has the tendency of working injustice if we realise that various types of environmental nuisances have the same substantive effect on the community at large, but more seriously threaten the health and welfare of residents in close proximity with the sources.[179] The above criticism has now been addressed by the decision

[175] Ibid at p. 762
[176] Ibid at p. 763
[177] In Akanle, O (1984) A Legal Perspective on Water Resources and Environmental Development Policy in Nigeria *Nigerian Law Journal* 12 (1), 1-20 at p. 12
[178] Ibid at p. 13
[179] Ibid at p. 14

of the Supreme Court of Nigeria in the case of *Adediran vs Interland Transport Ltd*[180] where Kariby White JSC held that with the coming into being of Section 6(6)(b) of the 1979 Constitution (same section in 1999, as amended), the distinction between public and private nuisances has been abolished, hence an individual whose right has been trampled upon in whatever manner, can always approach the court for redress.

Dale in his analysis of the remedy of self-help explained that the law in England at its early stage absolutely prohibited the use of self-help because the law viewed it as an enemy of the law and contempt of the king and his court.[181] By thirteenth Century the law recognised the use of self-help in the form of distraint especially as it applies to non-payment of rent.[182] After that, distraint was freely used and was extra-judicial in the sense that no order was required before goods could be seized.[183] In addition to the self-help remedy of distraint, the common law also recognised the landlord's right to enter the property and regain possession peaceably.[184] The use of force in defence of self-help against forcible resistance of tenant was also justified.[185] The modern trend and growing majority forbids the use of methods other than judicial process.[186] The author did not however, explain the possibility of ejecting trespassers through self-help as against tenants who were on the land with the consent of the person in possession. His discussion did not also touch on the position of trespassers who claim possession adverse to that of an owner out of possession.

[180] Supra at p. 16
[181] Dale, R.S (1986) Landlord-Tenant- Forcible Entry and Detainer Prohibition of Landlord Self-help Remedies *University of Arkansas at a Little Rock Law Review*, 9 (4), 683-698 at p. 684
[182] Ibid at p. 685
[183] ibid
[184] Ibid at p. 686
[185] Ibid at pp. 685-686
[186] Ibid at p. 695

Writing on the application of the rule in *Rylands vs Fletcher*, Chinwuba[187]said although there is the tendency for actions on the rule in *Rylands vs Fletcher*, nuisance or negligence to overlap, they all have clear distinctive origins and applications, and these distinctions have already been accepted in old Nigerian authorities.[188] But he cautioned that the Nigerian judiciary must examine its over reliance on the old English authority of *Rylands vs Fletcher* in the light of the development in this area of the law as well as in other common law jurisdictions and decide whether our peculiar socio-economic and historical circumstances require that we apply *Rylands vs Fletcher* as it was originally formulated, encompassing both narrow and wide interpretations of the decision.[189] Alternatively, the courts may opt to follow the approach of the English courts and apply the narrow approach or perhaps adopt the approach of the Australian courts and thereby abolish *Rylands vs Fletcher* or the Indian jurisdiction, to adopt the absolute liability approach.[190] Nigerian courts in the view of the present researcher have already departed from the traditional *Rylands* approach in a way, by merging situations under the rule and treat them as negligence in many cases that have been discussed in chapter three of this work. In fact, courts were only short of doing what the Australian court did by categorically stating that the rule in *Rylands vs Fletcher* has been abolished and subsequently, all cases which would have been treated under the rule should be treated as cases of negligence.[191] But from the array of cases reported later in this work, it is apparent that the courts in Nigeria have virtually merged the rule in *Rylands vs Fletcher* with negligence in a tacit manner.

[187] Chinwuba, N. (2013) Strict Liability or Reasonable Foreseeability in *Rylands vs Fletcher*: Why Nigerian Position Should be Considered, *University of Lagos Journal of Private and Property Law*, 71 , pp. 103-1(1) 25
[188] Ibid at p. 120
[189] Ibid at p. 124
[190] ibid
[191]

Diamond, Lawrence and Bernstein in discussing Trespass to Chattel and Conversion, agreed to the fact that both torts are two separate torts but protect personal property from wrongful interference.[192] The two torts which overlap in parts are derived from different historical origins. In many but not all instances, both torts may be applicable.[193] The authors however, did not provide the circumstances under which both torts could be applicable.

Kionka[194] discussed trespass to land from the various dimensions through which the tort may be committed. In this regard, the author holds the view that the boundaries of land (subject of the tort of trespass to land), extends above and below the surface and therefore, trespass may be by an intrusion above or beneath the surface.[195] Although the learned author acknowledged that the flight of an aircraft above someone's land is an exception to the tort of trespass, he also hold the opinion that there are several theories used to balance the possessor's right against the needs of the aviation. [196] The author neither provides detailed discussion on these theories nor did he provide some exceptions to the rule as encapsulated in some statutes.

In discussing the torts of Conversion, the author asserted that there was no simple test for determining when interference is so aggravated as to constitute a conversion.[197] This assertion may not in all respects be correct, especially in view of the fact that there are various means through which conversion as a tort may be committed, which have been established through the cases, which the learned Professor has acknowledged.[198] These include acquiring possession, moving the chattel, unauthorised transfer, delivery or

[192] Diamond, J. L, Levine, C.L and Bernstein, A. (2013) *Understanding Torts Law* (5th edition), LexisNexis-Mathew Bender & Co. Massachusetts, p. 26
[193] ibid
[194] Kionka, E.J. (2006) *Torts* (4th Edition) (Black Letter Outlines), Thomson West Carbondale, United States
[195] Ibid at p. 8
[196] ibid
[197] Ibid at p. 9
[198] ibid

disposal, withholding possession, destruction and misuse.[199] The author did not discuss the tort of trespass *ab initio* and the tort of Detinue. With regards to trespass on the sub-soil and in the air space, which is guided by the latin maxim "*cujus est solum ejus est usquae ad coelum et ad inferos*, Coleen,[200] the author was of the opinion that the maxim, which literally means "whoever owns a land owns everything below it to the centre of the earth and everything above it to the heavens", has witnessed significant changes, especially with the advent of commercial oil and gas industry.[201] As many courts have stated he said, 'it is an ancient doctrine that common law ownership of the land extends to the periphery of the universe…but that doctrine has no place in the modern world'.[202] This assertion may not be wholly correct because even in modern times, the doctrine is still applicable but with some limitations. The Latin maxim represents the general position of the law, but there are also exceptions which may be applied based on the peculiar nature of each circumstance, especially as the author rightly observed, where for example, the flight of aircraft passes across the surface of people's houses; that cannot be the subject of trespass.[203]

Osamolu, define possession as "that bundle of right which a person has over a piece of land which connotes the direct physical relationship of a person to a thing in this context, land.[204] The authors however, did not have discussion on how the issue of possession affects trespass to land as a tort.

Wigwe[205] On his part discusses the issue of torts affecting property from the perspective of remedies available to victims of oil pollution which may take the form of negligence, nuisance or even trespass to land. In his view, damages in oil pollution remain

[199] Ibid at p. 10
[200] Colleen, C.E (2011) Owning the Centre of the Earth: Hydraulic Fracturing and Subsurface Trespass in the Marcellus Shale Region, *Cornell Journal of Law and Policy*, 21 (2) (5), 457-487
[201] Ibid at p. 462
[202] Ibid at pp. 462-463
[203] See Section 49 of Civil Aviation (Repeal and Re-enactment) Act , 2006
[204] Osamolu, S.A, et al (2016) *Real Property Law and Practice in Nigeria*, Landlords Publishers, Abuja, p. 6
[205] Wigwe, C.C (2016) *Land Use and Management Law*, Mountcrest University Press, Osu-Accra, Ghana, p. 183

the most effective remedy in a claim arising out of oil pollution in spite of the fact that such cases may be rooted in statutes, negligence, nuisance, trespass or under the rule in *Rylands vs Fletcher*.[206] Individuals or communities that go to court on the basis that they have suffered one injury or another as a result of the pollution generally make claims for damages in monetary terms but injunctions are rarely granted against the operators of oil companies.[207] The author did not discuss how the above remedy applies to the torts mentioned in his discussion and whether it is possible for claimants to claim both damages and injunctions. With regards to possession, the author states that a person in possession or having present possessory title over land may seek to protect his possessory right against injury or interference by any other person except the true owner of the land or anyone who shows a better title.[208] But where he does not have any legal title in so far as he is in physical possession, he may keep out the person with better title.[209] The author did not give an explanation as to how that kind of deadlock can be resolved but agreed that as against other trespassers the person in possession has the right to possessory title and the possessory right in fact, ripen into title for lapse of time by laches and acquiescence on the part of real owner if the real owner did not take any step for a period of time.[210] The author did not explain how the law handles that kind of situation and the necessary steps required to be in place for the court to declare that laches and acquiescence have affected the title of an owner out of possession.

The author further explained that a non-owner, a tenant or caretaker of premises can maintain an action against a trespasser. But there is no discussion by the author on whether a trespasser can claim against other trespassers even though the author also admitted that a claim for trespass is not a declaration of title. According to him, the issues to be decided on

[206] ibid
[207] ibid
[208] Ibid at p. 347
[209] ibid
[210] ibid

the claim for trespass are whether the plaintiff has established his actual possession of the land and the defendant trespassed on it.[211] Discussing the defence of self-help, the author was of the opinion that where a tenant fails to quit in response to demands by the plaintiff, the plaintiff is not entitled to self-help in removing the trespasser.[212] But the question here is whether a tenant whose tenancy has expired and decides to hold over, is a trespasser or not (even though the author calls him a trespasser). In this regard, the author should have drawn a line between a trespasser and a tenant whose tenancy has expired but decides not to leave the property.

Taiwo[213] defines the term possession as "a state of having a thing in one's own power or control.[214] He also explained that all titles to land are ultimately based upon possession in the sense that the title of the man prevails against all those who can show no better title to seisin.[215] There was however, no discussion by the author on the centrality of the issue of possession to a claim for trespass to land.

To Olong,[216] possession denotes physical relation between a person and something in his control, and that the right to possession is an incident of ownership.[217] Also, a person is said to be in possession of land if he is in physical control of the land and has the intention to control it.[218] In this respect, a lodger in a hotel or boarder in a dormitory does not possess the hotel or dormitory wherein he spends the night though he makes use of the hotel or dormitory.[219] What the author did not disclose is whether for the purpose of the tort of trespass to land a child living in a family house with his parent can qualify as one who is in possession.

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[211] Ibid at p. 192
[212] Ibid at p. 193
[213] Taiwo, A (2011) *The Nigerian Land Law*, Ababa Press Ltd, Ibadan, p. 13
[214] Ibid at p. 13
[215] Ibid at p. 14
[216] Olong, A.M.D (2011) *Land Law in Nigeria*, Malthouse Press Ltd, Lagos
[217] Ibid at p. 38
[218] ibid
[219] Ibid at p. 39

From the foregoing literature review, it can be clearly seen, that a lot of research has been conducted in the area of law of torts, and specifically in the area of torts against property. It is also evident that despite the enormous research carried out in the area, there are still gaps which need to be filled, created largely, by new developments in the area. As for Nigeria, few writers are interested in writing in the area, hence the paucity of literatures on law of torts. Even the few who have written in the area, some of the researches are not up to date considering recent developments in other parts of the world.

1.8 Organizational Layout

The work comprises six chapters with chapter one containing general introduction, which discusses among other things background to the study, statement of the research problem, aim and objectives, justification and literature review as well as the methodology adopted in the research.

Chapter two discusses Trespass to Land and the development of fault element in Law of Torts. This also focuses on the operation of the law on trespass to land under Nigerian law.

Chapter focuses on liability for nuisance and the rule in *Rylands v Fletcher* and their application in Nigeria while chapter four discusses the liability for the torts of conversion and detinue in Nigeria.Chapter five deals with the remedies applicable to torts against while chapter six concludes the work, which presents the findings, summary, conclusion and recommendations of the research.

CHAPTER TWO

LIABILITY IN LAW OF TORTS AND THE DEVELOPMENT OF THE TORT OF TRESPASS TO LAND

2.1 Introduction

Liability in Law of Torts is generally guided by four major principles, which are intention, negligence, malice/motive and strict liability. All the torts known to law today fit into one or more of these principles. Where intention becomes central to liability, it means the *tortfeasor* had the intention to commit the tort, hence liable. Where the claimant fails to prove this then he will go with no compensation. Torts in this category are all forms of trespass, which includes trespass to person, land and chattel/goods. This form of liability is also referred to as *injuria sine damno*,[1] which means legal injury without damage. Liability in these kinds of torts arises when a particular act which the law has made unlawful is committed. This is irrespective of whether or not, a physical injury has occurred. The rationale behind this position of the law is that, once the act is committed with the intention to commit it, the *tort feasor* becomes automatically liable and the requisite intention necessarily required to establish the tort is the intention to commit the act rather than the intention to inflict any physical injury.[2]

Another category of torts which require no fault element to prove is the one based on strict liability. These torts include those covered by the rule in *Rylands v Fletcher*[3] and liability for animal or animal trespass, conversion and nuisance. In these torts liability is automatically attached irrespective of whether the defendant is at fault or not. This is simply because injury has been meted against someone without the existence of the evidence of any of the mental elements known to tort law, and the law has the feeling that it will be unjust to allow the claimant to go without any compensation.

[1] Omotesho, A (2012) *Law of Tort in Nigeria*, Malthouse Press Limited, Ibadan, p. 4
[2] ibid
[3] Supra at p. 1

This chapter therefore, takes an overview of the evolution and development of liability and the forms of action in law of torts; and at the same time discusses the tort of trespass to land as an offspring of the common law and its application by the courts in Nigeria.

For the purpose of clarity the four major categories of tortious liability are discussed hereunder:

2.1.1 *Intention***.** An intentional tort carry an element of intent that most other torts do not; to commit an intentional tort, it follows that one must do something on purpose.[4] Whether the tort is intentional or not, depends upon the mindset of the person committing the tort (tortfeasor) and the state of the mind of the tortfeasor determines the tort.[5] Knowledge along with reasonable and substantial certainty that the act of the defendant shall produce a tortious result is sufficient to hold him liable.[6] It has also been suggested that:

> The theories of intent in tort law can be either subjective or objective. The former theory aims to punish the tortfeaor for intentionally or at least, knowingly violating norms that are implicit in the law. The principle underlying this is that the mental state of the wrongdoer is important while determining the appropriateness of the liability.

On the other hand, under the objectivists' theory, fixation or determination of tortious liability is exogenous with respect to the mental state of the wrong doer. In line with this, in all cases of trespass, whether to land, to person or to chattel, liability is predicated on the basis of intention, irrespective of whether the defendant has inflicted any form of injury or not. However, the relevant intention necessary to succeeds in this tort is the intention to commit the tortious act but not the intention to cause any harm as the torts are actionable *per se.*[7]

[4] What is an intentional act? Posted on www.nolo.com , retrieved on 16/01/2019 at 8:49 am
[5] ibid
[6] www.lawyersclubindia.com retrieved on 16/01/2019 by 7:30am
[7] Omotesho, A. Op cit at p. 2

2.1.2. *Negligence*: This is found in the case of careless conducts where the action of the defendant is consequential in nature. The term negligence simply means carelessness with regards to someone's conduct. This may be a wide definition which can only be applicable in an ordinary parlance, but in legal parlance negligence may be defined in a restricted form. Though negligence may still bear the same meaning as it has in ordinary day to day use, its application may be the difference. Legally speaking, negligence may be the failure by one to take care not to injure any person in the course of conducting himself. But despite the similarities between technical and literal negligence, one fact remains clear, that not every act of carelessness or negligence is actionable under the tort of negligence. According to Lord Wright, in the case of *Lochgelly Iron & Coal Co vs Mcmullan*[8]:

> In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing. It also means the breach of a duty caused by the omission to do something which a reasonable man, guided by those principles which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent reasonable man would not do.[9]

What may be discerned from the above dictum of Lord Wright is that for any careless conduct to amount to an actionable negligence, it must be accompanied by the duty of care which was set by law between the plaintiff and the defendant. That duty must have been breached and in consequence of which damage in a physical sense has occurred. This is against negligence in an ordinary sense where any careless conduct could be termed as negligence without having regard to the essential legal elements.

Negligence was also defined to mean, a breach of legal duty to take care which results in damage undesired by the defendant, to the plaintiff.[10] This suggests that though the defendant was careless in his conduct, he never intended the act; that the accident initiated by the defendant which injured the claimant, was devoid of the intention to injure

[8] (1934) AC 1 at p. 25
[9] Per Alderson B in *Blyth vs Birmingham Waterworks Co* (1856) 11 Exch 781; (1943-1960) All ER Rep. 478
[10] Kodilinye, G and Aluko, O. Op cit at p. 38

the claimant. It could have been another person that would have been injured by the defendant's act. This is one feature which distinguishes negligence from other torts that are founded on intention such as trespass. It could be remembered that negligence is a consequential act as against trespass which is an intentional act, hence once negligence can be established, absence of intention will not absolve the defendant from liability in the tort of negligence.

3.1.3 Motive: This refers to a state of mind of a person which inspires him to do an act.[11] It may also be defined as "some inner drive, feeling or impulse which causes a person to act in a particular way. It is a willful desire that leads one to act.[12] Motive is generally irrelevant in the law of torts as "it is the act and not the motive for the act that must be regarded. If the act apart from the motive, gives rise merely to damage with legal injury, the motive however reprehensible it may be, will not supply that motive".[13] Although motive is generally not relevant in law of torts, there are exceptional situations where motive plays a role which may be summarized as follows:

a. In cases of deceit, malicious prosecution, injurious falsehood and defamation, where defence of privilege or fair comment is available. The defence of qualified privilege is only available if the publication was made in good faith.
b. In cases of conspiracy and interference with trade or contractual relations.
c. In cases of nuisance, causing of personal discomfort by an unlawful motive may turn an otherwise lawful act into nuisance.[14]

Barring the above exceptions, motive has no place in law of torts for the purpose of attaching liability.

[11] www.lawyersclubindia.com, retrieved on 16/01/2019 at 9:25 am
[12] https://definitions.uslegal.com retrieved on 16/01/2019 at 9:30am
[13] ibid
[14] ibid

2.1.4. Malice: Malice simply means "the intent without justification or excuse to commit a wrongful or illegal act.[15] Also in legal, parlance, malice connotes:

(a) The absence of all elements of justification, excuse or recognized mitigation

(b) The presence either of:

(i) An actual intent to cause the particular harm which is produced or harm of the same general nature:

(ii) The wanton or willful doing of an act with the awareness of a plain and strong likelihood that such harm may result.[16]

In its legal application the term malice is comprehensive and applies to any legal act committed intentionally without just cause or excuse.[17] Malice in legal parlance does not necessarily imply personal hatred or ill feeling, but rather, it focuses on the mental state that is in reckless disregard of the law in general and of the legal rights of others.[18]

2.1.5. *Strict liability.* This is where no fault is required on the part of the defendant in order to make him liable. In other words, strict liability is a legal doctrine that holds parties liable for their actions or products without the plaintiff having to prove negligence or fault.[19] An instance of this form of liability is for example where someone keeps ultra-hazardous objects such as wild animals, using explosives or the making of defective products.[20] Strict liability usually applies in three types of situations, viz: animal bites (in certain cases), manufacturing defects and abnormally dangerous activities.[21] A detailed explanation of the doctrine of strict liability and its application was given by an author in the following words:

> According to prevailing academic usage, strict liability is a liability without wrong doing. A defendant subject to strict liability must pay damages irrespective of whether he has met or failed to meet an applicable standard

[15] James, P.S and Brown-Latham, D.J . Op cit at p. 138
[16] Ibid at p. 361
[17] https://legal-dictionary.thefreedictionary.com , retrieved on 16/01/2019 by 2:40pm
[18] ibid
[19] https://legalmatch.com, retrieved on 16/10/2019 by 2:48pm
[20] ibid
[21] https://www.justia.com, retrieved on 16/01/2019

> of conduct. Action that causes harm is all that is required. By contrast, fault based liability is conceived as liability predicated on some sort of wrong doing. The defendant's liability rests on the defendant having been at fault, ie having failed to act as required.[22]

The point in strict liability is that even though instances abounds where proving the blameworthiness of someone may be relevant in some torts, there are also instances where such blameworthiness may not be relevant as explained hereunder:

> …in general tortious liability requires that the defendant must be proved to be blameworthy; there are yet certain areas in which proof of "fault" in that sense is not required. In those areas for various reasons, whether by historical accident or because of policy or justice so requires, the importance of providing a remedy for the injury inflicted, is permitted to overweigh the need to ensure that a "guiltless" defendant is not made to pay. In those areas liability is said to be "strict" and "fault" need not be established.[23]

The purpose of making liability strict in some torts is no more than serving the interest of justice, because someone or his property has been injured and despite the absence of a fault element, justice would only be done to him when compensation is provided by the law.

2.2 Origin of Liability and the Development of Forms of Action in Law of Torts

Torts as they are known today developed over a period of time. Originally there was no compartmentalization between various wrongs in the form of criminal, tortious or contractual wrongs.[24]For most of its history, English law developed through the procedural mechanisms used to bring action before the courts.[25] By around 13th and 14th Centuries the success of an action was dependent wholly on the availability of a writ, i.e. based on the

[22] Goldberg, J.C.P (2016) The Strict Liability in Fault and the Fault in Strict Liability. *Fordham Law Review*, 85(2) 744-786
[23] James, P.S and Brown-Latham, D.J . Op cit at p. 13
[24] Sambrani, S. *Historical Development of the Law of Torts in England*, available at www.scribd.com/documents028277842, accessed on 4-8-2017
[25] Lunney, M and Oliphant, K. (2008), *Tort Law Text and Materials* (3rd Edition), Oxford University Press, p. 2

principle of *ubi jus ibi remedium* (where there is injury there must be a remedy).[26]During that period, for a Plaintiff to succeed, he had to choose from a list of numerous writs to find which one suits his cause of action.[27] If a writ did not pertain to a particular right, the right was not recognized. This rigid system survived for more than 500 years.[28]

At the very beginning of the Common Law the writs were drawn up on an *ad hoc* basis but when the system became impracticable standard forms of writs were developed.[29] "This set out in a formulaic style and instructed the local sheriff to summon the defendant to answer the allegation. There were different writs for different actions."[30] These writs which were used to remedy injuries, which in modern times are called torts, were principally, the writ of trespass and the writ of trespass on the case.[31] The period between 1832 and 1833 marked the foundation of the modern law of torts[32] and in 1852 some major amendments were made by the Common Law Procedure Act which abolished the writs and in 1873 the Judicature Act provided that all pleadings were to contain only a statement of the facts of the case.[33] Although the writs were abolished by the Judicature Acts of 1873 and 1875, there is a suggestion that understanding the modern law of torts is impossible without appreciating the writ system and the forms of action which were developed under it. According to Maitland:

> What was form of action? Already owing to modern reforms (the Judicature Acts of 1873 and 1875), it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question, but it is still one which must be answered if he is to have more than very superficial knowledge of our law as it stands even at the present day. The forms of actions we have buried, but they still rule us from their graves.[34]

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[26] Gandhi, B.M. Op cit at p. 4
[27] Sambrani, S. op cit
[28] ibid
[29] Lunney, M and Oliphant, K. Op. cit at p.2
[30] Ibid
[31] *Winfield and Jalowicz* on *Tort*. Op cit at p. 53
[32] ibid
[33] ibid
[34] Maitlnad, F (1909) *The Forms of Actions at Common Law*, retrieved from www.nbls.soc.sif.cf.act/file on 5/4/2019 by 12:30 pm

The above statement clearly underscores the significance of studying the old forms of actions in law of torts even at present. It has also justified the discussion of the forms of action in this work as a prelude to a better understanding of this research.

2.2.1 The Writ of Trespass

With the coming into existence of the Judicature Act, causes of actions were instituted vide either writ of trespass or writ of trespass on the case. Writ of trespass on the case was developed before 1250 as a sort of civil version of a felony.[35] The writ was meant to take care of forcible or intentional action that directly resulted in injury.[36] Under the writ of trespass the plaintiff did not need to prove actual harm because the act being direct and forceful made it sufficient to establish injury. This feature is still relevant in proving all torts of trespass. It is in fact one of the cardinal pillars of the tort of trespass that physical or actual damage or injury is not relevant. Instituting a cause of action in all forms of torts of trespass, including conversion and *detinue*, was done through the use of this writ. This was perhaps in view of the fact that they share the single feature of someone asserting a right inconsistent with the right of the real owner or someone in possession of the property. Trespass in common parlance signifies unauthorised entry on another person's land but in law it has a wider significance as it has in the King James Bible.[37] The writ of trespass was used in remedying injuries which were direct and immediate, but did not extend to indirect or consequential injuries.[38] Lunney and Oliphant gave a clear description of the nature and operation of the writ of trespass in the following words:

> Trespass was a writ of wrong rather than a writ of right; it complained of wrong than demanded the reinstatement of a right. The mode of trial was by jury and the remedy was damages. A number of different forms of trespass were organised. The writ of trespass *quare clausum fregit* corresponds to the modern tort of trespass to land, that of trespass *de bonis*

[35] Lesher, S.H (2012) *Trespass: The Origin of Everything,* on mn.gov/law-library-stat/archive accessed on 9-8-2018
[36] ibid
[37] *Winfield and Jalowicz Tort*. Op cit at p. 53
[38] ibid

> *asportatis* to the modern trespass to goods. The writs dealing with trespass to the person took various forms corresponding to the modern tort of assault, battery and false imprisonment. What all of them had in common was the requirement that the defendant had acted *vi et armis* (with force and arms) and *contra pacem* (in breach of the King's peace).[39]

2.2.2 Writ of Trespass on the Case

Writ of trespass on the case is the 'twin brother' of the writ of trespass and it was meant to provide remedy for injuries that were not direct in nature. This writ was developed because of the failure of the writ of trespass to provide remedy for consequential injuries.[40] This was facilitated by the unsatisfactory requirement that the defendant should have acted with force and arms *(vi et armis*).[41] Fourteenth Century marked the beginning of a change in the use of the writ of trespass. The manner of this change was described in detail as follows:

> By the middle of the fourteenth Century the Chancery Clerks had begun drawing up a new writ of trespass. This writ required the Plaintiff to plead his special case. If the defendant's act had not been *vi et armis*, the plaintiff had to explain why it was nonetheless wrongful. The earliest forms of the writ involved situations where the parties were in a pre-existing relationship in the course of which the defendant had assumed responsibility to the plaintiff. If the plaintiff had asked the defendant to shoe his horse or hold a chattel on the plaintiff's behalf any contact with the animal or chattel could not be used *vi et armis*, but it could be wrongful if the shoeing was done carelessly or the chattel lost.[42]

The scenario painted in the above extract suggests that since injuries that were consequential in nature could not have been remedied by the writ of trespass there was the need for a legal instrument to remedy such injuries. This led to the development of the writ of trespass on the case or simply, the case to cater for them. The manifestation of the case could be seen in typical negligence cases, where duty of care, breach and damage exists. It is however, worthy of note that the two classes of actions, 'trespass' and the 'case', existed

[39] The torts of trespass to land, trespass to chattel and trespass to person are still guided by the same rules.
[40] Lunney, M and Oliphant, K. *Tort Law Text and Materials*, op cit at p. 5
[41] Ibid
[42] ibid

side by side for centuries and most of the law of tort is owed to them.[43] But as time went on certain claims acquired more specific names such as assault, battery, libel, slander, negligence, etc.[44] This is in spite of the fact that they acquired separate names due to mere accident of terminology, which could probably, be traced to their frequent occurrence, but still their roots are traceable to the ancient two categories[45]. It was this period that led to what we have today, with different torts having their specific names as against the past where each of the torts had a group or class to which it belonged, based on whether it was a direct or an indirect act.

2.3 Application of the Writ of Trespass on the Tort of Trespass to Land

One of the areas where the writ of trespass could perfectly fit into is the tort of trespass to land. This is because it deals with infringement of personal right that is direct and immediate. This therefore, emphasizes the need to discuss this form of trespass, coupled with the fact that it is one of the statements of the research problem. The tort of trespass to land also known in Latin as trespass *quare clausum fregit*, is committed where the defendant enters into the plaintiff's land without lawful justification.[46] The concept was originally conceived as a remedy against forcible and aggressive entry on to the land of others but later extended to include all forms of wrongful entry whether forcible or not.[47] These include any of the following:

(i) Entering the land in possession of another

(ii) Remaining on the land unlawfully

(iii)Wrongfully placing something on the land.[48]

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[43] *Winfield and Jalowicz, on Tort*. Op cit at p. 53
[44] ibid
[45] ibid
[46] Kodlinye, G and Aluko, O. Op cit p. 182
[47] ibid
[48] ibid

Although the dimension of the tort has been modified its association with violent entry still survives in that courts still regard the action as a valuable means of preventing breaches of the peace which are likely to occur when one man willfully trespasses upon the land of another.[49] Violence may sometimes occur where a trespasser who has trespassed against land in possession of another, is being ejected without the assistance of the court.

2.4 Meaning and Nature of the Tort of Trespass to Land

The term trespass is a derivative of the Latin term *transgressio*, meaning to pass beyond or to transgress the law.[50] In modern law "trespass is a voluntary wrongful act against the person of another or to the disturbance of his possession of property against his will. The act may be intentional or negligent but must be committed against the will of the plaintiff.[51] According to Lord Camden, "every invasion of private property be it even so minute, is a trespass, and no man can set his foot upon my ground without my license but he is liable to an action though the damage be nothing.[52] Mere setting a foot on the land or property of another against his consent will constitute a trespass with or without inflicting any damage to the property. Therefore, to constitute a trespass the act must in general be unlawful at the time when it was committed, with or without mistake or malice.[53] Trespass has also been defined as '"any unjustifiable intrusion by one person upon the land in possession of another".[54] It may also be any form of intentional and direct interference with land in possession of another in an unlawful manner. Directness of the defendant's action is fundamental to the proof of this tort. Where it is indirect no action would lie under this tort. The tort protects possessory right whether with respect to a developed land or a bare or

[49] Ibid.
[50] Gandhi, B. M. Op cit at p. 231
[51] ibid
[52] *Entick vs Carrington* (1765) 19 St tr 1066:95 ER 807
[53] Gandhi, B. M. Op cit at p. 232
[54] *Spiess vs Oni* (2016) 14 NWLR (pt. 1532) 236 at p. 262

undeveloped piece of land. Just like all other forms of tort of trespass, this tort is actionable *per se*, i.e without proof of any physical damage. It belongs to the categories of torts that are considered *injuria sine damno* (legal injury without damage). In this category of torts damage is presumed by the law even where it does not exist because it has considered that kind of conduct as unlawful or wrongful. The tort of trespass to land can take so many forms but there are basically three main forms of trespass to land as follows:

2.4.1 Trespass by Wrongful Entry

Generally the tort of trespass to land is committed where someone enters the land of another wrongfully or unlawfully. This is the commonest way of committing the tort of trespass to land as it simply requires mere entry without the consent of the person in possession. It consists of a personal entry by the defendant or by some other person through his procurement into land or buildings occupied by the plaintiff or claimant.[55] Putting a hand into someone's window or sitting on his wall also constitutes trespass.[56]

The Anambra State Torts Law[57] defines the tort of trespass to land and the various methods through which it may be committed as follows:

> Any person who without lawful excuse and without the consent of the owner or the person entitled to possession of any land-
> (a) Enters upon such land; or
> (b) Takes possession of such land or any part thereof or causes a third party to do so, or
> (c) Permits or suffers to remain thereon a person or a thing which he or his predecessor in title brought thereon in the manner stated in the next following two sections[58], shall be a trespasser and shall be liable for damages at the suit of the person entitled to possession thereof.[59]

Although the tort of trespass is actionable *per se*, intention may also be relevant but in a loose sense it is the intention to commit the act not the intention to cause any damage

[55] Houston, R.F.V. (1969) *Salmond on the Law* of *Torts* p. Sweet & Maxwell, United Kingdom 38
[56] *Ashby vs White* (1703) 87 ER 810
[57] Cap 140, Laws of Anambra State, 1986
[58] The next two sections (46 and 47) make provision for trespass by placing something on the land and remaining on the land
[59] Section 45 of the Anambra State Torts Law, ibid

or injury. Therefore, where the defendant's entry into premises becomes intentional in the sense that he consciously sits, walks, rides, drives or otherwise places himself upon the plaintiff's land, he will be liable in trespass; a defence that he was on his own land or that he had a right of entry will not avail him.[60]

2.4.2. Trespass by Remaining on the Land

This form of trespass takes place where a defendant over stays his welcome on the plaintiff's land or where his term of entry has expired. Where someone enters into another's premises with permission or license but refuses to leave after he was asked to, or when his license has expired, he will be a trespasser from the point he was asked to leave the premises. Licensees are therefore, required to leave the premises at the expiration of their licenses, failing which they will be considered to be trespassers. Therefore, where a person is lawfully on the premises of another once his license is terminated, he is allowed a reasonable time in which to leave and thereafter becomes a trespasser.[61] A period of 15 minutes was allowed to be enough reasonable time after which someone could be made liable in trespass.[62]

Section 46 of the Anambra State Torts Law also provides for trespass by remaining on the land as follows:

> Any person who has lawfully placed any structure, chattel or other thing on land which is in another person's possession shall if he permits or suffers such thing to remain on the land be deemed to commit trespass to that land in the following cases-
> (a) Where the thing was on the land with the consent of the person in possession after such consent has been lawfully withdrawn or otherwise terminated;
> (b) Where the thing was placed on the land pursuant to a license lawfully granted, after such license has been terminated by notice or otherwise or by effusion of time, or
> (c) Where the thing was placed on the land with lawful and sufficient excuse, after such excuse has ceased to exist.[63]

[60] *Basely vs Clarkson* (1681) 83 ER 565 and *Hewitt vs Bickerton* (1947) CLC 10504
[61] Per De Lestang CJ in *Balogun vs Alakija* ((1963) 2 All NLR 175
[62] ibid
[63] Anambra State Torts Law, Op cit, Section 46

The law however treats differently, tenants who hold over possession at the expiration of their tenancies.[64] The law applies to this category of people as follows:

> Whereas a licensee is liable in trespass for refusing to leave the premises within a reasonable time after accomplishing the purpose for which he was permitted unto the premises, whether or not he was asked to leave by the licensor, a tenant who holds over at the end of his tenancy does not become a trespasser unless and until the landlord has requested him to give up possession and quit the premises.[65]

What distinguishes a tenant who holds over possession and a licensee is that the former as against the latter only becomes a trespasser after the landlord or whoever is in charge of the premises demands for his exit. Until such a request is made the tenant is a tenant in sufferance.[66] Also, a tenant unlike a licensee has possession of the premises and where another person trespasses into a land where the tenant is in possession, he can sue the trespasser for the trespass but a licensee cannot do that. This is simply because he only has the license to use the premises for a short period of time as against a tenant who, during the period of his tenancy, has absolute possession.

2.4.3. Trespass by Placing something on the Land

The tort of trespass to land may be committed without entry but by merely placing something on the land so far as that placing is unlawful. Driving a nail for example, into the wall of someone's building may amount to a trespass. The same is true for placing a ladder on another's wall without his permission, or bringing anything into contact with the person's land or property. The Anambra State Torts Law also makes an elaborate provision on the manner in which trespass by placing something on land can be committed, thus: "a person who unlawfully places any structure, chattel or another person shall be

[64] Aluko, O and Kodilinye, op cit p. 184
[65] *Hey vs Moorhouse* (1839) 133 ER 20
[66] Nwabueze, B. O (1972) *Nigerian Land Law*, Nwamife Publishers

liable to the person who is, or is entitled to be in possession of such land for damages, for trespass to land."[67]

For the act of trespass to be committed against the land of someone the disturbance to his possession with respect to the land must be direct but not consequential.[68] In *Smith vs Giddy*, the plaintiff was a nurseryman who owned who owned a nursery and orchard adjoining the land of the defendant. On the land of the defendants were a number of trees which overhung the plaintiff's land and interfered with his apple trees growing in the orchard. The plaintiff claimed that the overhanging branches had caused damage and sued the defendant for damages and an injunction to prevent the defendant from allowing the branches of his tree from continuing to overhang the boundary. At the lower court judgment was given in favour of the defendant and the plaintiff appealed. On appeal it was held that the overhanging of trees was a nuisance not a case of trespass because the interference was consequential not direct.[69] Where contact with the land becomes indirect, liability will not be attached in the tort of trespass; it might now be in nuisance, in which case damage must be proved.[70] For the purpose of liability, the distinction between direct and indirect interference with land was illustrated by the case of *Onasanya v Emmanuel*.[71] In that case, the plaintiff complained that in laying the foundation of his building, the defendant had encroached into land in his possession by about ten feet. He also complained that the defendant was dumping refuse and threw water unto his land as well as allowing excreta to escape from the defendant's sewage to the plaintiff's premises. Omololu J held that throwing water and refuse on the plaintiff's land were acts of trespass while the escape of excreta, being indirect invasion was nuisance not trespass.[72] In addition to the above

[67] Section 46
[68] *Perrera v Vandiyar* (1953) 1 WLR 672; (1953) 1 All ER 1109
[69] *Smith v Giddy* (1904) 2 KB 448
[70] Ibid at p. 451
[71] (1973) 4 CCHCJ 1477
[72] See *MTN Nigeria Communications Ltd v Ganiyu Sadiku* (2014) 17 NWLR 382

forms which the tort of trespass may take, the Anambra State Torts Law makes provision for other acts in categorical term, which may also qualify as trespass to land, where it provides:

Any person who by himself or by his servants or agents, wrongfully in respect of land in possession of another or thereof-

(a) Sets foot or rides or drives over it, or

(b) Takes possession of it, or

(c) Takes any fruits or farm crops thereon, or

(d) Pulls down or destroys anything permanently fixed to it, or

(e) Wrongfully takes minerals from it, or

(f) Places or fixes anything on it or in it, or

(g) Sends filth or any injurious substance which has been collected on his own land on to it, is liable for trespass unless he does so with the consent of the person in possession or his agent or unless he is otherwise permitted by custom or license.[73]

The list given above is not exhaustive. Therefore, because any form of interference with land in possession of another without the consent of that person, no matter how slight, is trespass to land, that is why even the above provision makes mere setting of foot on land in possession of another a trespass.

2.5 Proof of Possession as the Basis for a Cause of Action in Trespass to Land

The tort of trespass to land and other related forms of trespasses are predicated on the basis of possession not ownership. Therefore, a claim for trespass is not dependent on a declaration of title because trespass is an injury to possessory right; hence the proper plaintiff in this action is the person who is deemed to have been in possession. A person

[73] Section 48, Anambra State Torts Law. Op cit at p. 15

who is in possession of land even as a trespasser, can sue another who thereafter comes upon the land unless that other is the owner or shows some title which gives him a better right to be on the land.[74] In the case of *Oguche vs Ilyasu* the plaintiff who was an employee of the Kano State Ministry of Works and an indigene of Kwara State, was in possession of a plot of land on which he built a house. The land was however, granted to him in breach of Sections 27 and 32 of the Land Tenure Law 1962. The aforesaid provisions provided that no and could be alienated to a non- native without the consent of the Commissioner for Lands, and that ay alienation without such consent was null and void. The defendant, purporting to be acting on behalf of the ministry, caused a bulldozer to enter the plaintiff's land and demolished the house. The plaintiff sued the defendant for trespass and it was argued on behalf of the defendant that the statutory provisions cited above prevailed over the common law rule that the person *de facto* occupying the land can maintain an action against all but the true owner or anyone acting under his authority. It was held inter alia that "…it is bare, *de facto*, physical possession or occupation which entitles a person to bring an action for trespass.[75] The Supreme Court of Nigeria made the following pronouncement with respect to the centrality of possession in an action for trespass to land:

> In a claim for trespass, what is primarily in issue is the possession of the land in dispute. The issue of possession is separable from the issue of radical title. Thus, trespass to land is actionable at the suit of the person in possession of the land. That person can sue for trespass even if he is neither the owner nor privy of the owner. This is because exclusive possession of the land gives the person in possession the right to retain it and to undisturbed enjoyment of it against all wrongdoers, except a person who could establish a better title.[76]

One fundamental thing to note is that even an owner who is out of possession can be a trespasser against the person who is in actual possession, unless he can prove the issue

[74] See *Oguche vs ILyasu* (1971) NNLR 157
[75] ibid
[76] Per Oguntade JSC in *Kopek Construction Ltd vs Johnson Koleola Ekisola*. Supra at p.14. This pronouncement was recently reaffirmed in the case of *Asoboro vs Pan Ocean Oil Corporation (Nigeria) Ltd.* (2009) 9 N.W.L.R (pt. 1146) 225.
77 See also *Chief Etim v Chief Nyang Enyong* (2010) 2 NWLR ((pt. 1177) 83

of radical title. In this regard, the Ilorin Division of the Court of Appeal held in the case of *Alhaji Tajuddeen Ibrahim Olagunju v Alhaja Habibat Yahya*[77] that:

> Trespass to land is a wrong committed against a person who is in exclusive possession of the land trespassed on. Consequently, when a parcel of land which was trespassed on is in the exclusive possession of another person, a suit in trespass is not maintainable by the owner of the land who has no right to immediate possession at the time the trespass was committed, nor can a person who has a right to possession or in actual possession of a land be liable for trespass.

It therefore follows that a lessor (an owner) who is out of possession cannot maintain an action in a trespass committed against a property he let out during the currency of the lease unless where his reversionary interest is being jeorpadised.[78] Although possession is considered central to the proof of trespass to land the Supreme Court of Nigeria has categorized possession into physical Possession (*de facto* possession) and Possession imputed by Law (constructive possession).[79] Possession is *de facto* where someone is in physical possession of the land trespassed against; it is to a large extent similar to occupation because the person residing in the land is considered by law to be the one who has the right to sue in trespass. It is the commonest kind of possession. With respect to the importance of possession in the tort of trespass to land, Tanko JSC delivering the leading decision of the Supreme Court held that: "Possession in land matters is the backbone against all other claims to land if not accentuated by the owner of the land who has a better title."[80] Possession imputed by law is not common because it is not the type acknowledged under the law dealing with trespass to land. This may happen where the person in possession happens to be a trespasser while the person with real possession is out of possession. Once the owner can prove that he is in possession though currently not in occupation, the law will impute that he is the one in possession by the imputation of the

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[78] *Jones vs Llanrwst UDC* (1911) 1 Ch 393
[79] *Amao vs Ameen* (2013) 9 NWLR (pt. 1358) 59 at 178
[80] *Spiess vs Oni*, supra at p. 262

law; only that he may have to go an extra mile by proving that he has a better title to the land.[81]

2.5.1 Proof of Possession in Trespass to Land

Since possession is the fulcrum upon which the tort of trespass is founded, whoever wants to claim under the tort must prove that he is in possession.[82] Proving possession is not always a difficult task where the person claiming in trespass is in occupation. Occupation may take the form of residing on the land, cultivation, using the land as a store or warehouse etc. But where the land is barren or the claimant is not physically in possession, he must find a way of convincing the court that he is in possession even if it means going to the extent of proving radical title.[83]On the proof of possession the Court of Appeal stated that:

> The onus of proving possession generally lies on the plaintiff. Therefore, a person who desires to dislodge the person in possession has to prove a better title. Thus, where the defendant in an action for declaration of title is in possession even though adverse, the burden is cast on the plaintiff to prove the defendant is not the owner of the land in dispute. If the title of the plaintiff out of possession is established, the defendant out of possession can successfully resist the claim of the plaintiff if he can show a better title or better right of possession.[84]

Proof of possession may sometimes go beyond mere proof of physical possession, especially where the wrong person or person with a defective possession is the one in occupation, in which case the plaintiff out of possession may go to the extent of proving the issue of radical title.[85] The Supreme Court of Nigeria has recently held in the case of *Chief Godpower Orlu (Alias Alhaji abubakar Orlu) vs Chief Godwin Onyeka,*[86] the respondent took out a writ of summons and claimed against eight persons including the appellant, jointly and severally, damages for trespass on his land and perpetual injunction

[81] ibid
[82] ibid
[83] *Kopek Construction Ltd vs Ekisola* supra at p. 14
[84] Per Dattijo JCA in the case of *Warigbelegha vs Owerre* (2012) 3 NWLR (pt. 1288) 513 at 527
[85] *Bossor vs Kessie* (1934) 2 WACA 65 and *Wuta Ofei vs Danquah* (1961) 1 WLR 1238
[86] (2018) 3 N.W.L.R (pt. 1607) 467

restraining further trespass on the land. The respondent's case was that the land in dispute formed part of a larger piece of land known as Akwodo, situate in Port Harcourt. The respondent presented evidence that he purchased the land in 1976 from John Nweke and Chukwuma Nwobu, who had earlier purchased it from Abirigba family, the native owners of the land through the head of tha family, enoch Abirigba. The respondent also relied on a court judgment which confirmed the title of his vendor over the land in dispute.

The appellant on his part, also claimed that ownership of the land through inheritance from his father, Ogbunda Orlu, who he said inherited it from his ancestor, Ahanonu but did not give evidence of how Ahanonu acquired title to the land. The appellant further stated that the Abarigba family sold the land to appellant's vendor under false pretence.

At the trial court judgment was given in favour of the respondent as he had established a better title to the land and his claim was granted by the court. Dissatisfied, the appellant appealed to the Court of Appeal which upheld the decision of the trial court and dismissed the appeal. The appellant appealed to the Supreme Court and the appeal was again dismissed. The court held further that:

> A claim for trespass to land is generally rooted on exclusive possession. Therefore all that a claimant needs to prove is that he has exclusive possession or that he has the right to exclusive possession of the land. However, where a defendant claims to be the owner of the land, title to land is put in issue and in order to succeed, the claimant must prove a better title. I this case the defendant admitted he was on the land in dispute, and the trial court adjudged the respondent as the owner of the land. So the appellant was a trespasser on the land [87]

Anybody having exclusive or *de facto* possession can claim for trespass to land and the same is also true for someone having right to immediate possession. The person having right to immediate possession could be a landlord out of possession, who let his property out to a tenant and therefore can sue because of the reversionary interest which he has in the property. An agent or a caretaker who has control over the property based on the

[87] Ibid at p. 492

authority given to him by the owner may also sue as a person being entitled to right of immediate possession.

2.6 Continuing Trespass

Continuing Trespass is a doctrine which operates with respect to the tort of trespass to land, that manifests where someone commits trespass against the property of another by placing something on the land. The trespass continues even where he vacates the land, so far as what he had placed still remains. The trespasser will be liable not only for the initial intrusion but also for the failure to remove himself or the object from the land.[88] Since the trespass continues, it will lead to a fresh cause of action which arises *de die in diem* (day by day).[89] In this situation, damages payable for the trespass will continue to run up till the day the defendant removes himself and the object he placed on the land. In *Lajide vs Oyelaran*[90] the defendant who had laid foundation of a building on the plaintiff's land wrongfully, was held liable for continuing trespass by the building of that foundation, which still remained even after he had left the land. The fact that he had stopped the building and left the land was held not sufficient to absolve the defendant from liability. Recently the Supreme Court of Nigeria reaffirmed the doctrine of continuing trespass in the case of *Asoboro vs Pan Ocean Oil Corporation (Nigeria) Ltd*,[91] where the court held that:

> It is a continuing tort of trespass for a person to remain on another's land without that other's authority or consent; and that barring any defence properly raised and sustained, which could defeat the right of the owner of such land to complain, the land owner is always entitled to protection as appropriate.

The fact that the defendant decides to leave the premises without abating what he brought unto the land illegally, will not limit his liability and damages will continue to run

[88] Kodilinye,G. and Aluko, O. Op cit at p. 186
[89] Gandhi, BM op cit at p. 236
[90] (1973) 2 WSCA 93
[91] suprat p 18

as if he were still on the land until the day he removes the object. In the case of *Apostle Ekweazor vs Registered Trustees of Saviour's Apostolic Church of Nigeria*,[92] the respondent instituted an action against the appellant at the Anambra State High Court, Awka. In the action, the respondent a registered body, claimed against the appellant, a declaration of title to the premises of the Saviour's Apostolic Church of Nigeria, general damages for trespass and an injunction. It also sought the return of the properties of the church and an account of the funds due to it but collected by the appellant. According to the evidence led by the respondent, the land in question was granted to it in writing by the Awka Local Government Area. Although the respondent could not tender the document in court, it established acts of long possession of the land extending over a long period of time; and the land was used by the respondent as a church. The 1st and 2nd appellant and 2 others were ordained Ministers of the respondent church. In 1977 they resigned their membership and ministration of the church but refused to hand over the church's properties or quit the church premises as demanded by the respondent. The appellants alleged that they had broken away from the church and proceeded to register/incorporate the 3rd appellant claiming ownership of the respondent's land. On 31st July 2007 the trial court found that the appellants began to trespass on the land from 1977 hence granted the claims of the respondent against the appellants except the claim for return of the vehicles, which was not substantiated. Dissatisfied, the appellants appealed to the Court of Appeal, arguing *inter alia* that the respondent's claim for trespass was statute-barred, though the evidence led showed that the appellants were continuing to trespass. Unanimously dismissing the appeal, the court held that the principle of continuing trespass will come in aid of a claimant who alleges trespass continues to prevent his claim from being statute-barred.

[92] (2014) 16 N.W.L.R (pt. 1434) 433

Where there is a continuity of acts of trespass, successive actions can be maintained by a plaintiff from time to time in respect of the continuance of trespass.[93]

2.7 Aerial Trespass and Trespass Beneath the Land

Trespass to land can be committed either on the land, below it or above it, in spite of the fact that trespasses to the surface or beneath the land is not always absolute. The law governing trespass is predicated on the Latin maxim, *cujus est solu ejus est usque ad coelom et usque ad inferos*, meaning, "whoever owns or possesses what is on the land possess or owns everything above it to the heavens and everything below it to the centre of the earth"[94]. By this rule, persons in possession of land have the right to sue for any form of trespass whether above or below it, no matter how high and below it no matter how low. Although this is the general position of the law its application is not absolute in view of certain exceptions which may present themselves due to some circumstances. In the case of aerial trespass for example, if such maxim is allowed to apply absolutely, it will impede the flight of aero planes against reasonable height. But where the height against which the defendant has interfered with the plaintiff's property is not reasonable, he may still be liable for trespass to land. The defendant was held liable for trespass to land in the case of *Kelsen vs Imperial Tobacco (Great Britain) Ltd*.[95] In that case the defendants erected an advertising billboard on their building which extended into the airspace above the plaintiffs' shop. The position was also maintained in the case of *Wollerton & Wilson Ltd vs Costain Ltd*[96], where a crane belonging to the defendant swung over the roof of the plaintiffs' factory at a height of only 50 feet. A different position was however, taken in the

[93] Ibid at p. 479
[94] *Corbett vs Hill* (1870) LR 9 E q 671, *Umeobi vs Otukoya* (1978) LRN 1
[95] (1952) 2 QB 334
[96] (1970) 1 WLR 411

case of *Lord Barnstein of Leigh vs Skyviews and General Services Ltd*[97]. Here the defendant's aircraft flew several hundred feet above the plaintiffs' property to take photographs. The plaintiffs sued and it was held that the defendant was not liable in trespass because his activity took place above the area of ordinary use. It was further held that the land owner's right in the airspace extends only to such heights as is necessary for the ordinary use and enjoyment of the land and structures attached thereto, so that the flight of an aircraft several hundred feet above a house is not trespass at common law.

In addition to the above, the statute in Nigeria has also provided a limitation as to when an owner of land or a person in possession would not be allowed to sue in trespass. This is by virtue of Section 49(1) of the Civil Aviation (Amendments) Act,[98] which provides:

> No action shall lie in respect of trespass or nuisance by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather, and all the circumstances of the case as reasonable, or the ordinary incidents of such flight, so long as the flight over such property duly complies with any regulations in force made in respect thereto.

One thing which is clear from both the judicial and statutory authorities mentioned above is that the Latin maxim which says whoever owns or possesses a land owns what is above the land to the heaven and what is below it to the centre of the earth does not have an absolute application. Therefore, an owner of land or a person in possession of it can only claim for trespass above the land to a certain limit. The only problem with the statutory and even to some extent, judicial pronouncement is that there is no precise limit allowed by law but circumstance can determine what is reasonable and what is not.

With regards to trespass beneath the earth one may say that, the principle is applicable absolutely, except where circumstances avail themselves which limits its

[97] (1978) QB 479
[98] Cap C13 LFN 2010

application. This may be where there is a mineral deposit beneath the land in question, in which case the person in possession cannot sue for trespass beneath his land as the law vests all mineral deposits in Nigeria in the Federal Government. In this regard, the Nigerian Minerals and Mining Act,[99] provides:

> The entire property in and control of all mineral resources in, under or upon any land in Nigeria, its contiguous continental shelf and all rivers, streams and water courses, throughout Nigeria, any area covered by the territorial waters or constituency and the exclusive economic zones is and shall be vested in the government of the federation for and on behalf of the people of Nigeria.
> All lands in which minerals have been found in commercial quantities shall, from the commencement of this Act be acquired by the government of the federation in accordance with the provisions of the Land Use Act.[100]

From the above provision it is clear that even where someone has possession or absolute ownership of land, he can only have possession or ownership of the underground where circumstances such as the one envisaged by the Act, does present itself. Where it has, the law would now take precedent over the Latin maxim which deals with absolute ownership. In that case even though the person in possession of the land has physical possession of it, in law he does not, and therefore, he cannot sue even where there is a trespass against the underground. This is simply because only the person in possession of land can sue for trespass to the land; as the Supreme Court of Nigeria declared:

> A claim for trespass to land is not dependent on a declaration of title because trespass is an injury to a possessory right. Therefore, the proper plaintiff in an action for trespass to land is the person who was or who is deemed to be in possession at the time of the trespass.[101]

Although the above pronouncement points to the fact that only the person in possession at the time of the trespass can claim, where a situation such as the exception under the Minerals and Mining Act presents itself, the person would be deemed not to be in possession, simply by virtue of that exception.

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[99] No. 20 of 2007 (hereinafter referred to as the Act)
[100] See Sections 1(1)-(3)
[101] *Alhaja Silifatu Omotayo vs Cooperative Supply Association* , supra at p.1

2.8 Trespass by Relation

This is the form of trespass which allows an owner out of possession to claim in trespass whenever he regains possession, and claim damages even during the period when he was out of possession. Under the doctrine of trespass by relation, a person having the right to immediate possession who enters the land in the exercise of that right is deemed by legal fiction to have been in possession from the time his right of entry accrued.[102] The kind of possession envisaged under trespass by relation is one that may be called "constructive possession". This is a possession in contemplation of law as opposed to *de facto* possession or possession in fact.[103] An example of this type of trespass is where A sells his land to B but before B takes actual possession another party, C trespasses upon the land. B here has the right to sue C for trespass, notwithstanding the fact that he had not yet taken possession of the land when the act of trespass took place. The title of B in this circumstance would relate back to the time when he became entitled to take possession. In other word, B's right with respect to the land will relate back to the period when transaction pertaining to the sale of the land became conclusive.[104]

2.9 Trespass by Co-owners

Generally, the rule is that no single co-owner of property can claim against the other except where one of the co-owners is doing something detrimental to the property. But generally, "co-owners enjoy 'unity of possession', which entitles each of them to the possession of the whole property jointly or in common with each other, and each is entitled to share in the rents and profits obtained from the property"[105]. A co-owner cannot sue because he does not hhave right of survival while a joint owner can sue because there is right of survival. The position of a co-owner in a joint ownership is more or less similar to

[102] Kodilinye, G and Aluko, O. op cit at p. 191
[103] Gandhi B. M. *O*p cit at p. 236
[104] See *Lawson vs Ajibulu* (1997) 6 NWLR (pt. 507) 20 for a definition of the trespass by relation.
[105] Enemo, I. F. Op cit at p. 202

that of a tenant and landlord, where though the landlord has ownership to the property, the tenant has possession and therefore, the owner cannot claim where a trespass occurs on the land. But the owner can take action against the tenant where he realizes the tenant is doing something on the land which is adverse to his reversionary interest.

2.10 Trespass *ab initio*

The doctrine of trespass *ab initio* which is a doctrine for determining liability in the tort of trespass to land simply put, means trespass from the beginning. The crux of the doctrine was explained by Gandhi as follows:

> He who enters on land of another by authority of law (not of a party), and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance against that other person, is deemed to have entered without authority, and is therefore, liable as a trespasser *ab initio* for the entry itself and for all things he does thereunder not otherwise justified.[106]

One fundamental thing to observe with respect to the above description of the doctrine of trespass *ab initio* is the phrase in bracket (not of a party), which is central to determining whether an action in trespass may be brought under the doctrine or not It would therefore, seem that the early development of the fiction (trespass *ab initio*) …was confined almost wholly to the abuse of some privilege.[107] The doctrine is therefore, most commonly applied in cases of damage done after a privileged entry upon land or the misuse or wrongful disposition of goods seized under process of authority.[108]

Under Common Law, the doctrine was first applied in the *Six Carpenter's Case*[109], where the six carpenters entered the tavern "Queen's Head" and ordered a quart of wine, plus a penny worth of bread amounting to 8d. Upon request for payment, they declined, and the question arose as to whether this refusal to pay rendered their original entry into the

[106] Gandhi, B.M. Op cit at p. 240
[107] James, T (1945) The Doctrine of Trespass *Ab Initio*. In: *Montana Law Review*, vol. 61, Issue 1 Spring, 1945 (61-61) at 62
[108] ibid
[109] (1610) 77 ER 695

tavern tortious. Although it was held that their omission to pay could not have made their original entry a trespass, it was also observed that: if after entering lawfully, one does some act of commission, the law will adjudge that he entered for that purpose; and that because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio.*[110] The application and working of the doctrine of trespass *ab initio* in modern times has been explained in the following paragraph:

> One performing an act by virtue of legal authority is liable for any subsequent tortious conduct. It is at this point that the doctrine of relation back enters. The majority of jurisdictions would hold that the misconduct dislodges the actor's privilege in making the arrest and makes him liable for the entire imprisonment in the same manner as if the original arrest were unprivileged on the grounds of the trespass *ab initio* doctrine.[111]

It is clear from above that the doctrine fundamentally applies to persons responsible for law enforcement, whether as security agents or as officers who have the authority of the law to carry out certain duties. Personnel of water and electricity corporations may fall under this category. What is deductible first hand is that for one to be liable under this doctrine his entry must have been allowed by a legal authority not that of the party. Where the person's entry is by the authorisation of the party he would not be liable under the doctrine. This doctrine was however, criticised by Lord Denning in the case of *Chic Fashions (West Wales) Ltd vs Jones,*[112] for what he described as "making unlawful what was originally lawful". He however, accepted and applied it years later in the case of *Cinnamond vs British Airports Authority.*[113] In the *Chic Fashions* case, police received information that certain goods were stolen in the plaintiff's shops. They obtained a search warrant from the court to search all shops in the town, including the defendant's shop. In the course of their search they discovered certain clothes which resembled the ones said to have been stolen in the plaintiff's shop though they did not carry the labels of the plaintiff.

[110] ibid
[111] James, P.S and Latham-Brown, D.J. Op cit at p.62
[112] (1968) 2 QBD 295
[113] (1980) 2 All ER 368

The police thought that the clothes found in the defendant's shop were stolen and took them away. The plaintiff was however, invited by the police to give explanation on how they got possession of the clothing, which they did to the satisfaction of the police, hence their goods were released to them. Afterward, the plaintiff company sued the Chief Constable for damages. One of the question for determination in the case was whether the police were justified in taking away and retaining the clothes which they wrongly thought were stolen as it was confirmed that none of the clothes was stolen. It was held *inter alia* that:

> Where a constable has a warrant to carry out a search he could only seize those goods which answered the description given in the warrant and he had to make sure, at his peril, that the goods were the goods in the warrant. If he seized other goods not mentioned in the warrat, he was a trespasser in respect of those goods; and not only so, but he was a trespasser on the land itself, a trespasser *ab initio* in accordance with the doctrine of the Six Carpenters'' case (1610) 8 Coke, 146a, which held that if a man abuses an authority given by law, he becomes a trespasser *ab initio*.

In Nigeria, the recent Supreme Court decision in the case of *Alhaja Silifatu Omotayo vs Cooperative Supply Association*[114] reaffirmed the long established principle concerning the doctrine of trespass *ab intio*. In that case, the respondent sued the appellant in the High Court of Lagos State claiming the sum of Five Hundred Thousand Naira as general damages for trespass on its land and an injunction. The respondent based its claim to the title of the disputed land and the Deed of Conveyance dated 21st July, 1985, executed by the Ajao family. The respondent alleged that the appellant was a licensee of the respondent having been allowed to occupy the disputed land by a caretaker of the land and engaged by the respondent. She was permitted to mould blocks for sale on one of the plots of land. It also alleged that the appellant extended the area granted to her to cover for the plots of the respondent. The Appellant on her part claimed title and ownership of the land and contended that her Deed of Conveyance was extended by an Attorney, who claimed

[114] Supra at p. 22

through Oloto family. At the end of hearing, the trial court found in favour of the respondent and the appellant appealed to the Court of Appeal and the appeal was unsuccessful. On further appeal to the Supreme Court, it was held *inter alia* on the question of what constitutes trespass *ab inito* that:

> Where a person who initially entered upon land lawfully or pursuant to an authority given by the true owner or person in possession, subsequently abuses his position or that authority, he becomes a trespasser *ab inito*, his misconduct is relating back so as to make his initial entry a trespass. In the instant case, the appellant not only challenged and denied the agents of the respondent, she also obstructed the agents and workers of the respondent. On the basis of denial being a licensee of the respondent, she became a trespasser *ab initio.*

The above position was adopted by the Enugu division of the Court of Appeal in the case of *Ekweazor v The Registered Trustees of the Apostolic Church of Nigeria*.[115] But one thing that is common in both cases is that the law was misstated by the courts, a situation which led to its wrong application. The law was somehow modified by the Nigerian courts as the doctrine only applies where the defendant had access to a land by virtue of an authority of the law not an "authority of the owner" as stated by the Supreme Court in *Alhaja Silifatu's* case[116]. It is a doctrine that applies only to those who enter into premises by authority of the law not that of a party that could be liable under the doctrine not to trespassers generally as claimed by both the Court of Appeal and the Supreme Court in the two cases. One can rightly say that the doctrine of trespass *ab initio* only applies where there is misconduct by security agents or persons who are under authority of the law to carry out certain official duties, such as officials of the electricity or water corporations, who may be in a particular compound to carry out their official assignments. The doctrine does not apply to all entries with the leave of the owners or persons in possession. This has been confirmed by Kodilinye where says "the doctrine applies where there is a misconduct,

[115] supra
[116] supra at p. 29

such as willfully damaging property or committing an assault by a security agent in the cause of carrying out an arrest or executing a search warrant".[117]

The application of the doctrine by the Supreme Court in the case of *Alhaja Omotayo,* is a wrong one. This is simply because of the fact that in that case, the appellant would have been treated like any other ordinary trespasser hence based her liability under 'trespass by remaining on the land' but not under the doctrine of trespass *ab initio* since her entry was based on the authority of the person in possession not authority of the law. After all, both parties in that case are claiming title to the land and therefore, could not have been a case for trespass; even where it is assumed to be so. The claim should not have been for trespass, since the appellant was not in the property to carry out any official assignment. Support for this assertion could be found in the case of *Chic Fshions (West Wales) Ltd vs Jones*[118], where though Lord Denning criticized the use of the doctrine as a valid principle of law, but typifies a clear case where the doctrine could be validly applied. In that case, Police Officers armed with a warrant were sent to search the Plaintiff's premises to look for some stolen goods. They could not find those goods but in the process cart away some goods, hence they were held liable for trespass *ab initio* because of the misconduct which they did in the process, by taking away something different which was not the subject of their search. This is clearly different from the scenario in the case of *Alhaja Omotayo*, which was no more than two parties claiming title to premises, for which each and every one of them had to produce evidence to prove its title, at the end of which the respondent succeeded. In the same vein, the definition of trespass *ab initio* provided in the Anambra State Torts Law supports the argument of the researcher which is at variance with the decision of the Supreme Court in the case of *Alhaja Silifatu Omotayo*. The law provides that:

[117] Kodilinye, O and Aluko, O, op cit at p. 192
[118] Supra. See also the American case of *Cline vs Tait* (1942) 129 (2d) 89

> Subject to the provision of this law, where a person enters on the land of another under the authority given to him by law or otherwise and while there, uses the land in a manner that is not authorised or otherwise abuses the authority by an act which amounts to a misfeasance, he shall be deemed to be a trespasser ab *initio*, and may therefore, be sued as if his original entry was unlawful.[119]

Although it may be argued that the word 'otherwise' used in the above provision connotes that the doctrine applies even to cases of trespass committed by persons who enter with the authority of persons in possession of land, this argument may not hold water in view of existing judicial authorities and academic arguments presented above. Where persons not in possession of a legal authority commit trespass in a similar manner their liability could be based on trespass by remaining on the land or the doctrine of continuing trespass, in which case their liability is less grievious than what is obtainable under trespass *ab initio*. Since their entry to the land was based on an invitation or the authority of the person in possession, their liability only begins from the moment they were asked to leave the premises not from the beginning. It is however, not clear as to whether the act of misconduct committed in the process of carrying out an official assignment by an officer of the law which renders him a trespasser *ab initio*, would also invalidate the assignment. The following paragraph has provided an answer, which this research thinks is a better approach on how to handle such a situation. It reads thus:

> If the actor having obtained the custody of another by a privileged arrest…fails to use due diligence to take the other promptly before court…the actor's misconduct makes him liable to the other only for such harm as is caused thereby and does not make the actor liable for the arrest or for keeping the other in custody prior to the misconduct.[120]

The above paragraph clearly shows that the fact that a public official commits misconduct in the process of carrying out his official assignment, that does not make his assignment an invalid one; instead, his official assignment remains valid. On the other

[119] Section 62, Anambra State Torts Law, op cit
[120] James, P.S. and Latham-Brown, D.J. Op cit at p. 61

hand, he can also be liable for the misconduct which he has committed in violation of the law. The only thing which makes him liable *ab initio* is a warning that whatever wrong he commits while carrying out an official work, will not shield him from liability. This is also in a way, a protection to all citizens provided by the law in order for them not to be harassed by overzealous public officers, such as the Police and other law enforcement agents.

2.11 Distinction Between Crimes and Torts

Tort just like many concepts is not susceptible to any universally acceptable definition. That notwithstanding, there have been several attempts by some authors to define what a tort means. A tort may be defined as a civil wrong involving a breach of duty being owed to persons generally, the breach of which is redressible primarly by action for damages.[121] Crime on the other hand, may be defined as an act, default or conduct prejudicial to the community, the commission of which renders the person responsible, liable to punishment by fine or imprisonment in special proceedings, normally instituted by officers of the state.[122]

Drawing from the above definitions, tort may be distinguished from crime as follows:

(a) While the main purpose of crime is to protect the interest of the public by punishing those guilty of it by means of imprisonment or fines, tort on the other hand, is a civil wrong which gives rise to civil proceedings, the purpose of which is to compensate the individual plaintiff for the damage which he has suffered as a result of the defendant's wrongful conduct.[123]

[121] Aluko, O and Kodilinye, G (2009) Nigerian Law of Torts ,Spectrum Books Ltd, Ibadan, p. 1
[122] Rutherford, L and Bone, S (1996) Osborn's Concise Law Dictionary (8th Edition), Sweet & Maxwell, London, p. 99
[123] Aluko, O and Kodilinye, G, op cit at p. 2-3

(b) The entire criminal code has been codified in the Criminal and Penal Codes in Nigeria while law of torts substantially, remains a creature of judicial precedent modified here and there by statutes.[124]

(c) Since criminal law protects the interest of the public generally, the appropriate person to sue on behalf of the public is the Attorney General. This unlike where a tort is involved in which case, the individual affected by the tort is the appropriate person to sue and claim compensation.

(d) The object of a suit in a crime is punishment while that of a suit in tort is compensation.[125]

(e) In crime unliquidated damages cannot be claim while in tort, unliquidated damages can be claimed.[126]

(f) Intention is the crux of crime while in tort intention is important, but not in all cases, especially where negligence or strict liability are involved.[127]

[124] Ibid at p. 3
[125] Gandhi, B. M, (2011), Law of Torts, op cit at p. 2
[126] ibid
[127] ibid

CHAPTER THREE

LIABILTY FOR NUISANCE AND THE RULE IN RYLANDS vs FLETCHER IN NIGERIA

3.1 Introduction

Liability in the tort of nuisance can be categorised into public and private. Public nuisance is generally a crime unless where the right of an individual has been affected in which case the tortious aspect of public nuisance will come into play. Nuisance is generally a tort against property and therefore, no cause of action could be based on nuisance unless the nuisance affects property or the enjoyment of it.[1] Private nuisance which is the focus of this chapter, could take the form of physical injury to the plaintiff's property and it could be in the nature of interference with use and enjoyment of land such as where the plaintiff is subjected to unreasonable noise or smell emanating from the defendant's neighbouring land. The tort may also be committed where there is interference with the use and enjoyment of property or some right over or in connection with such right.[2]

The word nuisance emanated from the Latin word, *nocumentum*. The French equivalent means nuisance which could be any form of annoyance that may cause actual damage.[3] Historical accidents have conferred upon this word the special and technical meaning and dual character it possesses now.[4] The idea of nuisance defies a precise definition until in the Williams' Case at the end of 16th Century when it was accepted that if by invasion of a public right, a private individual's rights had been infringed he could maintain an action.[5]

[1] where the nuisance affects the personality of the victim liability could lie in negligence but not nuisance
[2] *Registered Trustees of the Living Bread Christain Centre vs Lt. Col. Oluborokun(Rtd).* Supra at p. 4
[3] Gandhi, B. M.. Op cit at p. 320
[4] ibid
[5] ibid

Generally, for one to claim in nuisance he is required to show some damage before the cause of action becomes complete.[6] The damage in the action on the case for nuisance which was primarily damage to land also included damage in the things affixed to the land, such as trees and crops as well as damage to the use and enjoyment of the land through smell, sound or vibrations.[7]

The law on nuisance is one based on the idea of "live and let live" or "give and take" hence every person has the right to use his land in such a manner so as not to interfere with another person's use of his own land, even where his act is lawful.[8] Although the tort of private nuisance could take two forms, the first being physical material damage to property, and the second being interference with use and enjoyment of the property, which must be substantial. Courts are more disposed to granting injunctions and award of damages with respect to the first.[9] One major problem attributable to private nuisance which takes the form of unlawful interference with use and enjoyment of land is that courts are sometimes reluctant to give judgment to owners or occupiers of land on the basis that such interferences are not substantial. [10] When is interference said to be substantial is not precise and not amenable to any universally acceptable definition but each case is treated on the basis of its own merit. The approach adopted by the court makes it difficult for victims of private nuisance relating to interference with use and enjoyment of land to succeed. This is perhaps because the courts in most cases, always interpret the discretion given to them by the law with respect to determining substantial interference, negatively against claimants even where the activities which constitute the nuisance take place over a long period of time. This type of interpretation may also spell injustice for victims even though their suffering may not be physical.

[6] Oliphant, K and Lunney, M. Op cit at p. 528
[7] ibid
[8] *Registered Trustees of the Living Bread Christain Centre vs Oluborokun*. Supra at p. 4
[9] *St. Helen's Smelting Co. vs Tipping* (1865)11 ER 1483
[10] See for example, *Helios Ltd vs Isiaka Bello & Anor* (2017) 3 NWLR (pt. 1551) 93

In view of the importance land and quiet enjoyment of it is to man, this chapter therefore, analyses the basis for a cause of action in private nuisance and the manner in which the courts in Nigeria interpret the phrase "substantial interference" against victims of private nuisance with respect to unlawful interference with use and enjoyment of land.

3.2 Nuisance

Nuisance is one tort that has some similarities with the torts of negligence and the rule in *Rylands v Fletcher*, especially when it comes to application by the Nigerian courts.[11] This is why detailed discussion on the tort is necessary. Nuisance has been used in popular parlance to be any form of discomfort one person causes to another or to the community or any source of inconvenience or annoyance. But the tort of nuisance has a more restricted scope as not every inconvenience or annoyance is actionable.[12] One of the oldest actions known to common law is the action for nuisance.[13] Its foundation can be traced to the twelfth century, to the establishment of the Assize of Nuisance.[14]

The term nuisance had its origin in Latin, called '*nocumentum'*, which legally means 'annoyance or 'harm; and indeed the element of unlawfulness is the only thing common to all nuisances;[15] it also means nuisance in French.[16]The law of nuisance deals with the relationship between neighbours who in most cases never chose each other; hence their relationship is fraught with some inconvenience in point of time. They have a continuous mutual exposure to each other's acts and conducts.[17] Nuisance is not susceptible to any universally acceptable definition, perhaps due to the fact that nuisance

[11] *MTN (Communications) ltd vs Ganiyu Sadiku*. Supra at p. 50
[12] Kodilinye, G and Aluko, O. Op cit at p. 92
[13] Oliphant, K and Lunney, M. Op cit at p. 633
[14] ibid
[15] James, P.S and Latham-Brown, D.J. Op cit at p, 177
[16] Gandhi, B.M. Op cit at p. 320
[17] ibid

'has become a catch-all for multitude of ill-sorted sins'[18]. The fact that nuisance cases are so infinite in their variations that it is often difficult to discern any general principle at work, is another factor which makes the tort not amenable to definition that can be universally acceptable.[19] That notwithstanding, the tort may be defined as an unreasonable interference with a person's use and enjoyment of his land or some right in connection with the land,[20] as well as damage to the amenity value of the land. It has been warned that the protection of the amenity interests should not confuse one into thinking that nuisance protects personal as opposed to proprietary or possessory interests in land.[21] This point was made clear by the House of Lords in the case of *Hunter vs Canary Wharf Ltd*.[22]

Nuisance generally, covers:

(i) Acts unwarranted by law which causes inconvenience or damage to the public in the exercise of rights common to all subjects;

(ii) Acts connected with the occupation of land which injure another person in his use of land or interference with the enjoyment of land or some rights connected therewith;

(iii)Acts or omissions declared by statute to be nuisance.[23]

Nuisance may therefore, take the form of oil pollution,[24] emission of noxious fumes,[25] interference with leisure activities,[26] offensive noises and smells from premises used for keeping animals[27]. Nuisance generally can be categorised into two major classifications, which are public and private nuisance. Although private nuisance is purely a tort in all its ramifications, public nuisance may at best be described as a tort which is

[18] Fleming, J.G (1992) *Law of Torts,* Law Book Company, London, p. 92
[19] Pitchfork, A (1996) *Law of Tort* HTL Publishers, London, p. 235
[20] ibid
[21] Oliphant, K and Lunney, M. Op cit at p.633
[22] (1997) AC 655
[23] Gandhi, B. M. Op cit at p. 319-320
[24] *Esso Petroleum Co. Ltd vs Southport Corporation* (1961) 1 WLR 683
[25] *St. Helen's Smelting Co vs Tipping* op cit at p. 68
[26] *Bridlington vs Yorkshire Electricity Board* (1965) ch 436
[27] *Rapier vs London Tramways Co* (1893) 2 ch 558

situated on the borders of both crime and tort. But public nuisance is generally considered to be a crime, simply because it affects the general public rather than a single individual, and for this reason discussion on public nuisance will only be made in this work to the extent that it affects tort.

3.2.1 Private Nuisance

One important thing which should be noted with regards to nuisance is that it protects use and enjoyment of land, and on this note it shares some characteristics with the tort of trespass to land. The tort has enjoyed a double life; and its origin lies in the medieval protections over land, and it was used in the nineteenth century by wealthy landowners to preserve their estates while the condition of many historical towns approached the infernal.[28] Private nuisance may therefore, take any of the following forms:

(a) Encroachment into neighbour's land which may take the form of spreading of roots of tree

(b) Physical injury to the land which is direct;

(c) Interference with use and enjoyment of the land.[29]

Private nuisance may be categorized into physical damage to property or substantial interference with use and enjoyment of the land (causing discomfort)..[30] The position of the law is that in private nuisance, where it affects use and enjoyment of land, it has to take place for a substantial period of time. In other words, a single act of nuisance may not be sufficient to ground an action.

3.2.2 Elements of Liability in Private Nuisance

For liability to arise in the tort of private nuisance certain elements must be exist otherwise any claim on the basis of nuisance would fail. These elements are discussed hereunder:

[28] Wightman, J. (1998) Nuisance-The Environmental Tort? Hunter v Canary Wharf in the House of Lords. *Modern Law Review* 61 (6), 879-885 at p. 870

[29] *Winfield and Jalowicz on Tort*. Op cit at p. 646

[30] *Eliochim (Nig) Ltd & Ors. vs Mbadiwe* (1986) 1.S.C.99

3.2.2.1**.** Interference**:** The kinds of interferences or annoyances that may constitute actionable nuisances are limitless.[31]But substantial interference with use and enjoyment of land may be one of such instances where liability may arise. As one of the forms which the tort of nuisance can take, this is not easily ascertainable because it is not physical that can be seen with the naked eyes. Also, courts do normally give priority to injury to land rather than enjoyment of it which may be an abstract.[32] For this reason, a test has been fashioned out on how to determine whether a particular interference or discomfort amounts to nuisance or not. According to *Luxmore J. in Vanderpar vs Mayafair Hotels Co. Ltd*[33]

> Whether the act complained of is an inconvenience materially interfering with the ordinary physical discomfort of human existence, not merely according to elegant lifestyle or mode and habits of living but according to plain and sober and simple notions obtained among English people. It is also necessary to take into account the circumstances and character in which the complainant is living…. Also, the question on the existence of nuisance is one of degree and depends on the circumstances of the case.

One fundamental issue is that since it is not easily ascertainable to determine nuisance with respect to use and enjoyment of land though it dwells on substantial interference. Defining substantial interference is also a difficult issue. This therefore requires the use of other factors for the purpose of precision.[34] Although the issue of use and enjoyment of land is fundamental to the tort of private nuisance courts in some cases disagree with claimants who bring an action under it because to them the claimants could not adduce enough evidence to prove that the nuisance is substantial to such an extent that it has interfered with the use and quiet enjoyment of the claimants land. This has been the approach of some English cases decided decades ago and adopted even in the twenty first century in Nigeria. Recently, the Court of Appeal in Nigeria adopted the same approach in two cases brought before it. In those cases, after proper articulation of the centrality of the

[31] James, P.S and Latham-Brown, D. J. Op cit at p. 178
[32] *Vanderpar vs Mayafair Hotels Co. Ltd* (1930) 1 Ch. 138
[33] ibid
[34]*Tebite vs Nigeria Marine & Trading Co. Ltd* (1971) 1 UILR 432

issue of use and enjoyment of land in the tort of private nuisance, the courts decided against the claimants on the ground that they could not adduce enough evidence to prove that the nuisances were substantial.

In the case of *Holios Tower Ltd vs Isiaka Bello & Anor*[35] the claimant/respondent is the owner of a three bedroom bungalow at No. 3 Adebayo Street, Ado-Ekiti. He sued the appellant/defendant in 2012 before the Ekiti State High Court of Justice claiming for trespass, nuisance and wrongful interference with the claimant's use and enjoyment of his land. He also claimed damages for the nuisance and the imminent negative biological effects caused by the appellant/defendant, who operated a mobile phone transmission mast installed near the respondent's/claimant's residential building. He claimed that the said mast made it difficult for him and members of his family to sleep as a result of the emission of noise and micro-wave from the transmission mast. The claimant told the court that he had to relocate to another residence due to the noise. The trial judge entered judgment in favour of the respondent/claimant and awarded two million Naira damages.

Dissatisfied, the appeallant appealed to the Court of Appeal and it was held that no nuisance was proved by the respondent. It was further held that the whole aim of nuisance is to protect one's right to peaceful enjoyment of property and damage to that right.[36] The law of private nuisance is designed to protect individual owner or occupier of land from substantial interference with his enjoyment thereof. That where an action is founded on interference with his enjoyment of land such as where a plaintiff complains of inconvenience, annoyance or discomfort caused by the defendant's conduct the interference must be shown to be substantial.[37] The court went further to hold that in view of the findings of the lower court it cannot be said that a case of nuisance has been made

[35] (2017) 3 NWLR (pt. 1551) 93
[36] Ibid at p. 115
[37] ibid

out by the respondent and that the respondent must show actual damage not speculation.[38] The question is whether a nuisance which made someone to abandon his house and relocate to another area is not enough to amount to substantial interference?

In another case of *Registered Trustees of the Living Bread Christian Centre vs Lt. Col. S..T Oluborokun*[39] the respondent sued the appellant at the High Court claiming for an injunction restraining the appellant and all the members of the church from further noise generated by their activities in conducting worship services at their premises which is adjacent to the respondent's residence and Five Million Naira damages for the nuisance generated due to the said activities of the appellant. The respondent complained that the rowdy manner in which the appellants carry out their activities, himself and members of his household are subjected to extreme panic and absolute sense of insecurity. It was further contended by the respondent that his household has been subjected to a lot of stress and trauma which have rendered them restless and that their house had become inhabitable as most of the activities of the appellants were conducted indiscriminately, ranging from sessions very early in the morning, afternoon and evening which rendered his children not being able to rest after school; and that sometimes those activities were carried out very late into the night leading to the next morning in the name of night vigils. The trial court gave its verdict in favour of the respondent and the appellant appealed to the Court of Appeal where the court *inter alia*, held as follows:

1. That nuisance is a branch of the law of torts which is closely connected to the environment. It covers areas such as pollution by oil spillage or noxious fumes and other offensive smells from premises or noise generated from industrial concerns and other human activities, obstruction of public highways etc,[40]
2. That private nuisance…may be described as an unlawful interference with a person's use and enjoyment of land or some right over or in connection with such right; private nuisance could therefore be in the form of physical injury to the plaintiff's property. It could also be in the nature of interference with

[38] Ibid at p. 116
[39] Supra at p. 2
[40] Ibid at p. 40

> use and enjoyment of land such as where the plaintiff is subjected to unreasonable noise or smelling emanating from the defendant's neighbouring land.[41]

From the above two decisions of the Court of Appeal two questions come into mind, the first being whether use and enjoyment of land which is one of the pillars upon which the tort of nuisance stands has been relegated to the background? Secondly, what amounts to substantial interference, especially in view of the fact that excessive noise could be a ground for an action in private nuisance? In answering these twin questions one must bear in mind that use and enjoyment of land is the essence of private nuisance despite the fact that where an alleged nuisance affects that use and enjoyment of land by individuals, it has to be substantial. With regards to the second question even the courts did not define when a nuisance could be said to be substantial though the court acknowledged the fact that an inconvenience or annoyance in the form of noise or smell is enough to ground an action in private nuisance where it has become substantial.[42] Despite that the court in both cases cited above, refused to grant an injunction or the damages sought even where someone and members of his household were caused discomfort of such a magnitude that denied them peaceful sleep which ordinarily is a corollary of quiet enjoyment of one's property.[43] This is in spite of the fact that the court has acknowledged in the *Trustees of the Living Bread's* Case that:

> The crucial issue in the law of private nuisance has always been how to strike a balance between the right of the defendant to use his land as he wishes and the right of the plaintiff to be protected from interference with his enjoyment of his own land. To strike a balance between the contending and conflicting rights of the parties the courts have held the view that if the injury or interference complained of is with respect to damage to land or use of such land, the injury or interference must be sensible, while if it is a case of interference with the plaintiff's enjoyment of his land the interference must be substantial. This is so because the law on private nuisance is

[41] ibid
[42] Ibid at p. 40
[43] See for example the case of *Registered Trustees of the Living Bread Christian Centre vs Oluborokun*, supra at p. 4

> designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof.[44]

Despite the court's acknowledgement of substantial interference as the foundation of the tort of private nuisance in the form of interference with enjoyment of land, it still went ahead to allow the appeal in the two cases mentioned above on the ground that substantial interference was not proved. Although enjoyment of land is an abstraction that is not physical in nature, certain parameters are necessary to know when interference is unlawful and therefore actionable. In this regards, one may say with all sense of modesty and humility that the court did not put into consideration the enormity of the noise that emanated from the defendant's premises to such an extent that the claimants were denied reasonable comfort in their residences and prevented from sleeping. The fact that the discomfort caused by the nuisance made one of the claimants to relocate to another area should have been enough evidence that there was actionable nuisance and at least award damages to him even if it would not grant the injunction he sought. The court should ordinarily have adopted the approach of the High Court of Lagos in the case of *S.O. Odugbesan vs I. O. Ogunsanya & Ors,*[45] where Adefarasin J held that:

> owners or occupiers of premises are entitled to use such premises for any purpose for which it may, in the ordinary and natural course of the enjoyment of land, be used but they are not entitled to apply such property or premises to extra-ordinary and unreasonable uses or purposes which would impose upon their neighbours burdens which in the ordinary course of things, they are not called upon to bear.[46]

The above case was decided in a circumstance similar to that of *Registered Trustees of the Living Bread* but the court agreed in the former that the noise emanating from the defendant's church was enough nuisance that could inconvenience the claimant and it granted an injunction to stop it. In arriving at his decision, Justice Adefarasin held further that:

[44] Ibid at p. 42
[45] Suit No LD 354/67/2/1970 (unreported)
[46] ibid

> It must be made clear that the defendants are entitled to conduct their worship in any manner they believe. They are entitled to their own beliefs however much these beliefs may be disagreeable to persons of other religious persuasion. However, much as the plaintiff may disbelieve or dislike the manner in which the defendants prayed or spoke in tongues or prophesised or were possessed of the spirit, he has no right to complain against the things…I find that the noise which the defendants make especially in the dead of the night and when they claimed to be possessed of the spirit was such as not only disturbed the comfort of the plaintiff but were so excessive as they would disturb any reasonable person in the neighbourhood, having regard to the standard of the locality…Although it is expected that everyone in an organised society must put up with a certain amount of discomfort from the legitimate activities of his neighbours, it is too much to expect any reasonable person to put up with an excessive noise in this case which goes on every day of the week to the extent that the plaintiff could hardly hear people talking in his house and it goes on from midnight to the morning on more than two nights in any one week.[47]

The above principle enunciated by Adefarasin J for determining when a nuisance could be substantial or not should have been the guiding principle for courts to adopt, by determining whether the act of the defendant is reasonable or not in each circumstance. But the two recent decisions of the Court of Appeal held otherwise because the court did not in its opinion believe that the discomfort which the defendants suffered in the two cases were not substantial enough to amount to an actionable nuisance. Perhaps it also did not consider locality as a factor in determining liability for private nuisance in the form of the abstraction "use and enjoyment", which is not physical in nature.[48] Locality or character of neighnourhood is also as important a factor as reasonableness when it comes to attaching liability in private nuisance because that is what will guide the court to be able to strike a balance between the interests of different land users with respect to the use and enjoyment of their respective lands. The fact that the locality is a residential area presupposes that the noise which ordinarily one could put up with should be limited, especially in the middle of the night where people should be sleeping. It has in fact been held that even in a noisy area,

[47] ibid
[48] *Tebite vs Nigerian Marine & Trading Company Ltd,* supra at p. 72

one does not have the free license to make excessive noise that surpasses a tolerable level that could constitute a nuisance in the area.[49]

3.2.2.2. Unlawfulness of the Defendant's Act: The act of the defendant can only be a nuisance where it becomes unlawful. Where the interference is not unlawful then it does not become a nuisance, hence no action would lie. It must therefore, not be thought that every kind of interference with one's neighbour's enjoyment of his land must necessarily become a nuisance, even if it takes the form of one of the kinds of annoyances which have been mentioned above as examples of activities which may be nuisance.[50]This is on the basis of the fact that the tort is founded on the principle of 'give and take' and 'live and let live'[51] The whole of the law of nuisance is an attempt to preserve a balance between two conflicting interests, where one occupier exercises his right to use his land as he thinks fit and that of his neighbour in the quiet enjoyment of his land.[52] Essentially, the tort of private nuisance as stated above, generally results from lawful activities, where an owner or occupier of land or premises has the right to use and enjoyment of his land so far as it does not interfere with his neighbour's use and enjoyment of his land. Barring such limitations, the owner of land has every right to use and enjoy his land without constituting a nuisance.

3.2.2.3. Unreasonableness of the defendant's Action: For the act of the defendant to be unlawful thereby constituting a nuisance, it must be unreasonable. Rogers, in a long paragraph itemised certain considerations which must be assessed before determining whether the act of the defendant is reasonable or not, where he said:

> Reasonableness signifies what is legally right between the parties taking into account all circumstances of the case. No precise universal formula is possible to determine reasonableness in the above sense. Whether an act constitutes a nuisance cannot be determined merely by an abstract consideration of the act itself, but by reference to all the circumstances of the particular case, the time and place of its commission, the seriousness of the

[49] *ibid*
[50] James P.s and Latham-Brown, D. J. Op cit at p. 179
[51] Per Bramwell B in *Banford vs Turnley* (1862) 3 B & S 66 at 84
[52] *Winfield and jalowicz on Tort*. Op cit at p. 647

> harm, the manner of committing it, whether it is done maliciously or in the reasonable exercise of right and the effect of its commission, that is, whether it is transitory or permanent, occasional or continuous; so that it's a question of facts whether or not, a nuisance has been committed.[53]

In summation, determining whether a particular act of the defendant is reasonable or not, is a question of fact, which requires the consideration of several factors, detailed of which are provided hereunder:

a) Duration of the nuisance

b) Abnormal sensitivity

c) Defendant's Malice

d) Character of the Neighborhood

e) Utility of the Defendants' Conduct

f) Fault

(a) Duration: The shorter the duration of the nuisance the less likely it is that the use will be found to be unreasonable**.**[54] Although the court may not grant injunction to stop temporary nuisance, it may award damages to compensate for the nuisance which has taken place already.[55] That notwithstanding, judicial authorities are however, not consistent as to whether an isolated or single act may constitute nuisance.[56] In that case Oliver J. held that: "a nuisance must be a state of affairs, however, temporarily and not usually an isolated happening*"*. In *Midwood v Manchester Corporation*[57] a single gas explosion was held to be a nuisance. Even though for an act to be a nuisance it is necessary that the act must not be temporary, circumstance will determine whether or not such act is a nuisance.

(a) Abnormal Sensitivity: The rule is that where the defendant or his property is injured simply because he or the property is abnormally delicate, the defendant will not be liable in

[53] Ibid at p. 649-650
[54] *Harrison vs Southwark Water Co* (1891) 1 Ch. 409
[55] ibid
[56] *Stone vs Bolt* (1949)1 All E.R. 237
[57] (1905) 2 KB 597.See also *British Celanese vs Hunt* (1969)1 WLR 959

nuisance if the plaintiff would not have been injured if he were not abnormally sensitive. Also, a man cannot make another liable in nuisance if he decides to put his property to a special use which makes it abnormally sensitive.[58] Noise emanating from the defendants' electrical power station was held not to be nuisance in *Roshmer vs Polsue & Alfieri Ltd* because the Minister was only inconvenienced because he was abnormally sensitive.[59]

(c) Character of Neigbourhood**:** By the authority of the case of *St. Helens' Smelting co. vs Tipping* the character of the neighborhood is not relevant in determining liability in cases of physical damage to property.[60] Where however the nuisance complained of relates to the use and enjoyment of property, this is a relevant factor. According to Thesiger L.J. *in Sturges vs Bridgman*: "what would be a nuisance in Belgrave square would not be necessarily so in Bermunsdey.[61] This is as good as saying that what could be regarded as a nuisance in Ikeja GRA or Victoria Island in Lagos may not be a nuisance in Ajegunle or Oshodi, in Lagos. In *Tebite vs Nigeria Marine Trading Co. Ltd*[62]the plaintiff, a legal practitioner was in occupation of a premises which he was using as his law office in Warri. The defendant had a workshop close to the plaintiff's law office where it carried out the business of boat building and repairing. The plaintiff sued the defendant for nuisance alleging that the noise and noxious fumes emanating from the workshop of the defendant continuously through their operation, was causing him discomfort and inconvenience. After assessment of evidence and a visit to the area, the court held that the defendant's machines did create considerable noise and offensive smells. The learned trial Judge in the case, having assessed the character of the locality where the defendant was carrying out its activities, held that it was such that "majority of the inhabitants were all above the lowest class in the community and that the defendant was an extra-ordinary neighbour who had

[58] *Robinson vs Kilvert* (1889) 41 Ch. D 68
[59] (1906) 1 Ch 234
[60] supra
[61] (1879) 11 Ch. 832
[62] Supra at p. 72

opened a workshop and produced noise which in my opinion is certainly a good deal more than any noise that can be produced even in the noisiest Nigerian district." The judge further held that both the noise and smells, had been proved to have substantially interferes with the plaintiff's comfort and convenience, he was entitled to damages and an injunction to restrain the continuance of the nuisance.[63]

(d) Defendant's Malice: The fact that someone uses his property maliciously to annoy or inconvenience his neighbour is a relevant factor in establishing the reasonableness or otherwise of the defendant's conduct. Malice here means spite or ill will or evil motive. For a plaintiff to sue on this, he must show to the court that the defendant maliciously interfered with the right of the plaintiff to enjoy his property. In *Christie vs Davey*[64] it was held that the act of the defendant of beating drums maliciously while the plaintiff was giving music lesson to his students was nuisance.[65]

(e) Utility of the Defendant's Conduct: The more reasonable and useful the defendant's act, the more likely, it is that the defendant's action is not a nuisance.[66] But the conduct of the defendant will not always be found reasonable merely because he shows that his conduct was beneficial or useful to the community.[67] This is so because the plaintiff should not be compelled to bear the burden alone, of an activity from which others may benefit.[68] In *Bellew vs Cement Co. Ltd*[69] the court refused to accept the argument of the defendants that they should escape liability on the ground that their cement production factory was vital to the interest of the public at a time when building was of urgent public necessity and that they were the only cement producers in the country. Despite this, an injunction was therefore, granted in an action for nuisance against the company, which led to the closure

[63] ibid
[64] (1893) Ch. 36
[65] *Hollywood Silver Fox Farms Ltd vs Emmet* (1936) 2 K.B 468
[66] *Bellew v Cement Co. Ltd* (1948) CR. 61,
[67] Enemo, P. I. Op cit at p. 440
[68] *Winfield & Jalowicz on Tort* Op cit at p. 12
[69] Supra

of the cement factory for three months. This decision is however, at variance with the one in the case of *Bantel vs Ridgefield Co.*[70] where the court refused to grant an injunction against a saw mill company on the ground that the operation of the mill was of great value to the community. What could be deduced from this is that even though a particular activity may be considered to be a nuisance, circumstance normally determines whether or not the court would grant an injunction to stop it. Court may probably be more willing to grant such an injunction where it realises the danger which the activity poses to the community far outweighs the benefit it brings to it.

3.2.3 Noise Nuisance

A noise is a noteworthy and unreasonable amount of sound from neighbouring premises.[71] The nuisance could be coming from a domestic or commercial property and may affect a person or his family in a significant way which is more than a simple annoyance.[72]Nuisance may be committed through noise and this work decides to single out noise nuisance for discussion in view of the fact that one may arguably say Africa is a noisy continent and for that reason neighbours do tolerate noise even to intolerable level. In Nigerua for example, people engage in disseminating all kinds of noises, ranging from exhaust of cars, motorcycles, noise from the use of generating sets, industrial noises from places of worship and noise generated by herbal medicine vendours that have recently permeated our cities and villages, which in some cases have moral implication.

Noise could either be private or public and both can be actionable where the law find it to be unreasonable and unbearable. Where it takes the form of private nuisance, an individual can sue ro recover damages and where necessary, injunction.[73] Where however, it takes the form of public nuisance, it has become a discomfort to the generality of the public or a

[70] (1924) 229 p. 306; 37 ALR 683
[71] www.charnwood.goveuk , retrieved on 23-01-2020 by 10:00 am
[72] Ibid
[73] *Registered Trustees of the Living Bread Christian Centre vs Lt. Col. S. T. oluborokun (supra)*

section of it, hence only the Attorney General can sue to protect the public for such unwanted noise.[74] Even where a nuisance is public in nature an individual may sue in private nuisance to recover damages where he believes he has sufferered damage over and above what has been suffered by the public generally. [75]

The kind of noise beig generated by herbal medicine vendours across the cities and villages in Nigeria calls for concern, despite the fact that they have been tolerated by governments and the citizens for quiet a long time. Tacklig this menace mey not be easy but governments, especially local councils could take steps to regulate these activities even if they would not ban them. This could be in the form of registration of all herbal vendors operating in their areas to ensure that they do not operate in such a manner that they would disturb the peace of the public.

3.3 Who Can Sue in Private Nuisance

Only persons having proprietary or other interest in land affected by the nuisance are entitled to bring an action.[76] Also, in the case of *Malone vs Laskey* it was held that only persons with strict proprietary interest, such as owners of property or tenants, could bring an action.[77] In that case, the Plaintiff who was the wife of a tenant was injured when a cistern unseated by vibration from the defendant's electric generator next-door fell upon her. When she sued it was held that she could not lay a claim for nuisance. That it was a matter entirely for her husband and that a person who is merely present in a house cannot complain of a nuisance which has no element of public nuisance. This position therefore excludes even the wives and children of an owner or the tenant, who do not own the land from bringing an action in nuisance. The same principle applies to lodgers in a hotel and

[74] *A. G. vs PYA Quarries, (supra)*
[75] ibid
[76] *Bamford vs Tunley* (1861-73) All ER 489
[77] (1907) 2 KB 141

licensees. The position in Malone was subsequently modified in the case of *Khoradsanjian vs Bush*[78]. The case of *Motherwell vs Motherwell*[79] which first set the ball rolling in reversing the position earlier taken by the English courts in Malone's case is a decision of the Supreme Court of Alberta, Canada, which was subsequently adopted by the House of Lords in the *Khoradsandjian's* case.

In the case of *Khoradsanjian* the plaintiff was an eighteen year old girl who was a friend of the defendant, aged 28. Their friendship broke down and the plaintiff said she would have no more to do with him, but the defendant did not accept that. As a result, there were so many complaints against the defendant, including assaults, threats of violence and pestering the plaintiff at her parent's home where she lived. The defendant's threats and abusive behaviour led him to be incarcerated in prison. It was held by the English Court of Appeal that the traditional requirement of an interest in land as a precondition for success no longer applies. It was further held that mere occupation as a home provided a sufficient link with the land so that spouses and other family members could bring an action for nuisance. Additionally, that harassing telephone calls can be restrained on the basis that they constitute a nuisance to the occupier.

As stated above, the decision in *Khoradsanjian* was influenced by the decision of the Supreme Court of Alberta, which changed the position of the law as enunciated in the case of *Malone vs Laskey*[80]. In *Motherwell vs Motherwell*[81] the appellate division of the Alberta Supreme Court I Canada recognized that not only the legal owner of a property could obtain an injunction on the ground of private nuisance to restrain persistent harassment by telephone calls to his home, but also, the same remedy was open to his wife who had no proprietary interest in the property. According to Clement J.A:

[78] (1993) 3 WLR 476
[79] (1976) 73 DLR (3rd) 62
[80] supra
[81] (1976)73 DLR (3d) 62

> "Here we have a wife harassed in the matrimonial home; she has a status, a right to live there with her husband and children. I find it absurd to say that her occupancy of the matrimonial home is insufficient to found an action in nuisance. In my opinion she is entitled to the same relief as is her husband".

The above decision though of persuasive authority, was accepted as the law in England, as evidenced in the case of *Khoradsanjian vs Bush*[82]. It was further accepted in the case of *Hunter vs Canary (wharf) Ltd*[83]by the English Court of Appeal though subsequently reversed by the House of Lords when the case went on appeal. In that case, the Canary Wharf Ltd undertook to construct a large tower (now known as One Canada Square), for commercial and residential purposes. The tower was completed in 1990, reaching 250 metres in height and 50 metres squared area. The tower which was situated less than 10 kilometres from the BBC's primary television transmitter in Crystal Palace, interfered with the reception of several hundred home owners. It was submitted that before the construction of the said tower in the summer of 1989, the television reception had been good. The problem was remedied in 1991 with the installation of a broadcast relay at Balfron tower to transmit television signal into the affected area. Despite this, the claimant/plaintiff alleged that the large metallic structure had interrupted their television reception and instituted an action in private nuisance for loss of enjoyment and remuneration for their wasted television license fee, for the time their signal had been impaired. In arriving at a decision, thereby reversing the English Court of Appeal which had earlier accepted the position in *Khoradsanjian* on who can sue in private nuisance, the House of Lords concentrated on two aspects of private nuisance. The first issue was who could be seen to have a legitimate right in land, which is a necessary requirement to sue in nuisance? The law Lords by four to one, rejected the decision in the case of *Khoradsanjian vs Bush*[84], which had earlier held that proprietary interest was not necessary to found an

[82] supra
[83] (1997) AC 655, (1997) 2 WLR 684
[84] supra

action in private nuisance. They however, reverted to the position in *Malone vs Laskey*[85] thereby establishing that only householders with a right to property could commence an action in private nuisance.

The second issue considered by the law lords was that after establishing who could bring an action for nuisance, what rights were protected by the tort? In the lead judgement, Lord Goff referred to three areas of private nuisance, where he said: "private nuisance are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with use and enjoyment of land".

On who can sue in the tort of private nuisance, Lord Goff (Goff of Cheverly) held *inter alia*:

> The question therefore arises whether your lordships should be persuaded to depart from established principles and recognise such a right in others who are no more than mere licensees on the land. At the heart of this question lies a more fundamental question which relates to the scope of the law of private nuisance…In any event it is right for present purpose to regard the typical case of private nuisance as being those concerned with interference with the use and enjoyment of land, and as such generally only actionable by a person who has a right in the land. Characteristics of example of cases of this kind are those concerned with noise, vibrations, noxious smells and the like. The two appeals with which your lordships are here concerned arise from actions of this character. In private nuisance of this kind the primary remedy is in most cases injunction, which is sought to bring the nuisance to an end and in most cases should swiftly achieve that objective. The right to bring such proceedings is, as the law stands, ordinarily vested in the person who has exclusive possession of the land. He or she is the present person who will sue, if it is necessary to do so…Moreover, any such departure from the established law on this subject such as that adopted by the Court of Appeal in the present case, faces problem of defining the category of persons who would have the right to sue.

The above position undoubtedly represents the position in England and indeed the United Kingdom in general. But despite this, Lord Cooke of Thorndon in a dissenting judgment held the view that the decision in *Khoradsanjian* is still the better law. This is in view of the fact that, the tort of nuisance is first and foremost a tort which protects use and

[85] supra

enjoyment of land.[86] This being the case then, the issue of whether one has proprietary interest or not, in order to be able to sue for nuisance should not arise in the first place. According to the law Lord:

> Private nuisance is commonly said to be an interference with the enjoyment of land and to be actionable by an occupier. But 'occupier is an expression of varying meanings, as a perusal of legal dictionaries show…Where interference with an amenity of home is in issue there is no *apriori* reason why the expression should not include, and it appears natural that it should include, anyone living there who has been exercising continuing right to enjoyment of that amenity…A temporary visitor, however, someone who is merely present in the house…would enjoy occupancy of sufficiently substantial nature. Malone's case, a case of personal injury from a falling bracket, rather than interference with amenities, is not directly in point, but it is to be noted that the wife of the sub-tenant's manager, who had been permitted by the sub-tenant to live in the premises with her husband, was dismissed by Gorell's Barnes P as a person 'who had no right of occupation in the proper sense of the term'…My Lords, whatever the acceptability of those descriptions 90 year ago, I can only agree with the appellate decision of the Alberta Supreme Court in *Motherwell vs Motherwell*, that they are rather light treatment of a wife, at least in today's society where she is no longer considered to be subservient to her husband.
> The status of children living at home is different and perhaps more problematical but, on consideration I am persuaded by the majority of the Court of Appeal in *Khoradsanjian vs Bush*…that they too should be entitled to relief for substantial and unlawful interference with the amenities of their home.

The learned law lord however, accepted the fact that private nuisance is concerned with land, but considered substantial occupation rather than proprietary right, a sufficient nexus.[87] Lord Cooke's dissenting judgment is undoubtedly something which should be considered because if holders of a proprietary interest in land could be allowed to sue for damage done to the land and their right to enjoy, occupiers with no such right should also be allowed such right since the amenity right which persons with proprietary interest in the land have, is shared with those who occupy or live with them without having any

[86] *Cunnard vs Antifyre* Ltd (1933) 1 KB 351 at 357
[87] Wightman, J. op cit at p. 5

proprietary interest. Denying them such right on the ground that they do not have interest in the land will be a great injustice to them.

Having considered the position in England as to who has the right to sue in cases of private nuisance, the next important question is to know the position in Nigeria. The problem in Nigeria is that the position is not clear as to whether a wife can sue in private nuisance or not but the law has made it clear that the power to sue lies with the person in possession.[88]

3. 4 Who Can be Sued

Generally, the person to be sued in the tort of Nuisance is the person who created it. This however, suggests that occupiers of land from where the nuisance emanates, would be liable once they are in control of it. Liability is therefore not limited to occupiers, for they will not necessarily be the ones who are responsible for starting the nuisance.[89] Therefore, since the matter is not entirely free from doubt, the law will hold responsible, anyone who created it or authorises the creation of the nuisance, and it will also hold responsible anyone who, having knowledge or the means of knowledge of it, permits its existence upon premises over which he has control of a state of affairs which gives rise to a nuisance.[90] The case of *Goldman vs Hargrave* has settled the matter with respect to the liability of an occupier of land for nuisance caused by the act of nature.[91] According to Lord Wilberforce, "occupiers of land were not simply under a duty to refrain from causing damage to the plaintiff, but could be under positive duty to take steps to prevent such harm from arising."[92] It should however, be noted that an occupier who does not instigate the occurrence of certain affairs which results in nuisance, would not be liable but he is duty

[88] *Holios Tower Ltd vs Isiaka Bello & Anor, supra* at p. 7
[89] James, P.S and Latham Brown, D.J. Op cit at p.187
[90] ibid
[91] (1967) 1 AC 645 See *Leakey vs National Trust* (1980) QB 485
[92] ibid

bound to take care of the state of affairs before it leads to the nuisance. From this, it therefore follows:

1) That a landlord who has relinquished possession and control of premises is not liable for any tort committed in it except:

a) Where the nuisance pre-existed the lease, if he knew or ought to have known of its existence, whether expressly or impliedly

b) Where he covenants with the tenant to abate it, liability passes to the tenant[93]. This is in a situation where an occupier or an owner of premises lets his house to a tenant.

c) Where the activity for which the land is rented is in itself a nuisance, the landlord will still be liable[94].

d) Where the landlord reserves to himself the express or implied right to enter and repair, in such cases, he will be liable for both Third parties and tenants for damage caused by the nuisance[95].

3.5 Public Nuisance in Relation to Tort

A public nuisance is some unlawful act or omission to discharge some legal duty, which act or omission endangers the lives, safety, health or comfort of the public (or some section of it), or by which the public (or some section of it) are obstructed in the exercise of some common right.[96] Nuisance is public where it materially affects the reasonable comfort and convenience of the public or a section of it that come within the sphere or neighbourhood of its operation, though it is a question of fact, determining whether the number of persons affected is sufficiently large to attract the description of public to the

[93] *Candy vs Jubber* (1865)9 B&S 15
[94] *Harris vs James* (1876) 45 LJ QB 545
[95] *St. Anne's Well Brewery Co. vs Roberts* (1928)140 LT and *Wringle vs Cohen* (1940)1 K.B 229
[96] James, P.S and Lathham Brown, D. J. Op cit at p. 203

nuisance.[97] The essential thing about public nuisance is that it is a crime punishable by the state, though it may also be restrained by injunction at the suit of the Attorney General acting on behalf of the public[98]. This is the position at least at Common Law even though the position of the law has been varied in Nigeria as we shall come to see later in the chapter. Judicially, Denning L.J also defined public nuisance in *AG vs PY Quarries Ltd* as: "a nuisance which is widespread in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should take on the responsibility of the community at large".[99] Since public nuisance is generally a crime it can only be a tort where a single individual claims that he has suffered damage over and above what has been suffered by the public at large, in which case he can institute a separate action. In *Adediran vs Interland Transport Ltd***,** Karibi- whyte JSC (as he then was), defines public nuisance to mean: "One which inflicts damage or injury or inconvenience to the generality of the population or upon all of a class who come within its ambit"[100]

Defining what particular damage is sometimes becomes problematic; while some authorities suggest it is an issue of peculiarity, some suggest it is an issue of degree. Cases such as *Savage vs Akinrinade & Anor*[101]*, Ejowhomu vs Edok-eter Ltd*[102]suggests peculiarity, others such as *Winterbottom vs Derby*[103] and *Rose vs Miles*[104], Suggest degree, but the latter opinion is preferred. This is because the second interpretation suggests that the private individual who wants to sue in public nuisance is doing so due to the fact that in addition to the injury which he has suffered in unison with the public, he has also suffered a

[97] *Clerk and Lindsell on Torts*. Op cit at p. 974
[98] James, P.S and Latham Brown, D. J. Op cit at p. 203
[99] (1957) 2 QB 169
[100] (1991) 1 NWLR (pt.214) 155
[101] (1964) UIL.R 238
[102] (Supra)
[103] (1961) 2 ALL ER 12
[104] (1930) ch. D 38

higher damage not suffered by others. At common law, where for any reason, criminal prosecution becomes an inadequate sanction, the Attorney General may on the information of a member of the public bring a civil action through a Relator Action (the Attorney General being a relation of the plaintiff).. [105].

However, recent developments in Nigeria have modified the law from what it was known under the common law. This led to the emergence of a new position where an individual can sue even where nuisance is considered to be public without the assistance of the Attorney General. This is by virtue of the decision of the Supreme Court of Nigeria in the case of *Adediran vs Interland Transport Ltd*[106] where Karibi-Whyte JSC, held the view that it is unconstitutional for anybody to stop an individual from suing simply because it is a public nuisance.[107] In that case, the appellants (plaintiffs) were the resident of Ire-Akari Housing Estate, who had formed themselves into an association called Ire-Akari Housing Estate Association. The respondent (defendant) was a transport company which owned and operated many heavy trucks that were causing excessive noise at odd hours and causing vibrations over the estate. The trucks were also said to have blocked access roads to the houses of residents and caused enormous pollution of the environment by their numerous workers. With leave of the court the appellants sued the respondent in the High Court of Lagos State, claiming an injunction to stop the nuisance being caused by the vehicles and workers of the respondent in the housing estate. They also claimed damages for the damage to facilities and amenities in the area. The trial court found for the appellants in respect of all the claims holding that the nuisance was private. The appellants (respondents) appealed to the Court of Appeal, which set aside the judgment of the trial court and struck out the plaintiff's claim. The Court of Appeal held *inter alia*, that the nuisance committed was public and since not all the residents of the estate were members of the association; and the

[105] *A.G. v. Logan (*1891)2 QBD 100
[106] Supra at p. 23
[107] ibid

nuisance complained of was so widespread, including non-members, they were therefore, of the category of public nuisance and not private nuisance.

Dissatisfied, the appellant appealed to the Supreme Court, which allowed their appeal in part but struck out the suit. The appellants, just like they did at the Court of Appeal, contended that persons seeking to bring an action in nuisance will not be inhibited by the common law distinction between public and private nuisances; and that it is not necessary to persuade the Attorney General to bring a relator action relying on Section 6(6)(b) of the Constitution of the Federal Republic of Nigeria 1979.[108] They also contended that the common law distinction between public and private nuisances still subsists and remained unaffected by the above constitutional provision. In addition, they contended that public nuisance actions can only be instituted by the Attorney General himself or in his nominal capacity as a relator of those affected. Delivering the leading judgment of the Supreme Court, Karibi-whyte JSC ruled that the interposition of the Attorney General was not to rob the person injured by the nuisance of his right of action or the recourse to justice but to protect the generality of the population where their interest is involved.[109] The learned Justice held further that:

> …the basic law of the country is the constitution which came into force on 1st October, 1979 and Section 1 makes it supreme, its provisions having binding force on all persons and authorities…therefore, the distinction between public and private nuisance at common law on the right of action in public nuisance is inconsistent with the provision of Section 6(6)(b) of the 1979 Constitution (now 1999 as amended). This means that the rules of common law on the right of action, which is an existing law (based on the rule of common law), and which has to be in existence only in accordance with the constitution, is now inconsistent with it and therefore, cannot stand.

For clarity of understanding it will be of importance to reproduce the aforesaid provision of the Constitution, starting with the provision of Section 6(6)(1) which provides that: "The judicial powers of the federation shall be vested in the courts to which this

[108] This provision is *in pari materia* with similar provision in the 1999 Constitution (as amended)
[109] Supra at p. 24

section relates, being courts established for the federation." Section 6(6) (b) further provides:

> The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

By the above provision, the court has been given the power to adjudicate disputes between individuals or between individuals and government so far the civil rights and obligations of such individuals are involved. Relying on the above provision, the learned Justice of the Supreme Court further held that since the constitution has vested the courts with the power of determination of the civil rights and obligations between persons or between government or authority and any person in Nigeria where such is in issue, any law which imposes conditions is inconsistent with the free and unrestrained exercise of that right and is void to the extent of such inconsistency.[110] To buttress the court's position on this issue, Karibi-whyte, further asserts that:

> It is well settled that a nuisance, whether public or private is an injury which confers on the person affected a right of action. Even where the private individual brings action as the relation of the Attorney General, he must disclose a right of action on his own account. The Attorney General is merely a nominal party; in reality it is the civil rights and obligations of the person who has sustained injury that is in issue. Hence in certain circumstances, even an injury to the public may also constitute an injury to the individual. The burden is on the individual to establish his injury; the individual who suffers injury has a right of action because of the cause of action.

The learned Justice concluded by declaring that "the distinction between public and private nuisances has been abolished by the 1979 constitution; that the exercise of the right of action for nuisance is no longer based on or determined by the distinction"[111]

[110] ibid
[111] ibid

Does the above pronouncement by the Supreme Court of Nigeria mean that the common law distinction between public and private nuisance has been abolished as claimed by the court? This may not be wholly true because public nuisance still remains public while private nuisance also remains private. But it may be quickly added that for the purpose of instituting an action, an individual does not require the sanction of the Attorney General, even where the nuisance is public. However, one point worthy of note especially with regards to whether an individual has the right to institute a civil action for public nuisance is that, for an individual to have done that, he must have suffered damage over and above what was suffered by the general public or a section of it (including him). This is when the matter will be within the purview of the law of torts otherwise the kind of nuisance is public and therefore, has no business with tort. Also, the law has made it mandatory for an individual while suing privately for public nuisance, to join the Attorney General only as a nominal party.

3.6 Private Nuisance as it Affects Incorporeal Property (Non Possessory Rights)

An incorporeal property is an intangible property having value but is lacking physical substance, such as leases, mortgages and property rights.[112] Actions for private nuisance also extend to interferences with incorporeal rights, such as easements, *profits-d-aprendre* and other rights such as the right to support one's land by one's neighbour, which are inherent in the occupation or ownership of the land concerned, and which unlike easements and similar incorporeal hereditaments, do not need to be acquired by grant or prescription.[113] One feature which makes this type of nuisance distinct from private nuisance *simpliciter* is that, it is actionable without proof of actual damage, ie damage in

[112] www.businessdictionary .com visited on 30/12/2018 by 5:30 pm
[113] James, P.S and Latham Brown, D.J. Op cit at p. 193

this kind of private nuisance is presumed by law or one may call it actionable *per se*. These type of private nuisances, include:

3.6.1 Interference with the Right to Support (Lateral Support): This type of right manifests in two different ways, which are support for land and support for building. The right to have one's land supported by one's neighbouring land is a natural right,[114] and a nuisance will be said to have been committed where such support is removed either laterally (where the support is from the side) or, where the ownership of the topsoil of the land is different from the ownership of the subsoil, beneath.[115] The actual subsidence of the plaintiff's land is the essence of this claim not just the withdrawal without effect. Where therefore, a series of subsidence separated by intervals of time are caused by a series of excavation, each new subsidence grounds a fresh cause of action and the nuisance arises when the support ceases to do its work not when the excavation is made.[116] It should however, be noted that although the right to support for land is a natural right it is not inalienable and the right to withdrawal may therefore, be granted or reserved for another.

3.6.2 Interference with Right to Light (Easement of Material light): The right to light is not a natural right but a right in the nature of an easement which must be acquired by grant or prescription. Once acquired however, any interference with it, for example, by way of building, which diminishes the light, can constitute an actionable nuisance.[117]

3.6.3 Interference with Air (Riparian Right): Right of the access to air just like the right to light may also be acquired by grant or prescription. Where such happens, any

[114] *Humpheries vs Brogden* (1850) 12 QB 739
[115] James, P.S. and Latham Brown, D. J. Op cit at p. 103
[116] *Darley Main Colliery Ltd vs Mitchell* (1886) 11 App. Cas. 127
[117] ibid

subsequent infringement of the right constitutes a nuisance. As it is the case with right to light, this right is built on access to the land through a defined aperture not to access of the air to the plaintiff's land generally.[118] Therefore, if someone builds a school-house which blocks the passage of air to another person's windmill there will be no cause of action.[119] It is however, a nuisance to obstruct an acquired right of access for air through some defined channel to the plaintiff's premises.[120]

3.6.4 Interference with Right to Absorption of Water: According to Lord McNaughton "every riparian proprietor is entitled to the water of his stream in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.[121] A riparian proprietor is the owner of a land abutting upon a stream, and such ownership carries with it a certain natural right to the water of the stream naturally.[122] Interference with this right is a nuisance and it may take various forms, principal of which are abstraction, interference with the flow of the stream and pollution.[123] It should however, be noted that water rights may be claimed in respect of streams, except in the case of pollution, and defined channels whether above or below the ground. It is therefore, no wrong to abstract or divert water which merely percolates in undefined channels[124] whether upon or below the surface of the soil.[125] With regards to obstruction therefore, subject to the rights of other riparian proprietors higher up a stream, every riparian proprietor has a natural right to the undiminished flow of water from a natural stream and anyone who

[118] James, P.S and Latham Brown, D. J. Op cit at p. 197
[119] *Webb vs Bird* (1861) 10 CB & S 268
[120] *Bass v Gregory* (1890) 25 QBD 481
[121] *John Young & Co vs Bankier Distillery Co* ((1893) AC 691
[122] James, P.S and Latham Brown, D. J. Op cit at p. 198
[123] ibid
[124] See *Chasemore vs Richards* (1859) 7 HL Cas. 349
[125] ibid

abstracts the water of such a stream commits a nuisance which is actionable without proof of special damage.[126]

In view of the above therefore it should be noted first and foremost that abstraction is not similar to diversion; so that if the water which is taken from the stream is returned to it before it passes to the plaintiff's land undiminished in quality and unaffected in quantity, he will have no claim.[127] Secondly, every riparian proprietor has a right to take water from a stream for what may be referred to "ordinary or primary purposes" or domestic purposes, including what could be used by his cattle.[128] This, he can do without having any regard to the effect that it may have upon proprietors lower down the stream.[129] Thirdly, a riparian proprietor may also abstract water for "extraordinary or secondary" purposes such as irrigation or manufacturing but he may only do so where his use of the water is reasonable and it must be connected with his use of the riparian land and provided that it does not inflict sensible injury to other riparian proprietors down the stream.[130] One last point to note is that a riparian owner is only confined to the riparian uses and where a person whose land happens to cross a stream by several hundred miles on either side cannot claim to exercise such rights beyond a reasonable distance from the stream.[131]

3.6.5 Interference with Private Right of Way on the Highway: This is a natural right, and interference with it constitutes a private nuisance but its scope is limited in the sense that it is available only to occupiers of premises abutting upon the highway and accords them only the freedom of access to any part of their frontage from it.[132] Therefore, an occupier whose gateway has been obstructed will have a right of action but he will have no claim in respect of obstructions which prevents him from

[126] *Samson vs Hoddmott* (1857) 1 CB & S 590
[127] *Kensit vs Great Eastern Railway Co* (1884) 27 QBD 122
[128] *McCartney vs Londonderry Railway Co* (1904) AC 301
[129] *Minor vs Gilmor (*1858) 12 Moo PCC 131 at 156
[130] *Rugby Joint Water Board vs Walters* (1960) Ch 397
[131] ibid
[132] *Cabb vs Saxby* (1914) 3 KB 822

doing things upon the highway itself. In *W.H Chaplain & Co Ltd vs Westminster Corporation,*[133] the defendant erected a lamp standard in a public street opposite the plaintiffs' business premises, which caused the plaintiffs an inconvenience in loading and unloading their vans but their claim of that being an interference with their right of access failed. It was contended that though it was true that the process of loading and unloading might have been impeded, the plaintiffs' freedom to go from the pavement to their premises was in no way interfered with

3.7 Defences to Nuisance

3.7.1 Abatement of Nuisance

Abatement of nuisance refers to a situation where nuisance committed by another could be removed by a person against whom it has been committed without recourse to the court, through self-help. But the rule is that once a victim of nuisance decides to on his own abate a nuisance without seeking the assistance of the court, he cannot come back to claim other available remedies.[134] Right of abatement is therefore, the right to remove the cause of the nuisance and no more; it is not a license to inflict unnecessary damage upon the person responsible, nor is it a right of retribution.[135] However, there is no right to abate where the nuisance is something only remotely apprehended; for instance, a man is not entitled to pull down scaffolding on his neighbour's land simply because he fears that the house to be built thereon may, when built, infringe his ancient light.[136] One fundamental thing worthy of note is that abatement is still available even where a mandatory injunction

[133] (1901) 2 Ch 329
[134] *Lagan Navigation Company Co vs Lamberg Bleaching, Dyeing and Finishing Co.* (1927) AC 226 at 244
[135] James, P.S and Latham Brown, D. J. Op cit at p. 211
[136] *Norris vs Baker* (1616) 1 Roll Rep. 393 See also James, P. S and Latham Brown, D. J. Op cit at p. 211

to restrain a nuisance has been denied.[137] Being a self-help mechanism, in abating a nuisance the following conditions must be observed:

1) In abetting a nuisance, care must be taken not to put security of lives or property of the people at risk. Adequate notice must also be given unless where the nuisance can be abated without entering the defendant's premises or time does not allow for giving of notice.[138]
2) The defendant must not do unnecessary damage to the property while abating the nuisance.
3) Where there is more than one way of abating the nuisance, the method which involves the least cost to the defendant should be employed unless it will have a detrimental effect on the interest of innocent third parties or on the public at large.

In most cases, abatement may not be successfully executed without going into the land. Where abatement requires that the abettor may enter upon the land which harbours the nuisance he may do so, provided he keeps within his rights, otherwise he may thereby become liable. But before entering the land he must first give notice to the occupier requesting him to abate the nuisance as his entry would only be justified where the creator of the nuisance fails to do so.[139]

3.7.2 Prescription. This is a special defence available with regards to nuisance which absolves liability irrespective of the magnitude of the nuisance because it has been taking place over a long period of time. By prescription, one gets the right to continue a private nuisance and this right is acquired as an easement after the nuisance taken place for a period of 20 years without complaint by the claimant.[140] This defence is only available to

[137] *Lane vs Gapsey* (1891) 3 Ch 411
[138] *Lennon vs Webb* (1895) AC 1
[139] *Jones vs Williams* (1843) 11 M&W 176
[140] Gandhi, B.M, op cit at p. 340

defendants in private but not public nuisance.[141] Therefore, if an activity adjudged to nuisance is being carried out or enjoyed by a person peaceably, openly, as of right, without interruption and for up to 20 year, the activity is legalized *ab initio* as if the same had been authorized by the owner as a grant.[142] In the case of *Sturges vs Bridgman*, a confectioner and a physician occupied adjoining premises. In connection with his business, the confectioner used two large pestles and mortars and the noise and vibration had not seemed to the physician to be nuisance until he built a consulting room at the end of his garden against the wall of the confectioner's kitchen in which the pestles and mortars were operated. The consultant sought an injunction to restrain the use of the pestles and mortars in such a manner as to cause him annoyance. When the confectioner raised the defence of prescription as he claimed to have operated for 20 years, it was held that the act 20 years period cannot commence to run until the act complained of begins to be a nuisance. The court further held that the defence of prescription could not avail the defendant in this case.[143]

3.7.3 Necessity. This is more or less akin to an emergency which made one to commit a nuisance simply to avoid certain risk. The question as to whether a defendant can escape liability for creating a state of affairs that unreasonably interfered with another's use and enjoyment of his land arose and was answered in the case of *Southport Corporation vs Esso petroleum.*[144] In that case, a tanker got into some difficulties and fearing for the ship and the safety of his crew, the captain discharged his cargo of oil to make the tanker lighter. The oil discharged from the ship polluted the plaintiff's beach. Although the House of Lords was divided in its ruling, it was generally held that for the defence of necessity to avail a defendant he must prove that his action was unavoidable and the necessity should

[141] ibid
[142] Ibid
[143] (1879) 11 Ch.D 852
[144] (1956) 2 WLR 81, (1956) 3 All ER 864 (HL)

not be a result of the defandant's carelessness. It was also held that the defendant could only rely on the defence if he was not negligent.

3.7.4 Statutory Authority. This is an authority which is given to public authorities to carry out certain activities for the benefit of the public, even if they may constitute a nuisance. These activities include, running railways, water and electricity supply as well the disposal of sewage.[145]Where a nuisance is cause in the course of carrying out such activities, the public authority responsible for the nuisance may escape liability by pleading statutory authority.[146] In the case of *Lagos City Council vs Olutimehin*,[147] the appellant brought an action against the Lagos city council, complaining of the emission of certain offensive smells and vapours from the council's nightsoil depot which was situated close to the appellant's church and school. The respondent council pleaded the defence of statutory authority, arguing *inter alia*, that they were acting under a duty imposed upon them by Section 140 (50 of the Lagos Local Government Act, 1959, which provided that "it shall be duty of the council within the town to…provide for the removal of nightsoil and disposal of sewage from all premises and houses in the town." The Supreme Court held that the respondent could not rely on the defence of statutory authority since the duty imposed by statute was to remove nightsoil not to dispose of. Nor was the disposal of sewage (expressly mentioned in the statute) to be equated with the disposal of nightsoil.

3.7.5 Act of God. The defence of Act of God is one of the defences which may be raised by a defendant in virtually all torts. This defence when raised successfully could absolve the defendant from all forms of liability. Lord Westbury defined the defence in the case of Tennant vs Earle of Glasgow, to mean "an operation of natural force to which no human foresight can provide against, and of which human pretence is not bound to recognize the

[145] Aluko, O and Kodilinye, G, op cit at p. 111
[146] Ibid at pp. 111-112
[147] (1969) 1 All NLR 403

possibility.[148] When a defendant pleads an act of God as an answer to liability, he may deny that he was at fault.[149] This defence was illustrated by the case of *Blyth vs Birmingham Water Corporation*,[150] where the defendants constructed water pipes which were reasonably strong enough to withstand frost. There was however, an extraordinary severe frost that year causing the pipes to burst, resulting in severe damage to the plaintiff property. It was held that though frost was a natural phenomenon, the occurrence of an unforeseen frost can be attributed to an act of God, which relieved the defendants of all liability.

3.8 The Rule in *Rylands vs Fletcher*[151]

The rule in Rylands vs Fletcher was fashioned out to address the problem to property which occurs without fault of any nature. When the rule was first formulated by Blackburn J in the middle of the nineteenth century it looked set to play a significant role in tort law, but with the advent of the tort of negligence and judicial concern about the imposition of strict liability in any but the most extreme circumstances, meant that it never fulfilled its early promise.[152] The rule in *Rylands v Fletcher* is one rule which has some similarities with the tort of nuisance hence the need to discuss it in order to show the relationship between the duo, including areas of convergence and divergence. Philips James and Latham Brown have summarised the relationship between the two torts as follows:

> The law of nuisance renders a person liable for annoyance and danger caused by his failure to control resources for which he is responsible. It makes him, moreover liable, for certain hazards which results from the culpable recklessness of his independent contractor (as when a badly

[148] (1864) 2. M. 22
[149] Agarwal, A (2014), *General Defences in Torts*, retrieved from www.lawctopus.com on 26/10/2019 by 4.20pm
[150] (1856) 11 Ex Ch 781, 156 ER
[151] supra
[152] ibid

> mended racket falls onto a passer-by on the highway), and also for some inherently dangerous things or activities, such as large open fires or engine sparks irrespective of fault. In keeping with this doctrine of strict liability for dangerous property or conduct, a specific corollary has evolved, epitomised as the principle of liability under the rule in *Rylands vs Fletcher*, the case in which it was first formulated as a distinct head of tortious liability.

The above summarises how nuisance and the rule in *Ryland vs Fletcher* are intertwined though the two are guided by separate rules and conditions for liability. Nuisance and the rule in *Ryland vs Fletcher* do overlap into each other in modern times a situation which made the rule to be treated in England and Wales as an extension or a branch of private nuisance, while it has been absorbed into negligence in Australia.[153] This therefore, provides an alternative rule to liability without fault where some hazardous activities are involved.[154] One thing worthy of note is that liability in this tort is not based on any of the fault elements known to law of torts[155]

The rule in *Ryland vs Fletcher* was first laid down by Blackburn J. in 1868, in the above case as follows:

> We think that the rule of law is that where a person who for his own purposes brings on his land and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.

In that case, the defendants, John Ryland and Horrocks, owners of a mill, retained independent contractors to build a reservoir on their land to supply water to their mill and in the course of doing that the contractors came across some old shaft and passages which communicated with the mines of the plaintiffs. The contractors could not through their negligence discover the fact that the shafts communicated with the plaintiff's mines, for the shafts were thought to be filled with earth and so they did not block the shafts up.

[153] Steele, J (2007) *Tort Law, Cases and Materials*, Oxford University Press, p. 675
[154] ibid
[155] Zahid, A. I The Rylands v Fletcher Rule and the Modern Trend, retrieved from www.juristlaw.com on 29/08/2017

Consequently, when the reservoir was filled, water escaped down the shafts and flooded the mines of the plaintiff, causing damage later. It was held that a person who in the course of non-natural use of land, inflicts damage on the land of another, would be responsible for the accumulation on it, of anything likely to do harm if it escapes and is liable for the interference with the use of the land of another which results from the escape of the thing from his land. For a defendant to be liable for this tort and under the rule in *Ryland vs Fletcher* the following ingredients, as captured in the dictum of Blackburn J., must exist:

a) Dangerous object
b) Accumulation
c) Escape
d) Occupation
e) His own purpose
f) Non-Natural use (r)
g) Damage

1. Dangerous object: This is the kind of object which is considered dangerous to human life. It includes things which are inherently or naturally dangerous, such as explosives, liquefied gas, petrol or chemicals; and those that are relatively innocuous, which only becomes hazardous when they are accumulated in large quantity such as water, sewage (except where the purpose for which they were kept is natural).[156] The question to consider here is whether the thing so accumulated or brought on to the land is dangerous not just dangerous *per se*. Even on this, liability arises only where the dangerous object was brought unto the land artificially by the defendant[157]. The defendant is however, not liable for natural occurrence, to which he has no control[158].

2. Accumulation: This refers to a situation where the defendant brought something unto his land which escapes and injures another. This is devoid of whether or not something is

[156]*Rainham Chemical Works Ltd vs Beldevere Fish Guano Co* (1921) AC 465, *Oladehin vs Continental Textile Mills Ltd* (1975)6 CCHCJ 1269
[157] *Bartlet vs Tottenham* (1932) 1 Ch. 656
[158] *Wilson vs Waddel* (1976) 2 A.C. 95, Gilles vs Walker (1890) 62 LT. 933

inherently dangerous. Accumulation it is submitted, relates to something which may not inherently be dangerous such as gas, but becomes dangerous because it was kept in large quantity such as water. Even though there is no strict categorisation of the things which are likely to cause mischief when they escape, things like water, electricity and gas which may likely pollute water supply may qualify in this category.[159] The defendant is however not liable for accumulation due to natural forces such as erosion which leads to accumulation of sand that subsequently wreaks havoc to someone's property.[160]

In Nigeria, the court has articulated the principle on accumulation of dangerous object in the case of *National Oil and Chemical Marketing Plc vs Kamaruddeen Leye Adewusi*[161]. In that case, the first respondent was one of the thirty four people whose properties were destroyed by fire caused by oil spillage from a tanker driven by the 4th respondent. The tanker was owned by the second respondent which he gave to the third respondent and the latter employed the 4th respondent as a driver of the tanker to distribute petroleum products. The 2nd respondent and the appellant entered into haulage contract for the appellant to use the tanker to transport petroleum products to the appellant's filling stations. The name of the appellant's company was also inscribed on the tanker in compliance with NNPC directive. The tanker had accident and summersaulted thereby spilling oil which led to a fire that destroyed the respondent's shop. The 1st respondent claimed that the accident occurred due to the negligence of the 1st respondent and therefore prayed the High Court of Lagos State to award him general and special damages against the appellant, 2nd – 4th respondent, jointly and severally. Other people whose properties were affected gave evidence to buttress the 1st respondent's claims but the appellant denied the ownership of the tanker, claiming she was only the employer of the 4th respondent .and was therefore, not vicariously liable for his negligence. The trial court entered judgment for

[159] *Batcheller vs Tunbridge Wells Gas Co* (1901) 84 LT 765
[160] *Pontadarwe Rural Council vs Mooregwyne* (1929) Ch 656
[161](2009) All FWLR (pt. 455) 1669

the 1st respondent and the appellant appealed to the Court of Appeal. In delivering its judgment, the Court of Appeal stated the rule governing the application of the rule in *Rylands vs Fletcher* as stated by Lord Cairn more than one hundred and forty years ago. It also stated that for the rule to apply "there must be an accumulation of things such as water, gas, petrol, chemicals or explosives; and there must be an escape of the accumulated material from the defendant's land to a place outside that land.[162] The court held further that in the instant case the rule applies and the trial court rightly held the appellant vicariously liable for the damage caused by the 4th respondent.[163]

3. Escape: For any injured party to be compensated under this rule, the object which injured him must have escaped from the defendant's premises. But where the plaintiff gets injured by the defendant's act while in the latter's premises, the defendant would not be liable under this rule as there is no escape.[164] According to Lord Simon in the above case, escape for the purpose of applying the proposition in the Ryland's case, means escape from a place where the defendant has occupation or control over land, to a place which is outside his occupation or control. This does not however, mean that the defendant will not be liable in other torts; he may be liable in the tort of negligence where it can be established that the injury to the plaintiff occurred as a result of the defendant's negligence.[165] Also, in the case of *National Oil & Chemical Marketing Co Plc vs Adewusi,*[166] it was held that for liability to arise under the rule in *Ryland vs Fletcher* there must be an escape of the accumulated material from the defendant's land to a place outside that land.

The escape requirement has been extended beyond its original sphere in some subsequent cases. In *Charing Cross Electricity Supply Co vs Hydraulic Power Co*[167] it was

[162] Ibid at p. 1681
[163] ibid
[164] *Read vs J Lyons Ltd* (1947) AC 156
[165] *NEPA vs Ali* (1992) 8 NWLR (pt. 259) 279
[166] supra
[167] (1914) 3 KB 772

held that there was a sufficient escape when water from the main, laid by the defendants under the highway, escaped and damaged the electric cable which was near to it and under the same highway. The rule would also apply to a dangerous thing brought by the defendant on a highway and injury arising to a person passing along or to a person near the highway.[168] In the modern application of the rule for there to be liability the escape must lead to a damage of a foreseeable type.[169] It therefore, presupposes that the claimant would not be able to recover if the type of damage he suffered was not of a type which is reasonably foreseeable in the circumstance.[170] It was indeed the failure of the claimant in the case of *Cambridge Water Corporation (CWC) vs The Eastern Counties Leather (ECL) Plc* that made them to succeed because the court was of the opinion that the damage suffered was too remote.[171] This modern approach in essence has imported the idea of negligence into the rule in *Rylands vs Fletcher,* thereby modifying and extending the rule beyond what was conceived by Justice Blackburn in 1868.

Based on the above can one say the liability under the rule in *Rylands vs Fletcher* still belongs to the torts where liability is strict? An apt answer is no, especially in view of the fact that fault element has been introduced into it, where the claimant must prove to the court that the type of injury he has suffered as a result of the action of the defendant is one that is reasonably foreseeable. This requirement seems to go against the purpose of strict liability, which has made it basically, more difficult to succeed in any claim taken against generally industrialised activity which the tort sought to protect against.[172]

4. Occupation: For a defendant to be liable under this tort, the escape which injured the plaintiff must have emanated from the land in occupation of the former. Therefore, even where someone owns a land he can only be liable if the escape of a dangerous object from

[168] *North Western Utilities vs London Guarantee and Accident Co* (1936) AC 108
[169] https//www.lawteacher.net, visited on 11/02/2019 by 7:20 am
[170] ibid
[171] (1994) 1 All ER 53
[172] ibid

the land which injures another, is in his occupation or where tough not in occupation but authorised it.[173] Ooccupation may not necessarily be physical occupation. Any form of control may suffice hence, once a defendant is in control of the premises he would be liable even when he is not in occupying it in strict sense[174].

5. His own purpose: This is to the effect that the rule only applies where the land owner brings onto the land the object which escaped to cause damage for his own purpose. He will however not be liable where the thing brought onto the land were for the purpose of another, though he may be liable under other torts[175]. But he will also be liable if he shares a purpose with a third party. This principle has been restated by the Nigerian courts in *National Oil and Chemical Marketing Plc vs Adewusi and Ors*[176]

6. Damage: For the defendant to succeed in any cause of action he brings against the defendant he must have suffered injury. The kind of injury or damage envisaged here must be actual or physical damage, otherwise he will not succeed. Damage here must not only be damage to self; it may also be damage to immovable property (as it is the case in *Rylands vs Fletcher*), or damage to fixtures, including the subject matter of a franchise.[177]

7. Non-natural Use: The rule in *Rylands vs Fletcher*[178] under which a land owner can be held strictly liable for a "non-natural" or (special use) of his land which causes damage to his neighbour has had a chequered history.[179] This ingredient was absent in the dictum of Justice Blackburn, it was added by Lord Cairns L.C when the matter went on appeal to the House of Lords[180]. The ingredient of non-natural use has today assumed great significance in determining liability under the rule. Determining which type of use is natural and which

[173] *Rainham Chemical Works vs Beldevere Fish Guano Co* (Supra)
[174] *Midwood vs Manchester Group* (1905)2 K.B 597
[175] *Rainham Chemival Works vs Beldevere Fish Guano Co*. (Supra)
[176] Supra at p. 1669
[177] James, P.A. and Lathan, D. J. Op.cit at p. 216 See *also Charing Cross Electricity Supply Co. Ltd v Hydraulic Power Co. (supra)*
[178] Op cit
[179] Fordham, M. (2004) Surviving the Odds-The Rule in Rylands v Fletcher Lives on: Transco Plc v Stockport Metropolitan Borough Council. *Singapore Journal of Legal Studies*, 7(1), 241-250
[180] See (1961) 24 MLR 557

one is non-natural is not very clear but circumstance would determine whether a particular use is natural or not. There are however, some guidelines on determining whether a particular use is natural or not. According to Lord Moulton in the case of *Rickards v Lothian*:[181] "the phrase non-natural use mean…some special use bringing with it increased danger to others, and must not merely be ordinary use of land or such use as is proper for the general benefit of the community." Non-natural use may also mean that use which exists by nature and not artificial.

Despite the above difficulty in trying to define what the phrase non-natural means, it is worthy of note that determining whether a particular use is natural or not, is a question of fact: and all circumstances of the time and practice of mankind must be taken into consideration, so that what may be regarded as dangerous or non-natural may vary from circumstance to circumstance.[182] Based on this therefore, installation of water pipes in buildings, working the mines and minerals, lightening of fire for cooking and heating rooms, have all been accepted to be natural use.[183] This is simply because these uses have for time immemorial been accepted in human life as normal. In determining what kind of use is extraordinary or unreasonable use the court may have regard not only to the interest of the defendant but also that of the public.[184] In the case of *British Celanese (capacitors) Ltd vs A.H Hunt Ltd*[185] The defendant, manufacturers of electronic components, stored on their land metal foil in such a way that there was an escape of it on an isolated occasion, resulting in a flash-over at a nearby electricity sub-station. Lufton J refused to accept the argument that the act of storing metal foil was a non-natural use of land. The defendant were however, held liable for nuisance from a foreseeable harm through power loss to the

[181] (1913) AC 263
[182] *Read vs j. Lyons Co. Ltd (supra)*
[183] *Rouse vs Gravel works Ltd* (1940) 1 K.B. 489 and *Wise Brothers v Commissioner for Railways* (1974) 75 CCLR 5
[184] *Winfield and Jalowicz on Tort*. Op cit at p. 449
[185] (1969) 1 WLR 959

plaintiffs factory. The judge further held that the manufacturing of electrical and electronic components in 1964 cannot be adjudged to be a special use nor can the bringing and storing of metal foil a special use. The metal foil was there for the use in the manufacturing of goods of a common type which at all material times were needed for the general benefit of the community.[186]

3.9 Modern Application of the rule in *Rylands vs Fletcher*

In modern times, the courts of law look upon the rule with reservation, especially as to whether it can be applied in all scenarios similar to Ryland or it should have certain limitations. Due to changing circumstances, by the end of the twentieth century the role of the rule in R*ylands vs Fletcher* had become so marginalised that in 1994 the Australian High Court held in the case of *Burnie Port Authority vs General Jones Property*[187] that the rule should cease to exist and that cases which would previously have fallen within its ambit should in the future be dealt with under the umbrella of negligence.[188] In that case, General Jones Property Ltd stored frozen vegetables in cool rooms owned by the appellant, the Burnie Port Authority. An independent contractor engaged by the authority caused a fire on the premises by carrying out unguarded welding operations in close vicinity to stacked cardboard cartons of an insulating material called Isolite. It has been confirmed that isolite burns with extraordinary ferocity if set alight through sustained contact with a flame. The fire spread to the coolrooms and damaged the respondent's frozen vegetables. The trial court held that the independent contractor was negligent and that the appellant was liable for damage which it caused as an occupier from whose premises the fire escaped. On appeal, the Supreme Court of Tasmania (Australia), held that the appellany were liable under the rule in *Rylands vs Fletcher*..

[186] Ibid at p. 963
[187] (1994) 68 ALJR 331
[188] Fordham, M. Op cit at p. 248

In modern times it seems that the rule in *Rylands vs Fletcher* is gradually wearing the garb of nuisance or in some instances, negligence. The current regime for liability under the rule in *Rylands vs Fletcher* is the case of *Cambridge Water Corporation (CWC) vs The Eastern Counties Leather (ECL) Plc.*[189] The principle in this case was taken up and applied by the later Victorian judges with a considerable degree of vigour, but increasingly in the present century it has undergone dilution.[190] The rule has attracted a large number of exceptions or defences to liability which has limited its general scope and force; and cases in which it has been applied have become frequent.[191] In the Cambridge case, the appellant, a tannery company for many years used a solvent known as PCE as part of its industrial process. Quantities of this solvent escaped from containers and eventually percolated and polluted the source of water supply in the adjoining land. In 1976 the respondents, a water company, purchased a borehole at some distance from the land owned by the plaintiff (respondent). Before buying the borehole, CWC carried out tests on the water it could obtain from the borehole and these indicated that the water was wholesome and suitable for public consumption. The company therefore, purchased the borehole in order to carry out its responsibility of supplying water for public consumption. From1970s on, concerns were raised as to the presence of certain chemicals in the drinking water. An EC directive dealing with quality of water intended for human consumption proposed new standards as to the concentrations in drinking water of such solvents as PCE. The directive was implemented in the whole of the United Kingdom by the promulgation of new domestic standards dealing with the concentration of such chemicals in drinking water. CWC conducted tests to its water supplies to see whether they complied with the new standards. Analysis of samples of water taken from the borehole purchased in 1976 revealed excessive concentration of PCE. After a major geographical survey CWC eventually traced

[189] (1994) 2 AC 264
[190] *Clerk & Lindsell on Torts*. Op cit at 1041
[191] ibid

the source of this contamination to ECL. CWC decided therefore, to take the borehole out of commission and developed a new source of supply, and sued ECL as well, seeking compensation for its losses relying on negligence and the rule in *Rylands vs Fletcher*.

At the trial court, Kennedy J found that the spillage of the contaminant and its seepage into the ground water supply was the cause of the contamination to the borehole. He however, held that a reasonable supervisor employed by ECL at the time would not have foreseen this result, nor was it foreseeable that the detectable quantities of PCE would have spread and led to any environmental damage or hazard. It was therefore, held that ECL was not negligent and that there was no liability in nuisance, hence the claim was dismissed based on *Rylands vs Fletcher*. Kennedy J added that the storage of PCE and other solvents was a natural use of the land, being part of EC's manufacturing process. He concluded that the company's activities served the general benefit of the community by providing employment and in consequence, there could be no liability under the rule in *Rylands vs Fletcher*.

Dissatisfied, CWC appealed against the decision on the ground that the defendants were liable under the rule in *Rylands vs Fletcher* based on the fact that its introduction of chemicals onto its land was a non-natural use because the chemicals were likely to cause damage if they escaped and that the escape of the chemicals had damaged its water supply. Deciding the appeal, it was held that it was unnecessary to decide the issues under the rule in *Rylands vs Fletcher* since there was liability in nuisance. The court upheld CWC's appeal on the basis that the defendants were liable in nuisance. The reason given by that court is that it felt it was unnecessary to deal with the issues raised under the rule in *Rylands vs Fletcher*. It further held that where a defendant damages or interferes with an adjoining land owner's rights, such as the right to water, then liability is strict.

On further appeal to the House of Lords, it was held, per Lord Goff:

> The main issue is whether foreseeability of damage is a prerequisite for the recovery of damages under the rule in *Rylands vs Fletcher* or not…Foreseeability as to damage is a prerequisite for recovery in the law of private nuisance and that it is therefore, logical to extend the same requirements to liability under the rule in *Rylands v Fletcher.*

The court however, refused to accept the proposition of some writers that *Rylands vs Fletcher* should be treated as developing principle of strict liability resulting from hazardous operations on a land. The conclusion from the above decision of the House of Lords is that reasonable foreseeability is necessary to establish the existence of the rule in *Rylands vs Fletcher*, in addition to other ingredients discussed above. Also, the rule in *Rylands vs Fletcher* has exceeded its original limit and invaded the territory of negligence and nuisance to the extent that one may be confused for the other and determining which rule to apply will now be a question of fact. This might have been the reason for absorbing Rylands into nuisance in the United Kingdom and its abolition and merger with negligence in Australia. But despite the stand taken by the court with respect to liability under the rule in *Rylands vs Fletcher*, Fordham,[192] somewhat criticized the rush with which courts are eager to abolish the rule when she said:

> There has been too great a willingness on the part of courts in recent years to cast aside the concept of strict liability in general and the rule in *Rylands vs Fletcher* in particular in order to make way for the advancing tide of negligence One of the major hurdles facing claimants in *Rylands vs Fletcher* action has always been the need to overcome the reluctance of the courts to impose liability in the narrow assessment of what constitutes a non-natural use of land.[193]

From all that have been said above, it is clear that the area of application of the rule has been substantially restricted. Even the view of the House of Lords in *Transco Plc vs Stockport Metropolitan Borough Council*[194] suggests that very few situations will nowadays be regarded as satisfying the requirement of non-natural use.[195] It is only in the

[192] In her article, Surviving Against the Odds-The Rule in Rylands v Fletcher Lives on. Op cit at p. 248
[193] Ibid at p. 247
[194] (2004) 2 AC 1
[195] Margaret, Fordham, op cit at p. 248

most extreme circumstances such as those where land is used to store high explosive or toxic chemicals, will *Rylands vs Fletcher* claims likely succeed.[196] Although authors such as Fordham have admitted that the rule in *Rylands vs Fletcher* still exist in England and other jurisdictions, she has warned that:

> The rule in *Rylands vs Fletcher* has survived in England but as a shadow of its former self… Although there are authorities in favour of the retention of the rule, the attitude of English courts to *Rylands vs Fletcher* in general; and to the non-natural use in particular, during the next decade or so, is likely to prove decisive in determining whether the rule survives as a valuable basis for the imposition of strict liability or becomes nothing more than an insignificant footnote to the tort of nuisance.[197]

3.10 Application of the rule in *Rylands vs Fletcher* in Nigeria

The rule in *Rylands vs Fletcher* has based on recent judicial authorities in the United Kingdom been substantially altered from its original posture[198] to such an extent that the modern approach to the rule is now predicated on two ingredients; these are the issue of foreseeability and that of natural use of land. In fact, the issue of whether the defendant uses his land naturally which has now been interpreted to mean "special use bringing with it increased danger"[199] has become central to the issue of liability under the rule. In Australia, the rule has been abolished and merged with the tort of negligence so that all liabilities under the rule have now been shifted to negligence.[200] But in Nigeria the position of the law has not been unequivocally stated by the court despite the fact that the courts in most cases treat the rule in *Rylands vs Fletcher* as an appendage of negligence.[201] The courts in Nigeria in fact, equates Rylands with negligence, hence in some cases hold

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[196] ibid
[197] Ibid at pp. 249-250
[198] *Cambridge Water Co. vs Eastern Counties Leather, supra* at p. 38 and *Transco Corp. vs Stockport, supra* at p. 45
[199] *Rickards vs Lothian, supra*
[200] This is based on the decision of the Australian Court in *Burnie Port Authority vs General Jones Property, supra*
[201] The same approach was also adopted in the cases of *National Oil & Chemical Marketing Plc v Adewusi & Ors* (2009) All FWLR 1669 and *Ogbiri vs Nigeria Agip Oi Co* (2010) 14 NWLR (pt. 1213) 208

that Rylands apply in circumstances where negligence should, without saying clearly, that the rule in Rylands vs Fletcher has now been absorbed into negligence.

In view of the above it will not be out of place to report some of the cases where the Nigerian courts have equated the rule in *Rylands vs Fletcher* as negligence or at best makes it an appendage of negligence. In *National Oil & Chemical Marketing Plc vs Adewusi & Ors,*[202] the first respondent was one of the thirty four people whose properties were destroyed by fire caused by oil spillage from a tanker driven by the 4th respondent. The tanker was owned by the second respondent which he gave to the third respondent and the latter employed the 4th respondent as a driver of the tanker to distribute petroleum products. The 2nd respondent and the appellant entered into haulage contract for the appellant to use the tanker to transport petroleum products to the appellant's filling stations. The name of the appellant's company was also inscribed on the tanker in compliance with NNPC directive. The tanker had accident and summersaulted thereby spilling oil which led to a fire that destroyed the respondent's shop.

The 1st respondent claimed that the accident occurred due to the negligence of the 1st respondent and therefore prayed the High Court of Lagos State to award him general and special damages against the appellant, 2nd – 4th respondent, jointly and severally. Other people whose properties were affected gave evidence to buttress the 1st respondent's claims but the appellant denied the ownership of the tanker, claiming she was only the employer of the 4th respondent and was therefore, not vicariously liable for his negligence. The trial court entered judgment for the 1st respondent and the appellant appealed to the Court of Appeal. In delivering its judgment, the Court of Appeal stated the rule governing the application of the rule in *Rylands vs Fletcher* as stated by Lord Cairn more than one hundred and forty years ago. It also stated that for the rule to apply "there must be an

[202] Op cit at p 669

accumulation of things such as water, gas, petrol, chemicals or explosives; and there must be an escape of the accumulated material from the defendant's land to a place outside that land.[203] The court held further that in the instant case the rule applies and the trial court rightly held the appellant vicariously liable for the damage caused by the 4th respondent.[204]

It can be clearly seen from above that the Court has equated the rule in *Rylands vs Fletcher* to the tort of negligence. The scenario in that case ought to have been decided under the tort of negligence without extending it to the rule in *Rylands vs Fletcher*; and even if the court wanted to introduce 'reasonable foreseeability' as an element of the tort, by adopting the modern approach as it is the case in other jurisdictions, it should not have givien the impression that it is an appendage of negligence. For the scenario to have been brought under the rule in *Rylands vs Fletcher* the court should have asked whether conveying petroleum products in a tanker is a natural use? If the answer is in the affirmative then, the rule in *Rylands vs Fletcher* should not have been the applicable law. One thing worthy of note is that where there is a claim for negligence liability under Rylands may not arise because the two are not the same with regards to the ingredients which one must prove to succeed in his claim. While liability under negligence is based on fault (negligence), under the rule in Rylands vs Fletcher, liability is strict (devoid of any kind of fault).

In another case of *MTN (Communications) Ltd vs Ganiyu Sadiku*[205] the question for determination was whether the trial court was right to have made out a case of strict liability for the respondent without allowing the parties to address it on it. The summary of the facts of the case were that by writ of summons filed at the High Court of Ondo State, Akure, the respondent commenced an action against the appellant seeking forfeiture by the appellant of the lease agreement between him and the appellant in respect of his land

[203] Ibid at p. 1681
[204] ibid
[205] Supra at p. 50

situate at No.23, Isinkin Street, Akure, for fraudulent breach by the appellant of the conditions of the lease to keep the land in good condition. He also sought an order directing the appellant to vacate and give up possession of the land because of the breach, and a perpetual injunction restraining the appellant either by itself, agents or servants, from further polluting the land. The respondent also claimed that at some point his water well became polluted by the diesel which was escaping from the appellant's tank situate at the site. The appellant on its part denied the possibility of diesel escaping from its storage tank which it claimed was built underground and in accordance with specification of the Nigeria Communications Commission and the World Health Organisation. After hearing witnesses, the trial court granted all the reliefs sought by the appellant but awarded the sum of Fifty Thousand Naira as damages. The trial court further held that although there was no scientific report from the respondent to substantiate his claim that his wealth was polluted with the diesel from the appellant's land or that it was the diesel that escaped from the appellant's tank that caused damage to his wealth, it was an offence of strict liability which is based on the breach of an absolute duty to make something safe and that the maxim of *res ipsa loquitur* was applicable. Dissatisfied, the appellant appealed to the Court of Appeal, and unanimously allowing the appeal, the Court of Appeal held *inter alia*:

What is required to succeed in a claim for negligence primarily is to prove the existence of a legal duty of care and to go further to establish that there was breach of such duty of care consequent upon which damage, injury or economic loss was suffered…On the purport of the rule in *Rylands vs Fletcher*, the rule is that: where an occupier of land who brings upon it anything likely to do mischief if it escapes, is bound at his peril to prevent its escape even if he has not been guilty of negligence. By this rule, a person who is in control of substance which can easily escape and cause damage is placed under strict liability. In the instant case, with or without negligence on its part, the appellant was under a duty of care to ensure that there was no spillage of diesel from its storage tank to the extent of polluting the water well and or causing any form of damage to the vegetation on the land[206].

[206] Ibid at p. 416

The same problems which characterised the previous decision are still manifest in the one just cited in that, the court assumed that liability under the *rule in Rylands vs Fletcher* and that in negligence are founded on the same elements or that the rule is an aspect of negligence. This is notwithstanding the fact that the court as evidenced in the above ratio agrees that liability under the rule is strict as against negligence which is predicated on a fault element. The problem with this approach is that it is asking a claimant who is claiming under the rule in *Rylands vs Fletcher* to prove his case, which is more difficult than where liability is strict. Also, the court in arriving at its decision, applies the same old rule in the case of Rylands, which was enunciated on the basis of "bringing dangerous objects unto someone's land that escapes and causes damage to the claimant". This case should have been perfectly decided as a case of negligence because of the absence of fundamental ingredient of the element of "non-natural use", which is the foundation of the modern application of the rule. The use of storage tank is natural in telecommunication business, especially in Nigeria where there is no constant power supply and on the basis of this there could be no liability under the rule.

The last authority to consider on this is that of *D.N.N Ltd vs Chief Joel Anor & Ors*[207]. In that case the appeal was instituted on the basis that in 1983 the respondents instituted four separate actions against the appellant at the then Bendel State High Court in Warri, seeking among others, compensation for damage done to their farmlands, crops and rivers due to oil spillage pollution but the suits were consolidated by the trial court. The trial court in its reserved judgment entered in favour of the respondents as appellants in each of the four consolidated suits for various sums. The trial court accepted evidence called by the respondents' witnesses but rejected those of the appellant's on the ground that the team of experts called by the appellant carried out their work three years after the

[207] (2015)

spillage had occurred. Consequently, the trial court awarded damages in favour of the respondents in respective sums. Dissatisfied, the appellant appealed to the Court of Appeal which dismissed the appeal. Still dissatisfied, it appealed to the Supreme Court, which also unanimously dismissed the appeal and held *inter alia*, that:

> On the application of the rule in *Rylands vs Fletcher*...an occupier of land…will be liable for all the direct consequences of its escape, even if he has been guilty of no negligence. In the instant case, the Court of Appeal in affirming the finding of the trial court was right in holding that the rule was applicable. The appellant knew that it was keeping crude which would be regarded as dangerous to the environment if allowed to spill and there was in fact, a spillage.[208]

One thing which is common to the above three decisions of the Nigeria's appellate courts is that the courts based their decisions on the old rule in *Rylands vs Fletcher* fashioned out since 1868, when the law has in 2019 passed through some modifications due to the invasion into its territory by both nuisance and negligence. The decisions have also given an impression that both negligence and the rule in *Rylands vs Fletcher* are the same or the two can be used interchangeably. This confusion was made more prominent when the Supreme Court in the instant case held further that:

> A single act of a defendant may give rise to liability under the heads of tort in negligence and the rule in *Rylands vs Fletcher*. Thus, where a plaintiff pleads damage from the escape of oil waste, give particulars thereof in his pleadings and the trial court finds in his favour on the issue, the defendant would also be liable in negligence for damages resulting from the escape of the oil waste.[209]

Although escape is one of the pillars upon which the rule was built, that enough cannot make a defendant liable unless the use to which the defendant put his land to, is non –natural, and that the type of injury occasioned is reasonably foreseeable, he will not be held liable under the rule. His liability would now be in negligence but not *Rylands vs Fletcher*. So, the instant case would have been decided under negligence, but not under the

[208] Ibid at p. 185
[209] Ibid at p. 175

rule in *Rylands vs Fletcher* because transporting crude in pipelines is a natural use by the appellant of their land only that they were negligent not to prevent spillage when they were under a legal duty of care to do so. It should however, be noted that the idea of reasonable foreseeability envisaged under the rule in *Rylands vs Fletcher* is not similar to what is envisaged under negligence. The application of the phrase under Rylands is limited only to foreseeability of the kind of injury occasioned.[210] Although the Nigerian Courts dwell their decisions on the age long ingredients necessary for the application of the rule, especially accumulation and escape, it has been observed thus:

> Today the courts of law look upon the rule with a squinted eye like a step-mother, and tend to restrict its application mainly through non-natural use...As it is now interpreted, this excludes from the ambit of the rule those accumulations which in the judgment of the court (there being no objective test), do not involve an unreasonable risk or an extra ordinary use of land. Such an interpretation allows the court to hold that a common activity such as the collection and storage of gas or water does not constitute a non-natural use of land even though the injury potential is high.[211]

It is now settled that no matter the quantity of water, gas or chemical is accumulated, it will not lead to liability under the rule in *Rylands vs Fletcher*, because accumulation of those substances is considered to be natural but keeping of explosives may be considered non-natural and hence could lead to liability under the rule.[212] In the same vein, the manner in which the courts in Nigeria equate negligence with the rule in *Rylands vs Fletcher* and make the two look as one, is in fact not the correct position of the law. The fact that negligence (as a fault element) is required to establish liability under the rule in *Rylands vs Fletcher* does not make the tort synonymous with negligence as an independent tort. As one author rightly observed, "…Rylands vs Fletcher is not subject to an explicit test for fault as negligence is, but it has features which at least, overlap with a test for fault. The main procedural difference is that the claimant does not have the burden of proving

[210] Per Lord Goff in *Cambridge Water Co vs Eastern Counties Leather* Op cit at p. 50
[211] Zahid, A.M.D, *Rylands vs Fletcher and the Modern Trend*, op cit at p. 13
[212] ibid

that the defendant was at fault-this is assessed by the court with regards to the reasonable user and remoteness considerations.

Drawing from above, it needs to be restated that for liability in negligence the claimant must prove before the court that a duty of care exists between him and the defendant and that the defendant breached that duty and that led to an injury to the claimant. In other words, that the claimant got injured as a result of the fault of the defendant. This is not necessary for liability under the rule in Rylands vs Fletcher, as the tort is one predicated on strict liability (without ay fault). In other words, once the injury suffered by the claimant could be connected to the act of the defendant, it is not the business of the law, whether the defendant was at fault or not. This is irrespective of the fact that the law makes reasonable foreseeability an ingredient in the tort.

3.11 Liability for Fire

If anything is capable of attracting liability under the rule in *Rylands v Fletcher* is fire[213] but responsibility under the rule is confined to damage caused by the escape of fire or combustibles likely to do harm so that there may also be liability for damage caused by fire independently of the rule. Therefore, anyone who deliberately sets a fire on the property of another or begins a fire on someone's land commits an actionable trespass. It follows then, that a person may also be liable for damage done by fires which he did not originate or which were properly begun but which he is required to keep under control.[214] Also, a man who starts a large or dangerous fire may be liable under the rule in *Rylands vs Fletcher*[215] or for creating a nuisance.[216] But the doctrine of liability for fires deliberately started by or on behalf of the defendant is complemented by a principle of non-liability for

[213] James, P.S and Latham Brown, D. J Op cit at p.221
[214] ibid
[215] *Balfour vs Berty-king , Hyder & Sons (Builders) Ltd* (1956) 2 All ER 555
[216] *Moss vs Christchurch* (1925) 2 KB 750

those accidentally begun.[217]However, on principle no one is liable for a fire which occurs unaccountably and unforeseeably, except if the defendant fails to take reasonable steps to abate the fire.[218]

The foregoing discussion in this chapter has shown that both the torts of nuisance and the rule in *Rylands vs Fletcher* have undergone radical transformation and modifications. The tort of private nuisance has been somehow infected by negligence. Even though liability in private nuisance affecting use and enjoyment of land is dependent on substantial interference with use and enjoyment of land, it must also be proved that the defendant is using his land unreasonably. With regards to the rule in *Rylands vs Fletcher*, liability now depends on whether the injury suffered by the claimant is reasonably foreseeable or not (which is an element of the tort of negligence that was not present when the rule was first formulated) That for a claimant to succeed under the rule he must show that the injury which he has suffered as a result of the conduct of the defendant is the type that is reasonably foreseeable. Also, for a claimant to succeed in his claim under the rule, he must show that the injury which he has suffered is as a result of the use which the defendant has subjected his land to, which is non-natural. In this context, the phrase "non-natural use" does not in modern times mean artificial, but a use that is not natural in the course of the kind of business or usage to which the owner of the property put it.

[217] Ibid at p. 222
[218] *Murgrove vs Pandelis* (1919) 2 KB 43

CHAPTER FOUR

LIABILITY FOR THE TORTS OF CONVERSION AND DETINUE IN NIGERIA

4.1 Introduction

The torts of conversion and detinue deal with chattels or moveable property. They protect the interest of someone in possession or ownership of the goods converted or detained. Conversion and detinue together with the tort of trespass to land have gradually transformed or widened in some jurisdictions, a situation which led to their merger through legislative process and condensed into one single tort of wrongful interference with goods. This development manifests in the jurisprudence of the United Kingdom and Canada among others. But the three torts still remain separate in Nigeria.

In view of the manner in which conversion has encroached into the territory of detinue, almost to the point of extinction, this chapter canvasses an argument for the reform of the law in Nigeria, in spite of the fact that the subject matter of discussion is within the legislative powers of States Assemblies. Discussion in the chapter aside from the two torts, includes the tort of trespass to chattel which is normally committed first before committing the two other torts.

4.2 Historical Evolution of the Torts Dealing with Goods/Chattels.

The torts of trespass to chattel or goods, conversion and detinue are collectively referred to as "wrongful interference with goods". Historically the first in time among the three torts was detinue. Originally action used to lay at the suit of one who had bailed goods to another and who sought the return of those goods from that other.[1] The writ was conceptually similar to the ancient writ of right for the recovery of land. While the writ of right remained real in the sense that it affected specific recovery of the land, in practice the

[1] James, P.S. and Latham Brown, D.J. Op cit at p.144

writ of detinue became a hybrid and real in intent but personal in form[2]. The reason for this is that the court would not force the defendant to return the chattel bailed but would allow the defendant the option of returning it or paying damages.[3] That notwithstanding the claim for detinue remained, throughout its history, in essence, a claim of a proprietary nature for the return of the chattel rather than a claim in tort for the wrong done in refusing to return it.[4] Next in time in terms of emergence is the tort of trespass to goods. This tort is also known as trespass *de bonis asportatis*, though asportation of the goods was only a form of interference with them even if the plaintiff was not deprived of possession.[5] This tort just like trespass to person is actionable only where there is direct physical interference with the goods either by merely tempering with them or taking them out of the plaintiff's possession. The claim here is tortious not proprietary even in cases where the defendant had deprived the plaintiff of the chattel.[6]

An action in trespass enabled a plaintiff to recover damages for a lost or stolen chattel and this action was based on the direct and forceful interference with the plaintiff's right to possession and so could be undertaken not only by an owner of the goods, but a bailee in appropriate cases[7]. The writ of trespass however, had its own limitations, especially in view of the fact that it was only available against the person who had taken the goods from the owner or the person in possession of them and not against any person who subsequently received the goods from the original taker. In the same vein, trespass to chattel was also not available where the injury complained of was indirect or consequential[8].

[2] Ibid
[3] Ibid
[4] Ibid
[5] Ibid.
[6] Ibid
[7] Hawes, C. Op cit at p.4.
[8] This can be deduced from the original writs of trespass on the case, where only indirect and consequential injuries can found a cause of action e.g. Negligence.

The appropriate place to apply the above scenario is where for example, the defendant throws an object which directly strikes and injures the plaintiff; an action would lie in trespass. Where however, the object was thrown into the highway and the plaintiff tripped over it, there would be no action in trespass. Conversely where a defendant who had the plaintiff's prior authority to deal with goods but damaged them by misusing them through an act or mission which resulted in damage to the goods; trespass was not available for there was no forceful wrong *ab initio.*[9] It is however, important to state here that being a tort against wrongful possession, it was not available against a bailee to whom the owner had voluntarily delivered the goods and did not give back after demand. The appropriate cause of action would be detinue and the philosophy and origin behind detinue could be summarized as follows:

> The writ of detinue… is the failure of the bailee to carry out his or her agreement to deliver goods to the bailor. But originally, detinue was available only against a bailee. As the remedy was confined to the recovery of goods or their value it could not be used to obtain compensation for damage to goods short of their destruction.[10]

The third in time in the course of evolution among the three torts dealing with wrongful interference with goods, is the tort of trover (which is today known as conversion). This tort evolved through what was described as the tortious machination of the medieval court[11]. The evolution of the tort was explained thus:

> This was an action on the case and thus tortious, rather than, proprietary in aim, but by historical chance; it was directly derived from detinue, which depended for its efficiency upon a fictional allegation of loss and finding hence the name trover. And that form of detinue was designed to meet the case where the defendant (as where a stranger took the plaintiff's chattel), was not a bailee.[12]

By the seventeenth century conversion was in practice superseded detinue both where there was a bailment and where there was not. But its early association with detinue,

[9] Ibid at p.4
[10] Ibid at p.5
[11] James, P.S. and Latham Brown, D.J. Op.cit at p.1
[12] Ibid

though essentially tortious, led to it carrying proprietary overtone in that the essence of the plaintiff's claim lay in the affront which the defendant had offered in his title to the goods, whether if there were a bailment, the defendant had challenged the title by refusing to return the goods after demand.[13] Therefore, originally, allegations of losing and finding were the key foundation of the tort of conversion, the essential features of which were that the plaintiff was lawfully possessed, or was entitled to possession of the goods in question and that the defendant had afterwards converted and disposed them to his use.[14] The widening of the tort of trover and conversion has now extended it into the territory of detinue and trespass to goods. It also went further to overcome some of the deficiencies and limitations of these torts by providing an alternative action with a wider scope than either of them.[15]As a salient feature of conversion, it protects possessory interest and for the plaintiff to claim under it, he must establish the requisite entitlement to possession. The plaintiff's interest in this respect is relevant not only as a prior question establishing his right to sue, but also shapes the determination or result of the case by allocating and ranking the respective right of the parties in the goods themselves[16]. For this reason therefore, conversion largely operates to allocate proprietary interest and the law governing it cannot be considered without an associated analysis of the law of proprietary and possessory interests in goods.[17]

Conversion was originally founded on alleged finding by the defendant of the claimants' chattel and a wrongful conversion to the defendant's use. This fictitious averment of finding was abolished in 1854 by the Common Law Procedure Act 1852. It was replaced by a simple declaration that "the defendant converted to his own use or

[13] Ibid
[14] Hawes, C. op.cit at p.6
[15] C*ooper vs chilty* (1956) 1 Bur 20 31, 97 Eng Rep. 166
[16] Hawes, C op cit at p. 2
[17] Ibid

wrongfully deprived the plaintiff of the use and possession of his goods.[18] Having considered the historical evolutions of the three torts which comprised wrongful interference in the goods it is now time to go into an in-depth analysis of the torts and their operation.

4.2.1 Trespass to Goods/Chattel

Trespass to goods/chattels is a tort that affects movables. It is at the minimum committed by mere touching without permission. As it is the case with all forms of trespass including trespass to land and to person, it is actionable *per se*, but no one is therefore, liable for damaging property which he reasonably believes to be his own.[19] This tort affords a remedy or compensation for injury to chattel in the claimant's possession and it lies for any direct and wrongful interference with possession as well as actionable *per se*.[20] This is notwithstanding the fact that the claimant/plaintiff can also recover for any loss suffered in fact.[21]The tort may therefore, be defined as a wrongful interference of a direct and physical kind by the defendant with the plaintiff's possession of goods.[22] The old action of trespass to goods, called trespass *debonis asportatis*, originally required a taking away or removal of goods from the plaintiff's possession or a complete destruction of the goods. This is however, no longer the case since now the tort may be committed by acts which fall short of complete removal or destruction.[23] The current position of the law is that any unjustified interference with the plaintiff's possession of the goods no matter how slight is enough to ground an action, provided the interference is direct and immediate. The House of Lords has held in the case of *Leitch & Co. vs Leydon*[24] that trespass is committed whether or not damage is caused to the goods or of the plaintiff. It has been

[18] Dugdale M.A, et al. Op cit at p. 728
[19] Gandhi, B.M. Op cit at p. 253
[20] Dugdale, A.M et al. *Clerk and Lindsell on Torts*, Op cit at p. 728
[21] ibid
[22] Hawes, C. Op cit at p. 17
[23] Ibid
[24] (1931) AC 90 bet 106

argued in support of this proposition that the rule which makes the tort of trespass to goods is necessary on the ground that if "trespass were tort actionable *per se*, it would be impossible to prevent acts such as the touching of works at galleries and museums[25]. The direct physical interference with goods required to establish the commission of trespass may take a variety of ways such as taking goods away even though no material damage results to them,[26] using the goods without authority, destroying the goods or removing an article from one place to another.[27] In other words, mere touching the goods or changing position for them may amount to trespass to goods. The same way, unlawfully placing a wheel clamp on a vehicle is a trespass to that vehicle (against the owner of the vehicle or person in possession of it). This is whether or not the defendant has made any contact with the goods, but mere interference in the form throwing stones or shooting suffices.[28] This is the same where someone throws stone at another person's vehicle or even beating his dog. The instances of which may be categorized as trespass to goods are uncountable but one thing worthy of note is that both trespass and conversion have overlapped just as it is in the case of detinue, as stated in the case of *Wilbrahim vs Snow*[29] where it was held that;

> Whenever trespass for taking goods will lie, that is where they are taken wrongfully, trover will also lie; for one may qualify but not increase a tort. But the converse of the proposition does not hold for trover may often be brought where trespass cannot, as where goods are lent or delivered to another to keep and he refuses to return them in demand; trespass does not lie but the proper remedy is trover.

Generally, for conversion to be committed, the goods must have been first trespassed upon. Where A unjustifiable touches goods in possession of B, he has committed trespass, but where he goes further to deny the plaintiff of their possession he has committed conversion. So it is possible for a defendant to commit only trespass or

[25] Hawes C, Op. cit at P. 2 see also *R vs Inland Revenue consumers Ltd* (1980) at 9502, 1011
[26] *Penfolds Wines Property Ltd vs Elliot* (1946) LR 104 at 214
[27] *Fouldes vs Willoughby* (1841)8 M & W 538
[28] *Hamps vs Darby* (1948)2 KB 311
[29] (1669))2 W ms Saunders 47, 85, ER, 642-3

commit both trespass and conversion depending on his level of interference with the goods. Also, another reason which makes asportation both conversion as well as a trespass is that the removal or taking away of goods in possession of another is evidence of the necessary assumption of exercising dominion over them which is required to establish conversion.[30] It has also become established that the fact that a defendant acted honestly without moral fault cannot be accepted as a defence in a claim for trespass to goods. A defendant may therefore, be liable even though he honestly believes the action is justified and has less idea of the plaintiff's interest in the goods, situation which makes an honest mistake of law or fact not to be an excuse to the defendant[31]

As to whether trespass can be committed by an unintended or voluntary act it has been established that intention is an ingredient of the tort. In *National Coal Boad vs J.E. Evans & Co (Cardiff) Ltd*[32] the English Court of Appeal held that trespass was committed when contractors in the course of excavating a trench struck and damaged an unsuspected cable. The court further held that conduct which was neither willful nor negligent could not be trespass and the contractors had no liability for their involuntary and accidental act. This decision according to Hawes, explains why there are today, few cases involving claims of trespass to goods.[33] If trespass were a tort which could be committed inadvertently and accidentally, and without fault it would be easily established and so more widely pleaded[34]

4.2.1.1 Elements of the Tort of Trespass to Goods/ Chattel

For the plaintiff to succeed in a claim for trespass he must have possession of the goods at the time of the trespass,[35] subject to certain exceptions. It follows therefore, that if

[30] Hawes, C. Op cit at p. 2
[31] *Wilson vs New Panel beaters Ltd* (1959) 1 NZLR 74
[32] (1951) 2 KB 861
[33] Hawes C. Op cit at P. 2
[34] Ibid
[35] Gandhi, B.M. Op cit at p. 5

the plaintiff were not in possession at the date of the alleged intermeddling he cannot sue for trespass.[36] The person in possession at the time of the intermeddling can sue even though he is not the owner of the goods.[37] Possession may be actual or constructive or by relation and even a person entitled to the reversion of goods may maintain an action for permanent injury due to them.[38] The case of *Penfolds Wines property Ltd vs Ellion*,[39] illustrates the above point. In that case the appellant winemaker sold its wine in bottles embossed with its name. it was made clear to the appellant's customers that the appellant retained ownership of the bottles and that the customers were obtaining possession of them only to enable them to buy and consume the wine. The respondent, a hotelkeeper, sold wine to various people by filling from his bulk supply of wine bottles which the buyers brought from him. Some of the bottles were owned by the appellant and the appellant, wishing to prevent the respondent from using its bottles in this way applied unsuccessfully for an injunction to restrain an alleged trespass to goods/chattels.

On appeal, the High Court of Australia affirmed the decision to refuse the injunction and held that the facts disclosed no wrong to the possession of the appellant. The appellant had come into possession of the bottles without trespass for the customers had delivered possession of the bottles to him. It was further held that the appellant's possession was never infringed or invaded. The fact that the appellant was the owner of the bottles and was thereby entitled to their possession did not give them a right to maintain an action of trespass. It was the person in actual possession rather than one entitled to possession against whom trespass could be committed.

There are however, exceptions to the above rule which says that only a person in actual possession can claim for trespass to chattel to the effect that;

[36] *Winfield and Jalowicz on Tort*. Op cit at p. 749
[37] Gandhi, B.M. op cit at p. 5
[38] *Kirk v Gregory* (1876)1 Ex, D 56
[39] (1946)74 CLR 204

1. A trustee can claim against any third party who commits a trespass to trust chattels in the hands of the beneficiary.[40]
2. An executor or administrator can claim where a trespass is committed against the goods of the deceased after his death but before probate is granted to the executor or before the administrator takes o
3. ut a letter of administration.[41]
4. The owner of a franchise to take wreck or trove against anyone who seized the goods before he himself can take them[42]

Based on the above, it does follow that the beneficiary of a trust cannot sue for it if he holds the chattel he seems to have joint possession with the trustee.[43] With respect to bailed goods where such goods are interfered with by a third party the right to claim would be dependent on the nature of the bailment. If the bailment is for a fixed time and for consideration, the person with possession for this purpose is the bailee. This is because the terms of the bailment are such that the bailor has no right to the possession of the goods.[44] In such a circumstance the bailor may himself commits trespass by interfering with the goods while they are in the bailee's possession, even though the bailor is the owner. Where however, the kind of the bailment is a bailment at will, either the bailor or the bailee may sue. This is because such a bailment requires privity between the parties, and it is not therefore, enough for the above rule to apply that one person has merely come to have possession of the goods of another.[45] But the bailee who claims against the trespasser will be entitled to recover the full loss which is caused by the trespass, although the bailee must

[40] *White vs Morris* (1852)11 CB 1015
[41] *Tharpe vs Stallward* (1843)5 Man & G 760
[42] *Bailiffs of Dunwich vs Sterry* (1831) 1 Band Ad 831
[43] *Winfield and Jalowicz on Tort* Op cit, at p. 750
[44] *East West Corporation vs DKBS AF* (2003)3 WLR 916
[45] *Penfolds Wines Property Ltd vs Ellion* (supra)

account to the bailor for any amount recovered which exceeds the bailee's own interest in the goods.[46]

In Nigeria, the judiciary has given its own take in explaining the tort of trespass to chattel in the case of *Amico Construction Co. Ltd v ACTEC Ltd*[47] where the Owerri Division of the Court of Appeal defined trespass to chattel as follows:

> The tort of trespass to chattel may be defined as the intentional interference in the chattel of another without lawful justification. To succeed in a case of trespass the plaintiff must establish before the trial court that the defendant made a volitional movement that:
>
> a) Dispossesses the plaintiff of the chattel as in where that defendant actually asserts ownership over the chattel, or
> b) Intermeddle with the chattel as in where the defendant merely interferes with the plaintiff's use of his chattel.

In attempting to explain the nature of the tort of trespass to chattel and how it differs from the tort of conversion, the court stated further:

> Trespass unlike conversion is actionable *per se* and what this means is that it can be established without any proof of damage or negligent intent on the part of the interfering party. Under the tort of trespass the plaintiff may be entitled to measurable award of damages, but generally this lies only at the instance of a person who has possession to the chattel in question.[48]

The above pronouncement has confirmed two things with respect to the tort. Firstly, that trespass to chattel is actionable *per se;* and secondly its foundation is based on *de facto* possession. There is however, another dimension to this tort which is to the effect that the tort of trespass to chattel may be committed as a result of negligence instead of the actionable *per se* theory[49]. In view of the fact that there is a judicial authority on the matter in other jurisdictions, it is pertinent to discuss the issue even if it is briefly.

Negligence, having developed from the action on the case (one of the two oldest writs for commencing action in tort), requires proof of fault but such is not necessary in all trespasses, (to land, chattel and person. This is because liability is actionable *per se*.

[46] *The Winkfield* (1902) p. 42
[47] (2015)17 NWLR (pt. 14801) 146
[48] Ibid at p. 171
[49] *National Coal Boad vs Evans & Co* (Supra) at p. 7

However, the case of the *National Coal Board vs Evans and Co*,[50] has suggested that there could be liability for willful and negligent conduct in the tort of trespass to land. An author tries to resolve this seeming confusion, when she says".

> Negligence and trespass have in some respects, coalesced or, perhaps put more accurately negligence has grown to such an extent that it has subsumed and dominated trespass so far as negligent conduct is involved. Trespass as we have seen requires a direct physical interference with goods, which negligence does not and the plaintiff had to show such interference with his or actual possession. Negligence as it developed was not subject to these restrictions and so could extend to damage which was not of this narrow kind. Because it covers a wider field, negligence could include not only physical damage to the goods themselves but also other damage caused indirectly and consequential losses. In addition, negligence was not limited to a plaintiff who had been in actual possession at the time the wrongful act was done, but was open to plaintiff claiming on the basis of an entitlement to possession.[51]

What may be discovered from the above is that the tort of trespass generally remains actionable *per se*, but by way of an exception, it may also be founded on negligence especially, where the interest of someone not in actual possession, (such as a bailor) is at stake. Contributing to this discussion, the renowned law of torts authors in Nigeria expressed an opinion thus:

> Originally, trespass to chattels was a tort of strict liability and it was unnecessary for the plaintiff to prove that the defendant's act was intentional or negligent but the modern rule is that either intention or negligence must be established,[52] and there is no liability for an interference with goods which is merely accidental. Thus a contractor who in the course of carrying out excavations on land in the possession of a third party, struck and damaged the plaintiffs underground cable, was held not liable on trespass since he did not know of the presence of the cable and there was no fault on his part.[53] Another manifestation of the principle that the plaintiff must prove intention or negligence is the rule that a person whose chattel was damaged on or near the highway by the defendant's vehicle…must prove that the harm was caused by the negligence of the defendant or of someone for whom the defendant is vicariously liable and it is not sufficient for him to

[50] ibid
[51] Hawes, C op cit at p. 21
[52] *Fowler vs Laning* (1959) 1 GB 426
[53] *National Coal Board vs Evans* (supra) at p. 7

> assert merely that the defendant's vehicle came into contact with the damaged property.[54]

What can be deduced from the above is that the principle governing the tort of trespass to chattel, has gradually transformed, to such an extent that negligence has come to play a part in determining liability under it. One can therefore say that the general principle of liability under the tort of trespass to chattel still remains actionable *per se* but negligence and even intention may have limited application in it. Contributing further to this discussion, Hawes,[55] asked the question whether there is any place today for the continued existence of trespass as a separate tort, or is the field now well covered by negligence. In answering this question, the author struck a balance between two ends and asserts that;

> It seems that the answer to this question depends on whether a deliberate act causing damage to goods may be categorized as negligence, or not. As we have seen many acts of trespass also constitute conversion provided the elements of both torts are established. There is therefore no need for a separate trespass action where interference with the plaintiff's possessory title is involved. By contrast, conduct which causes direct damage to the goods but which does not amount to the assumption of possessory right is not conversion, but may be negligence depending on the circumstance. In consequence, it seems that the only acts of trespass which may not fall into this ambit of either conversion or negligence are deliberate acts of damage which do not have the effect of interfering with the plaintiff's possessory title. This small field could perhaps be covered by adopting one of two possibilities: first, an act of deliberate damage could be labeled conversion because the act of deliberately causing damage arguably amount to a usurpation of a possessory right just as asportation does or secondly, the tort of negligence could include deliberate conduct resulting in damage to goods.[56]

The above excerpt has confirmed that negligence has encroached and taken a space in the tort of trespass to chattel but having limited application because liability in

[54] Kodilinye, G. and Aluko, O. Op cit at pp. 197-198. See also *Gayler and Pope vs Daries & Cons* (1924)2 K.B 75 *Holmes vs Mather* (1975) LR 10 Ex. 261, p. 267, per Bramwell, L.J
[55] Hawes, C. op cit at P. 22
[56] Ibid

negligence could only result where there is interference with the chattel in such a manner that the chattel has been damaged without the requisite intention to convert it. But despite that limited application of negligence in conversion the law still remains that for a claimant to succeed there is generally, no need to establish that he has suffered any damage because the tort is still recognized as actionable *per se*.

4.2.2 Detinue

Detinue is the ancestor to the tort of conversion, but as time went on, it was overtaken and subsumed by the latter. It is for this reason that the former became abolished in some jurisdictions.[57] Detinue is the detention of property with the intention of keeping it in defiance of the rights of the person entitled to its possession.[58] Detinue or detention comes from the Latin word *detinue* which is the adverse withholding of the chattel of another.[59] It is also a corollary of the French word *detinue*', which means to hold back. It is a common law action where a person having absolute right in goods seeks to recover it from another who is in actual possession of the goods and refuses to deliver them up after a demand has been made.[60]The tort of detinue substantially lay at the suit of the claimant having a right to immediate possession, for the wrongful detention was normally, though not invariably, evidenced by the defendant's refusal to deliver it up on demand, and the redress claimed was the return of the chattel or payment of its value, together with damages for its detention.[61] Originally, the medieval action of detinue was available only to a bailor against a bailee, where the latter failed to return bailed goods. Thus, the action was essentially akin to a claim for breach of contract, because it rested on a failure by the bailee to carry out his obligation to return goods in accordance with the terms of the bailment.[62]

[57] Such as England
[58] Hawes, C. Op cit at p. 10
[59] Gandhi, B.M. Op cit at p. 256
[60] www.cantracher.net(law-tort/lecture-notes accessed on 26/08/2018 by 6:00pm
[61] *Rosenthal vs Aldeton & Sons* (1946) KB 374
[62] Hawes, C. Op cit at p.10

The application of the tort at that time was, to say the least, restricted to only the issue of Bailment. But by 13th century, the scope of the tort was extended to allow an owner to claim against a person other than a bailee who was wrongfully holding goods; and a case in which a loser of goods claimed them from a finder but detinue became recognised in the fourteenth century.[63] Gradually, the scope of conversion became widened and there was little need for detinue.[64] Conversion was eventually recognized to include refusal to deliver goods.[65] This latter development led to the present overlap between conversion and detinue, whereby detinue, has virtually been consumed by conversion, hence, the only instance which does not also constitute conversion is where there is a mere inability to return goods because they were destroyed, as the act was a misfeasance.[66] The tort is therefore not committed by the mere retention of the property of another unless the manifestation of the necessary state of mind is present and the detention must be consciously adverse to the rights of that other. In *EE McCauley Ltd vs PMG*[67] the defendant, a Postmaster- General, faced with two rival claims for parcels in his possession, took steps to ascertain which of the parties was entitled to the parcels, which he retained pending the resolution of the matter. It was held that he should not be liable in detinue, for he was at all times willing to handover the goods to the person lawfully entitled to them. It was also held that the necessary proof that the detention was unlawful was lacking and that the mere fact of possession was insufficient to support the action.

The essence of detinue therefore as was stated in the above decision, is that the detention should be adverse and that unless there were insistences on a right to hold goods or a refusal to deliver them to the rightful owner, detinue would not have been

[63] ibid
[64] ibid
[65] *Owen vs Lewyn* (1673) 1 Ventris; 86 ER 150
[66] Hawes, C. Op cit at p. 10
[67] (1959) NRLR 553

committed.[68] A wrongful detention may be established by proof that the plaintiff demanded the return of the goods and that the defendant refused to return them or failed to do so.[69] Demand and refusal are condition precedent for detinue to occur.[70] According to Scrutton L.J., "a person might be out of possession of his chattel for a hundred years, but no cause of action would lie until a demand and refusal had taken place."[71]

According to Diplock L.J. "detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until the goods are recovered or judgment is obtained."[72] This aspect of the tort gives rise to difficulty because the owner is permitted to allow time to run indefinitely before making any demand upon the person who has detained the goods, thereby giving to the plaintiff some ability to control both date when the cause of action arises and the date at which damages should be assessed.[73] This problem as to when the cause of action may arise in detinue, may however, be of little practical significance simply because as things are at the moment every case of detinue, would virtually constitute conversion. This is because the essential element of detinue that the detention be adverse to the owner also amounts to a denial of the owner's rights of a kind which is required under conversion by detention (as we shall see later in this chapter).

It is however, worthy of restating here that the only circumstance which remains today in which detinue lies but conversion does not, is where the defendant is a bailee who has breached his duty to the bailor by allowing the goods in question to be lost or destroyed. This reflects essentially, the contractual nature of the origin of detinue as the bailor's conduct here does not constitute conversion because, the delivery of the goods

[68] Ibid
[69] *Kuwait Airways Corporation vs Iraqi Airways Co*. (No 4 and 5) (2002) 2 AC 883, 1083-4
[70] Chigbu vs Tonymoi Nig. Ltd (2006) 9 NWLR (pt. 984) 189 and Olajide vs Diamond Bank Plc (2017) LPEFR/CA/ J/ 203/2014
[71] ibid
[72] *General and Finance Facilities Ltd vs Cooks Cars (Rawford) Ltd* (1963) WLR 644
[73] Hawes, C. Op cit at pp. 12-13

13under a bailment is a voluntary, agreed act on the part of the bailor, and the bailee has not in such circumstances, converted the goods to his or her own use.[74] Because conversion today covers the entire area of detinue except the one mentioned above, the desirability of the continued existence of detinue as a separate tort, has been considered in a member of jurisdictions which this research will look at subsequently, in this chapter. Although detinue still exists in Nigeria as a tort separate from conversion, the courts have sometimes been faced with the dilemma of whether a particular act is a conversion or detinue or even the dilemma of definition, but the Court of Appeal explained detinue as follows;

> An action to recover for personal property wrongfully taken by another…a claim in detinue lies at the suit of a person who has immediate right to the possession of them and who upon proper demand fails to deliver them up without lawful excuse. The plaintiff may desire the specific restitution of the chattel and not damages for their conversion.[75]

The fact that claim in detinue can be made at the instance of a person having right to immediate possession of goods suggests that it applies to a bailor who has bailed chattel to a bailee. It was also decided the case of *J.E Oshevive vs Tripoli Motors Nig. Ltd*[76] that the gravement of the tort of detinue is the wrongful detention of the chattel.

4.2.3 Conversion

The tort of conversion is one out of the three which constitutes the wrongful interference with goods/chattels. This tort consists in dealing with someone's property in a manner that is inconsistent with the right of the owner. An owner means a person in possession without necessarily being the real owner. The tort of conversion was judicially defined by Atkin J. (as he then was), in the case of *Lancashire & Yorkshire Railway Co. vs McNicolle*..[77] In that case, he defined conversion to mean – "dealing with goods in a

[74] Ibid
[75] Per Fabiyi JCA in *Ogunsola vs Ibiyemi* (2008)
[76] (1997)5 NWLR (pt. 1205) 339 at 336
[77] (1919)88 L.J. KB 601,

manner inconsistent with the right of the true owner provided there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right". The same definition was also reechoed by Lord Templeman in *Mayne Graine Property Ltd vs Campafina Bank,*[78] where he said: "conversion is whenever a person performs a positive wrongful act of dealing with the goods in a manner inconsistent with the right of the owner."

The Supreme Court of Nigeria defines conversion in the case of *Henry Stephens Engineering Ltd vs S.A Yakubu (Nig) Ltd*,[79] as follows:

> The detention of the plaintiff's chattel becomes a conversion only if it is adverse to or inconsistent with the right of the plaintiff or other person entitled to its possession. Therefore, to be liable for conversion, the defendant must be shown to have demonstrated an intention to detain or withhold the chattel in defiance of the plaintiff.

The above definition, more or less defines the tort of detinue as it is presently known to be in Nigeria even though the same definition may also qualify for conversion. Conversion is so called because the essence of the tort is the denial by the defendant of the possessory interest or title of the plaintiff in the goods. The defendant is therefore said to have converted the goods to his or her own use by manifesting an assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff.[80] A further adumbration of the tort of conversion was given by Hawes in the following tone:

> The pleading that the defendant converted the goods to his own use is not a requirement additional to that of usurpation by the defendant of the plaintiff's possessory right. It is not necessary that the defendant be shown to have obtained some personal benefit to himself or herself or assumed dominion over them for the person's acquisition. Rather the defendants' act of unjustifiably asserting dominion over the goods amounts in itself to converting them to his own use.[81]

[78] (1964) 1NZWLR 258
[79] (2009) 10 NWLR (pt, 1149) 416 at p. 432
[80] Hawes, C. Op cit at p. 47
[81] Ibid

What may be gathered from the definition above is that the converter of goods to commit conversion he needs not put the converted goods to his own use or benefit; even where he transfers same to another, he will still be liable for conversion. *In Hriot v Bolt*[82]it was held that:

> the declaration that the defendant, converted to his own use, the goods in question did not mean that the defendant consumed the goods himself for, if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it.

The fact that the defendant did not use the converted goods himself did not absolve him from liability since the purpose of liability in the tort is exercising a right inconsistent with that of the owner and the conversion in effect deprives the plaintiff of his or her interest in the goods. For this reason, the measure of damages for conversion is generally the value of the goods themselves with the result that judgment for the plaintiff in such a case once satisfied operates as effectively as a forced sale.[83] The defendant's intention is taken to include the natural and probable consequences of those actions which are intended in fact, even if such consequences may not have been intended.[84] Once there is the intention to convert, liability is therefore strict. Conversion may also be committed even by someone who has never had actual possession of the goods[85]. This is because physical possession or physical dealing with the goods is based on the authority of *Union credit Bank vs Mersey Docks and Harbour Board,*[86] not a necessary element of conversion and the act complained of may be committed constructively, typical of which is an order authorizing delivery of goods to another.[87] Since not all types of property can be converted Property capable of being converted have the following features:

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[82] LR 9, Ex, 86, 89, per Bramwell B
[83] Ibid at p. 48
[84] *Moorgate Mercantile Co. Ltd vs Finch* (1962)1 Q.B. 701
[85] *Bank of Montreal vs Trust & Young Inc* (2002) 220 DLR (4th) 193
[86] (1899)2 QB 205
[87] ibid

1. Liability in the tort of conversion is strict and even though the defendant's dealing with the chattel must be deliberate, the interference with the claimant's right need not be. Since liability is strict, an entirely honest person may also be caught as a culprit in conversion.

2. Just as it is the case with trespasses to land and to chattel, the tort protects possession not ownership. Acts of conversion are therefore inconsistent with the claimant's right to possession and the action for conversion may be used to vindicate possessory rights.[88]

3. As with any tort, the nature of the protected interest should be reflected in the remedies available. In an appropriate case, a court may in its discretion order the return of the converted chattel to the claimant. But this remedy is not available as of right even where the defendant retains possession of the goods.[89]

4.2.3.1 Property Capable of Being Converted

In this section, an attempt would be made to discuss an example of some of the property which are capable of being converted or against which the tort of conversion may be committed.

1. Specific Personal Property

For a successful claim in conversion, such claim must lay against identified or specific personal property, hence a property which is not ascertained or identified cannot be converted as it cannot be sold[90]. Therefore, a person who asserts an interest in goods must be able to state precisely, the goods in which his or her interest is claimed to be vested.[91] Land will however, not be a subject matter of conversion, as that is already covered under the tort of trespass to land, coupled with the fact that being an immoveable property, it

[88] Steele, J (2008) *Tort Law, Text, case and Materials*, Oxford University Press, London, P. 900
[89] Hawes, C. Op cit at p. 47
[90] Ibid at p.32
[91] Ibid

cannot be the subject of conversion. The same rule applies to fixtures which are permanently attached to the land such as items regarded as part and parcel of the land. But items which are temporarily affixed to the land and intended to remain as such may be the subject of conversion.[92] A typical example here is a power generator or even electrical installations such as transformers and poles. Money in the form of currency cannot be converted.[93] This is because money as currency cannot be recovered in specie[94].

Animals, especially those that are tamed (*domital nature*), may be converted[95]. Paper documents such as private letters may also be converted and in that case, although the real value of the items is generally the information or material contained in it rather than the object itself, the person with the possessory right in it may sue in conversion even if the copyright of it is vested in a third party.[96] On this, document which evidence valuable rights, such as documents of title, negotiable instruments share certificates, guarantees, insurance policies and bonds, the value of the converted article lies not in the piece of paper, but in the right which is disclosed on its face.[97]

2. Intangible Property

Unlike tangible property, the position of the law on intangible property, such as *choses in actio*n cannot be converted. The reason is simply because by definition they are incapable of being possessed, and are enforceable only by a legal action. Hawes articulated further on this position of the law, where she said: "…the tort of conversion required assertions of goods lost by their possessor and found by the defendant. The use of such concepts indicated that conversion must relate to property of tangible and movable kind"[98].

[92] Ibid
[93] *Lipkin Gorman vs Karpnale* Ltd (1991) 2AC 548
[94] Hawes, C. Op cit at p. 34
[95] *Hamps vs Darby* (1948) supra
[96] Ibid.
[97] Hawes, C. Op cit at p. 20
[98] ibid

This situation came for determination in the case of *OBG vs Allan*[99]. In that case, the House of Lords confronted directly the question of whether a *chose in action* could be the subject of conversion. The facts of the case were that OBG Ltd and an associated company (the claimants) went into financial difficulties and an unsecured creditor appointed receivers for them. The receivers took control of their business and terminated, settled or otherwise dealt with their contracts. The claimants after this procedure went into liquidation. They then brought proceedings against the receivers, alleging that the receivers had invalidly appointed receivers for them as a result of which they caused the claimant loss by wrongfully interfering with their contractual relations, and therefore, converted their contracts. The trial judge held the appointment of the receivers invalid arguing that the claimant's liquidators would have obtained more profitable results in dealing with the contracts than those achieved by the receivers. He however, dismissed the claim of conversion on the ground that the contracts, being *chose in action* and not tangible goods could not be the subject of conversion. The English Court of Appeal unanimously upheld the decision and in delivering the judgment, Peter Gibson L. J. Observed that:

> … It was historically obvious that a *chose in action* could not be converted because conversion derived from trover, which required averments of goods lost by their possessors and found for the defendant. Convenient though, it might be to find invalidly appointed receivers liable in conversion for their wrongful dealings with choses in action, it was not open to the court to invent such a tort.[100] The Canadian authorities cited in argument is supporting a contrary view were of little assistance.

On appeal majority of the House of Lords (though sharply divided), rejected the claimant's arguments and affirmed the longstanding rule that only tangible goods capable of being physically possessed could be converted. They further held that the very nature of conversion precluded its application to *choses in action*. Lord Hoffman, with whom Lord Walker and Lord Brown agreed, observed:

[99] (2008) 1 AC 1
[100] The Court of Appeal decision in the above case is contained in (2005) 2 WLR pp74 at 1190.

> Conversion was historically a tort which related only to tangible chattels. There was no authority to the contrary in English law. The extension of Conversion, and hence strict liability, into the area of economic loss would be an extra ordinary step, the law, having always been wary of imposing any kind of liability for purely economic loss. Parliament had modified the law of conversion by various statutes to provide, for example, exceptions to the *nemo dat* principle, and to provide protection for bankers and receivers against strict liability in some circumstances. But such protections had never been enacted to cover dealings other than those concerning tangible chattels because it would never have occurred to parliament that strict liability could apply to any other kinds of property. Although there were United States cases which supported the application of conversion to intangible property, these profligate the extent of tort law which had taken place in that country.

Despite the above position, it was however, accepted by Lord Hoffman that the common law had long recognized that documents, such as cheques, guarantees, insurance policies and other instruments, could be converted, and the measure of damages was generally held to be the value of the particular document. On the other hand, the minority view was expressed by Lord Nicholls of Birkenhead and Baroness Hale of Richmond, which was in favour of extending conversion to cover at least the misappropriation of contractual rights. Lord Nicholls stated.

> … As the need for tangibility had arisen from the historical need to plead that goods were lost and found, it should be acknowledged that it was based upon a fiction, and the fiction should therefore, be abandoned. A legal fiction was, by its nature, a pretence; in reality, the law had already crossed the boundary between tangibles and intangibles in the document cases, in which a piece of paper was treated as a token which had the value of the rights recorded on it. This was in effect, to file a fiction upon fiction. Why should the law have extended conversion to cover intangible rights which were represented, or recorded in a document but not otherwise? The better approach today would be to abandon the requirement of the piece of paper and to seek to identify the intangible property rights which were already as a matter of reality, protected by conversion.

On her part, Baroness Hale also observed:

> There existed no reason in the context of conversion to make a distinction between *choses in action* and *choses in possession*. A purchase of shares for example, was an acquisition of property just as much as a purchaser of a coat, both entailed proprietary interests which could be usurped, and the law should extend a proprietary right to protect them both.

Despite the minority opinion, especially the one expressed by Lord Nicholls that a legal fiction should be abandoned this is not always possible, especially where it will result to injustice on the part of a claimant. For example, trespass by relation (discussed in chapter two of this work) is a legal fiction which is still relevant and upheld, because doing the contrary may result in injustice to someone entitled to the right to immediate possession of land. In Nigeria however, the development of the law has not reached this level, because there is to the knowledge of the researcher, no authority on law of torts that has taken a particular position. The English decision may however, be adopted in Nigeria, as a persuasive authority.

3. Human Body.

The question here is can a human body be a subject matter of the tort of conversion? This issue has been a difficult and developing one. But it is a well-established common law rule that no one may own or have the right to possess the body of another[101] Not only does the common law refuse to recognize property rights in human beings, the assumption of such rights, by for example, detaining or trafficking in other persons, is generally punishable by the Criminal Law as being kidnapping or slavery.[102] It follows from this rule that, no one may own human corpse, the reason being that the occurrence of death cannot engender or trigger property rights which had not existed when the person had been alive.[103] However, though an administrator or executor of the estate of a deceased person may have right to possession or control of the deceased's body, this is merely for the limited purpose of carrying out the obligation to ensure proper disposal of the body. But no further property right is involved[104] and this same rule also applies to parts of dead

[101] Hawes C Op. cit at p. 42
[102] *R vs Bentham* (2005) 1 WLR 1057
[103] Hawes, C. Op. cit at p. 42
[104] Ibid at p. 45

bodies[105]. In the English case of *Retention Group Litigation*[106], it was held that the parents of deceased children upon whom post-mortems had been conducted could not maintain an action for wrongful interference in respect of organs that had been removed, retained and disposed of without their knowledge and consent. But where a body or body part is treated or worked upon and its character is altered that it ceases to be a corpse or becomes an item or property, the rule cannot apply, and based on this it was held in *R vs Kelly*,[107] that the application of dissection or preservation techniques for the purpose of creating an object for display or for teaching purposes, may have this effect. It was also held in case of *Doodeward vs Spencer* that a preserved *foetus* kept for scientific interest, lost its character as a corpse and becomes property of the input of skill and labour involved.[108]

4.3 'Special' Interests protected by the Tort of Conversion

It is now never in doubt that the tort of conversion protects possessory interest in a chattel owned by the plaintiff/claimant. In this context, *de facto* possession, in the form of effective control as evidenced by some outward act, is the interest being protected, and it is a question of fact.[109] Therefore, an action in conversion will not be available to a person who lacks actual possession of the goods being converted or an immediate right to it, but who has only a deferred or conditional or contractual right to possession. *In Leigh and Sullivan Ltd vs Aliakmon Shipping Ltd*, the Aliakmon[110], it was held that buyers of goods which were damaged during sea transit before the property in the goods had passed to them could not sue the ship owners in tort. That the buyers had agreed to buy, but had not bought the goods at the time of the damage and they therefore, had no proprietary interest in them

[105] Ibid.
[106] (2005) 2 WLR 358
[107] (1999) QB 621, per Lord Rose at P. 630-631
[108] (1908) 6 CLR 406
[109] *Irving vs National Provincial Bank Ltd* (1962) 2 Q.B 73 at 82, per Wilmer L.J
[110] (1986) AC 785

and they had no right to immediate possession of the goods at the relevant time. The buyers' contractual right to obtain property in the goods in the future did not suffice to allow them to sue. In addition to the possessory interest protected by the tort of conversion, there are other interests which the present writer categorized as 'special' interest. They are special because, the law recognized their protection through the tort of conversion, in addition to the possessory interests, which are generally protected under the tort.

4.3.1 Reversionary Interest

Reversion is more like a residue or an indisposed portion of interest in the property (whether chattel or land).[111] A reversioner on the other hand, is a person who has no more than a future right to the possession of the chattel.[112] Not having either possession of it, nor the immediate right thereto, he has no claim in trespass or conversion in respect of any interference and such a person, for instance, is the bailor in the case of a fixed term bailment.[113] He may however claim for damage to the goods which represents a permanent injury to his right of the reversion.[114] A typical example of this situation is where for instance, A gives his car out to a mechanic for repairs and a third party tempers or damages the car or does anything inconsistent with his interest. At the time the damage is being inflicted on the car, A cannot claim because he is not ordinarily in possession but he may sue to claim his reversionary interest, which is being jeopardized. Where however, a stranger takes A's car which is in the possession of B, a bailee and destroys it, the law allows either the owner or the bailee in possession to sue for conversion, as either of them may recover the full value of the car. But where the stranger did not convert the car but damages it by for example, hitting it on a wall, rock or a collision with other vehicle; same

[111] Rutherford, L and Bone, S (ed) (1993) *Osborne's Concise Law dictionary* (8th edition), Sweet and Maxwell, London, p. 293.
[112] James, P. S. and Latham-Broom, D. J. Op.cit at p. 1.
[113] *Tanered vs Allgood* (1859) 4 H & N 438
[114] ibid

way, both A and B can claim damages in negligence[115] This is unlike a situation where the stranger deliberately scratches the car as he passes by in which case only B can sue. The reason is simply because at that time only B is in possession and the stranger is not exercising any right, which is adverse to that of A.

One fundamental point to note with respect to the above situation is that although a bailee has the requisite possessory title to sue for interference with goods, the right is exclusive to the bailee only if the bailor had no right to regain possession of the goods at the time the unlawful interference occurred. If the bailment is at will the bailor by definition has the right to possession of the goods at any time although the actual possession is with the bailor. In such circumstance both the bailor and the bailee have current rights to sue a third party who wrongfully interferes with the goods, though both cannot recover the same loss simultaneously.[116]

In *O' Sullivan vs Williams,*[117] it was held that: "there cannot be separate claims by the bailor and the bailee arising from loss or damage to the chattel. If the bailor recovers damages and the bailee has some interest in the property enforceable against the bailor, then the bailor must account appropriately to the bailee."[118] It is also worthy of note that where a bailment is one at will such as simple loan, both bailor and bailee have the possessory rights in the goods as well as the concurrent right to sue a wrongdoer even though they cannot both undertake the same cause of action. In the same vein, where the right to repossess goods sold on hire purchase arises in consequence of the buyer's default, the seller is entitled to sue a third party for conversion.[119] However, the distinction between a possessory and reversionary interest is important when the recovery of damages is under consideration. As stated earlier, a bailee is regarded as having a competing title *vis-à-vis* a

[115] *Rooth vs Wilson* (1817) 1 B & Ald 59, 106 ER 22
[116] *O'Sullivan vs Williams* (1992) RTR 402
[117] Ibid.
[118] The above decision was given based on *Nicholls v. Bastard* (1853) 2 CM & R 659, 150 ER 279
[119] *North Central Wagan and finance Co. Ltd vs Graham* (1950) 1 All ER 580.

stranger. The bailee may sue to recover the whole value of the goods. But by contrast the holder of only the reversionary interest may recover no more than his actual loss.[120] Based on this therefore, it appears that an owner out of possession (a reversioner), may sue if he can establish actual damage but the cause of action cannot be conversion, trespass or negligence because the necessary possessory title is lacking.[121] The owner may sue as if he were founding an action on one of the relevant nominate torts, but may not directly base a claim on the above three torts. If this is correct, as asserted by Hawes[122] "the owner's action is essentially derivative or parasitic, for it depends upon establishing that some other nominate tort has been committed against another person, presumably the bailee. This reasoning however, implies that the elements of the action for reversionary damage are the same as those of the individual tort of negligence, conversion and trespass.[123]

Hawes, however, elucidated further on the above discussion and resolved as follows:

> At present, the bailee with an exclusive right to possession and so the sole right to sue ultimately retains in any event no more than the value of his own interest in the goods. Although the bailee may obtain from the wrongdoer the entire value of the lost or damaged goods, the bailee may obtain as against the bailor only damages resulting from the wrongful interference with his possessory interest in them. The value of this will of course vary according to the terms of the bailment, but the value of the respective possessory interests of the bailor and the bailee must be assessed. If both are able to sue because the bailment is at will, no double recovery for damage to their respective possessory interests result, for the bailor's right to possession includes the right to make use of his property as he wishes including allowing possession to the bailee.[124]

As the law stands, if a wrongdoer's act of conversion occurs, a day before the expiry of a fixed term bailment the bailee may sue the wrongdoer but the bailor may not, but where the conversion occurs a day after the bailment has ended and the bailee

[120] Hawes, C. Op cit at p. 83.
[121] This is based on the English case of *HSBC Rail (UK) Ltd vs Network Rail Infrastructure Ltd* (2006) 1 All ER 343.
[122] Hawes, C. Op.cit at p.86
[123] Ibid
[124] Ibid at pp. 93-94

continued to be in possession either the bailor or the bailee may bring an action in conversion[125]. Therefore, the major distinction with respect to interest to the reversion lies typically, in a bailor-bailee relationship.

4.4 Methods of Committing Conversion

The tort of conversion has a wide coverage to such an extent that it can be committed through various means. The authorized taking, detaining, misuse or disposal of goods, all amount to conversion. The various ways which the tort can take are discussed hereunder:

4.4.1 Conversion by Taking

This type of conversion comprised in taking a chattel or goods out of the possession of the person entitled to their custody for the purpose of exercising dominion over them.[126] Therefore, the unjustified removal or taking away of goods for the defendant's own purposes which are inconsistent with the owner's use and possession of the goods is conversion.[127] For an action to lay in conversion the taking must be intentional, i.e with the intention to maintain control over it to the exclusion of the owner or person in possession. It is however, not necessary for conversion that the person taking the goods intends to claim ownership of them or keep them for himself or herself. But it is sufficient if he asserts a right to take the goods in circumstances where no right exists, such as taking possession of goods to obtain or assert a lien to which the taker is not entitled to. Impounding vehicle of someone for 14 days without his permission was held to be conversion by taking[128]. In the case of *Davies vs Lagos City Council*[129], the defendant was

[125] Ibid 1t p.95
[126] *Fouldes vs Wiloughby* (1841) 8 M&W 540
[127] Hawes, C. Op. cit at p.51
[128] *Famujuro vs Ojomu* (1955-56) WRNLR 129
[129] (1973) 10 CCHCJ 151

held liable in both trespass to chattel and conversion for the act of its staff who wrongfully carried away the plaintiff's taxi in the conduct of their official assignment.

Worthy of note in the tort of conversion is the intention to keep or exercise dominion over the goods. If the goods were merely taken from one place to another without the intention to take them away such as where one has to move somebody's goods to reach his that is not conversion; at most it will be trespass to chattel, where the requisite consent is absent. Therefore, if the necessary intention to assert dominion over the goods is absent no conversion has been committed because the mere act of taking possession is not in itself sufficient.[130]Unlike criminal conversion, in tortious conversion it is not necessary that the defendant should intend to retain permanent possession of the goods at the time that they were taken. A temporary taking is sufficient provided the necessary inconsistency with the plaintiff's right is present[131].

4.4.2 Conversion by Using/Misusing

Mere use of the goods without the permission or consent of the owner constitutes conversion. Therefore, where for example A takes the bicycle of B and use it to go to the market or just take a ride to any place, no matter how short the distance is, then brought it back (without permanent deprivation) that is also conversion. The redelivery of the bicycle back to the owner will not constitute a bar to the action in conversion, though it may be a mitigation of the damages to be paid.[132] However, a finder of missing chattels who uses it is also liable for conversion, but where he only finds the chattel and keeps it without using it he cannot be liable for conversion.[133]

[130] *Kuwait Airways Corporation vs Iraqi Airways Corporation* (Nos 4 and 5) supra
[131] *Wibbrahim vs Snow, Supra* at p. 7
[132] *Clerk and Lindsell on Torts*, op.cit at p.732
[133] *Malgrave vs Ogden* (1591) 78 ER 475

4.4.3 Conversion by Destruction or Consumption or Alteration

Destroying someone's chattel such as, putting his cloth ablaze or consuming his soft drink or changing the pattern of the chattel intentionally amounts to conversion. This position is contrary to what was obtainable under conversion in the absence of a voluntary act.[134] Based on this rule, if goods were lost accidentally or carelessly, the bailee or other person in possession could not be sued for conversion. He may however, be liable under his contract with the bailor or for negligence[135] or in limited cases for detinue[136]. This position still remains in Nigeria because detinue is still recognized, but in jurisdictions where the law has undergone some amendments to such an extent that detinue is no longer recognized as a tort, such as the United Kingdom, one instance where conversion does not require a voluntary act to be established, is the case of bailee, who in breach of his duty under the bailment allows the goods to be lost or destroyed[137].

In the case of alteration, taking someone's long sleeve shirt and turning it to a short sleeve typifies the tort of conversion by alteration. This is because the nature of the shirt has been changed from what the owner wants to something different. This mere act of changing the mode of the shirt is enough exercise of dominion by the converter over the claimant's chattel. Mere damage committed unintentionally may not amount to conversion but can be actionable in the tort of trespass to chattel because the requisite mental element required to found the tort of conversion, which is intention[138] is absent. An example of this principle is where A keeps his vehicle to spend the night at a public park and due to the negligence of the guard (may be his failure to close the entrance to the park), the vehicle of Mr. A got stolen. In that circumstance, the guard can be liable for trespass to chattel or even negligence but not conversion, since he was only negligent but did not act

[134] *Clerk and Lindsell on Torts*. Op.cit at p.5
[135] *Ross vs Johnson* (1772) 5 Bar. 2825
[136] Ibid
[137] See the *Torts (Wrongful interference with goods) Act*, 1977, passed in the United Kingdom.
[138] Kodilinye, G and Aluko, Op cit at p. at p. 12

intentionally[139]. Where however, the defendant exposes the plaintiff's goods to the risk of destruction he will also be liable for conversion.[140] In the case of *Moorgate Mercantile Co. vs Finch*[141] the defendant who used the plaintiff's vehicle for smuggling as a result of which it was confiscated, and he was held liable for conversion.

The above scenario is conversion by destruction because the chattel became extinct and the willful destruction of the goods is the essence of this type of conversion. This is because the act of destruction was that the plaintiff can no longer possess or use the goods, or exercise his or her rights over them[142]. Acts short of physical destruction may also have this result and so constitute conversion of the goods thereby lose their identity and become something else.[143] For example, where one adds water to another person's soft drink is as good as destruction because the original test has been varied with the dilution.

4.4.4 Conversion by Receiving

Any receiver of property of the plaintiff transferred to him by a third party is liable for conversion. This is because by mere receiving, the defendant, though seemingly innocent would be considered to have contributed to the interference with the plaintiff's right of possession of his goods or chattels.[144] An example here is where the defendant takes away the plaintiff's goods and sells them to a third party. The defendant in this circumstance may not be liable by the ordinary and initial receiving where he buys the goods in market overt in accordance with the use and practice of the market, so far as he does that in good faith without having notice of any defect to the title of the person who sold the goods to him.[145] The same rule applies in the case of the person who sold the goods by a mercantile agent having authority in the ordinary course of his business to

[139] *Simmons vs Lilly Stone* (1853) ER 1417
[140] Pitchfork, E.D. Op cit p. 408
[141] (19962) 1 QB 707
[142] Hawes C. Op cit at p. 63
[143] Ibid.
[144] *BEWAC Ltd vs African Continental Bank Ltd* (1971) 6 CCHCJ 12
[145] See Section 24 of the *Kaduna State Sales of Goods Law* No. 15 of 1991.

dispose of the goods in his possession. Whoever buys such goods has good title to them. This is on the condition that at the time of the transaction, the agent is in possession of the goods with the consent of the owner and purchaser for value in the course of business.[146]

4.4.5 Conversion by Wrongful Transfer of Title to Another

This is a form of conversion where the defendant will be held liable if he takes the plaintiff's chattel and sells out rightly. An author described this type of conversion in a greater detail though with certain reservations and posers; thus:

> The unauthorised disposal or transfer of goods may in some circumstance constitute conversion. The question of whether a disposal or purported disposal of goods constitutes a conversion of them is decided not so much by labelling the act itself as for example, a sale, a pledge, a gift, a delivery or anything else, but by examining the effect of the transaction upon the plaintiff's interests. A person who purports to deal with the goods of another may or may not have effect. In some circumstances a transaction done without authority may be effective in law, and in others it may have no validity at all. Therefore, such transactions as a purported sale, gift, pledge or hire may or may not be conversion. The question cannot be answered without considering whether the facts of the particular case reveals the necessary denial of the plaintiff s interests. Again, the essential feature is the assumption of dominion over goods in such a way as to deprive the plaintiff of his or her rights in the goods.[147]

What may be deduced from above is that wrongful transfer of title in the context of conversion may take more than one form. That it can be committed by other means apart from sale. Also, whether such a transfer of title is conversion or not is a question of fact. It follows therefore, that mere physical delivery or transfer of goods, although done with no intention of effecting any alteration in property rights or interests may be conversion of the person to whom the goods are delivered is not entitled to them.[148]The difference between conversion by wrongful transfer of title and conversion by receiving is that, here it is the person who took the chattel that converts it. Wrongful disposition of a truck by the

[146] Section 27 of the *Kaduna State Sale of Goods* Law, ibid
[147] Hawes, C. Op. cit at p. 6.4
[148] Ibid See also the New Zealand's case of *Helsen vs Mckenzie (Cuba Street) Ltd* (1950) NZLR 878

defendant bought by the plaintiff on a hire purchase when he defaulted in making payments, was held to be conversion in the case of *Anoka vs SCOA*[149]

4.4.6 Conversion by Detention

This is the kind of conversion where the defendant, who is in possession of the plaintiff's chattel with lawful authority, refuses to deliver or surrender it to the plaintiff when asked to do so by the owner or a person having right to immediate possession of the goods. In this type of conversion, the defendant normally comes into possession of the goods through lawful authority and there is usually an unconditional demand for the return of the same by the intermeddler who fails to do so. Detention constitutes conversion only where it is adverse to the person claiming possession, so that the person detaining the goods must show an intention to keep them in defiance of the claimants.[150] In the same vein, the defendant's intention is also relevant as one who innocently comes into possession of the goods of another, not having been the original taker, does not commit conversion because of the absence of direct interference of the goods on his part. An unqualified and unjustified refusal to return after demand constitutes conversion by detaining. It is not always unlawful to deliver up goods immediately the demand has been made for the person detaining the goods is entitled to take adequate time to enquire into the rights of the person claiming the goods.[151] This will only absolve the person in possession though not the true owner or any person entitled to it, where he keeps the goods for the purpose of ascertaining the claim of the claimants. A typical example of this scenario is where the police keep or retain goods pending certain investigation. Conversion by detention could also qualify as detinue in jurisdictions where detinue is still recognized as a separate tort from conversion.

[149] (1955) 56 WRNLR 113
[150] *Cuff vs Broadbands Finance Ltd* (1987) 2 NLR 34 at 346
[151] Hawes, C. Op. cit at p. 54

4.4.7 Conversion by Mis-delivery by Carrier

Delivering goods wrongly by a carrier or any person in a similar position is conversion. It is therefore the duty of a bailee or a warehouse man to deliver the goods with which he is entrusted to or to the order of his baitor, but where he delivers them to an impostor, such as where he delivers the goods to a fraudster who presented to him, a fake bill of lading or to anyone else is *prima facie* a conversion[152]. The fact that the delivery was made to an owner who had no right to receive them, will not be a defence to the defendant.[153]Therefore, a carrier commits conversion if in breach of contract with his consigner, he delivers to the consignee and thus destroys the lien of the consignor or if he delivers goods to the consignee without production of the bill of lading where the bill of lading has been pledged to a bank.[154] In the same vein, a carrier or a warehouse man who delivers goods to a wrong person commits conversion whether or not his mistake was innocent. But failure to deliver goods because they were lost or destroyed, whether accidentally or carelessly cannot be conversion.[155] But the fact that he is absolved from liability does not mean he will not be liable in other torts. This means, he may be liable in contract, or for negligence, or detinue.[156]

4.4.8 Conversion by Wrongful but Effective Sale and Sale in Emergency

A delivery by way of sale on the part of a non-owner even if ineffective to pass title to the buyer is conversion.[157] By contrast therefore, a mere bargain and sale is not conversion even if the non-owner purports thereby to transfer title to the would be buyer[158] An exception to this rule is where the sale is captured under any of the exceptions to the *nemo quod non habet* doctrine. An example here is where such a sale includes cases where

[152] *Mortis Exports Ltd vs DAF (*1999) I Lloyds Rep. 837
[153] *Clerk and Lindsell on Torts* Op. cit at p. 734
[154] *The Stone Gemini* (1999) 2 Lloyd Rep. 255
[155] www.lawteacher net/Law-tort accessed on 26/08/2012
[156] See *Ross vs Johnson, supra*.
[157] *Clerk and Lindsell on Torts* Op. cit at p. 736
[158] *Lancashire Wagon Co. vs Fitzhigh (1*861) 6 H & N 502

the true owner is estopped from denying the possessor's power to pass a good title or where the purchaser sells a vehicle to a *bonafide* private purchaser.[159] With respect to an emergency sale, a bailee has an implied power to sell the bailor's good in the case of real and urgent emergency and that will not make him liable in conversion if he does.[160] This right is limited as it will not apply to a bailee who sells goods merely to relieve himself of an unwelcome encumbrance, even if he cannot contact the owner.[161]

4.5 Unauthorised Disposition of Goods

Disposition of goods in the common law (Nigeria inclusive), is generally guided and regulated by the sale of Goods Law.[162] It is therefore, impossible to discuss the subject of conversion without considering the law dealing with disposition of goods which was made by a person who has no right to sell them.[163] How the law allocates title in such circumstance must be examined before it can be determined on who may sue or who may be sued in conversion. Determining where liability rests will only be possible if the question of where the property in the goods is vested especially now that it has become established that conversion is essentially one of property.[164] The question of how to deal with unauthorised sale of goods in the event an innocent person buys goods from another, who does not own them or lacks the authority to sell, Hawes, answered as follows:

> A sale of goods is by definition a transfer of property in the goods by the seller to the buyer in exchange for the buyer's payment of the purchase price. If property in the goods is not passed because the seller has no title to pass or no authority to sell no sale can be validly effected. It is not sufficient merely to transfer the physical goods themselves for that is no more than a transfer of possession. To constitute a sale, a transaction must transfer ownership. In consequence, it has long been axiomatic that the

[159] Hawes, C. Op cit at p. 5
[160] *Australasian Co S/N vs Morse* (1869) L R4 PC 222
[161] *Sacks vs Milkos* (1948) 2 KB 2
[162] *Sale of Goods Law of Kaduna State,* 1991is adopted in this research.
[163] Hawes, C. Op. cit at p. 7
[164] Ibid.

> basic rule for sales carried out without authority is that *nemo dat quod non habet*: no one may give what he or she does not have.
> A person with no title to goods, and no authority to sell them, cannot pass to a purchaser a good title because he or she has no title to transfer. In other words, the effect of the *nemo da*t rule is that the property rights of the true owner prevails over those of a buyer; and the rule is that the true owner retains his or her title to the goods. The *nemo dat* rule follows as a matter of logic from the principle that the inherent nature of a sale of goods is a transfer of ownership of them from (or through, if the seller is an agent for the owner), the seller to the buyer. Overtime, the common law developed exceptions to the *nemo dat* rule. It was recognized in the common law, and in subsequent legislations that at least some innocent third parties who bought goods in the honest belief that the seller was entitled to sell them ought to protect them[165]

The summary of the above assertion is that a person who does not own a chattel or goods cannot legally speaking transfer title in them even where he has effected their physical transfer by way of a sale. Where he does so, he can be liable in conversion, as even by the law the principle applicable in contract for sale of goods is generally, *nemo dat quod non habet.*[166]

4.6 The torts of Conversion and Detinue in Nigeria

The torts of Conversion and detinue together with that of trespass to chattel/goods are more of conjoined triplets which historically, emerged together and are to some extent, together even though the torts have undergone certain transformation in some jurisdictions where they presently bear the single name of wrongful interference with goods. In Nigeria the law still wears its original common law garb, in which conversion and detinue still remain separate. But this researcher is of the opinion that maintaining the two torts as separate is of no importance, This is simply because even the courts in Nigeria define the two torts interchangeably; thereby creating confusion in the law and agreeing to the fact that detinue has largely become extinct. This is evident from cases decided by the appellate

[165] Ibid at pp 119-120
[166] ibid

courts in Nigeria. In the case of *Henry Stephens, engineering Ltd vs S. A. Yakubu (Nigeria) Ltd*[167], the Supreme Court of Nigeria stated that:

> … the usual mode of establishing that a detention of a chattel by a defendant is adverse to the right of the owner or other person entitled to its possession and therefore, constitutes the tort of conversion, is to prove that the plaintiff demanded the delivery of the chattel and that the defendant refused or neglect to comply with the demand. Thus, a demand by the plaintiff and refusal by the defendant are the essential ingredients of conversion.

The above definition in many respects resembles that of detinue given by the Court of Appeal in the case of *Ogunsola vs Ibiyemi*,[168] where Fabiyi JCA defined dettinue to mean:

> An action to recover personal property wrongfully taken by another… A claim in detinue lies at the suit of a person who has immediate right to the possession of them and who upon proper demand, fails or refuses to deliver them up without lawful excuse. The plaintiff may desire the specific restitution of his chattel and not damages for their conversion.

The ingredients of the torts of detinue as outlined by the Supreme Court of Nigeria in the case of *NACB vs Achagwa*[169] can still qualify as conversion by detention and which by extension means that detenue is of less importance. In that case, the respondent sued the appellant at the High Court of Taraba State in Jalingo. By his statememnt of claim, the respondent claimed against the appellants, an order to the appellant to release the Certificate of Occupancy of his plot of land and general and special damages for the failure to release same. When the matter came for hearing in November 1998, the appellants' counsel was absent hence the respondent's counsel moved the court to enter judgment for the respondent in default of appearance and the trial court granted his application. The court also granted the respondent's claim for the payment of damages. In 1999 the appellant sought from the trial court an order enlarging the time to apply to set aside the

[167] Supra at p. 17
[168] Supra at p. 17
[169] (2010) NWLR (pt 1205) 339 at 368

judgment, an order granting leave to the appellant to defend the action and an order releasing its vehicle from attachment.

In its ruling, the trial court held that the appellant's application was incompetent and dismissed the applications. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. On appeal, the appellant contended that the trial court's order of specific performance to wit-release of the respondent's Certificate of Occupancy, was wrong. It also contended that the award of damages without any form of assessment was also wrong . Unanimously allowing the appeal the Court of Appeal held *inter alia* that for a plaintiff to prove the tort of detinue there must be an evidence to establish:

(a) That the person suing must be the owner of the property (goods or chattel).

(b) That the property was detained by the defendant

(c) That the plaintiff demanded the release of the goods

(d) That the defendant refused or neglected to release the property.

Although detinue still remains a separate tort in Nigeria, it is of less importance since its territory has now been invaded by the conversion in which case conversion can be committed by detaining goods. Also, since the ingredients of conversion are exactly similar to those of detinue, there is no need for the continued existence of the tort of detinue as its continued existence is no more than a confusion and duplication in the law. This is perhaps the reason it has been abolished in some common law jurisdictions. Despite the argument put forward above by the researcher that detinue is no longer relevant as a separate tort since conversion has encroached into its territory and made it virtually extinct, except for historical purpose, there are authors who express the opinion that the two torts are different. Professor Kodilinye is one of such authors with this opinion, and for clarity of understanding, his opinion as to the distinction between detinue is hereby provided.

4.7 Assessment of Damages in Conversion and Detinue

These torts deal with wrongful interference with goods, and substantially, the same principle on assessment of damages apply to them.[170] The principle has been explained by professor Kodilinye as follows:

> Where the goods in question have been damaged, lost or destroyed by the defendant's tort, the measure of damages is founded on similar principles to those applicable in the tort of negligence. Thus, for instance where the plaintiff's chattel has been wrongfully taken out of his possession by the defendant and then lost or destroyed, the defendant will be liable for its market value, or if the chattel is not readily available in the market to its original cost minus depreciation. The plaintiff may also recover general damages for loss of use of the chattel during the period reasonably necessary for acquiring a replacement.[171]

Where the plaintiff's goods have not been destroyed, or damaged but have been kept out of possession for some time, the plaintiff can claim only for the detention including general damages for the loss of use and special damages for any proved loss of earnings during the period.[172]

Part VII of the Enugu State Torts Law,[173] has provided the method for assessment of damages in cases of conversion and detinue as follows:

> The damages awarded in an action for detinue where the goods are not returned, shall be the market value of the goods at the time of judgment, provided that if the value of such goods at the date of the judgment is attributable in part of expenditure on work thereon done by the defendant, allowance for that should be made in his favour in assessing the damages.
> Where a person sues in conversion, the damages recoverable by him shall be equal to the value of the goods at the time of conversion, and if the goods have arisen in value between conversion and judgment he shall be entitled to recover the difference in value as additional damages save to the extent to which he ought to have mitigated any loss sustained by him.[174]

[170] Kodilinye, G. and Aluko, O. Op.cit at p.295
[171] Ibid.
[172] Ibid at p.296. See also *Davies vs Lagos City Council* (1973) 10 CCHCJ 151
[173] Cap 150, Laws of Enugu State, 2004
[174] Section 90(1) and 91, Enugu State Torts Law, Ibid and *Darego vs A.G Leventis Nig. Ltd* (2015) LPELR-CA/L/481/2011

As a corollary to the above, the Supreme Court of Nigeria provides the procedure for assessment of damages for conversion and detinue in the case of *Enterprise Bank Ltd vs Aroso.*[175] In that case, one Mr. Kayode Olatunji, under the name of Kaylat Enterprises applied for and obtained a loan from the appellant. The loan was executed as a legal mortgage. To further secure the loan, the father of the respondent, Chief M.O Olatunji, who was the Managing Director of another factory, executed a personal guarantee form on behalf his son (Mr. Kayode Olatunji). Mr. Kayode Olatunji defaulted in repaying the loan and failed to meet his financial obligation, hence judgment was obtained against him at the High Court of Ondo State. Chief M.O Olatunji, the father of Kayode Olatunji, was not a party to the proceedings and notice of default of payment of debt or demand was never served on his son, the principal debtor.

After the judgment an auctioneer, (the second defendant in the High Court suit), acting on behalf of the appellant, in company of heavily armed policemen, went to the factory of Chief M.O Olatunji and at gu point carted away some equipments, including a 75 KVA generator and cash. After the incident Chief M.O Olatunji sued the appellant, its agents, the Commissioner of Police of Ekiti State and another person. The trial court in its judgment ruled that the respondent's claims against the appellant and the second defendant were valid and awarded damages to the tune of overt thirty million naira against the appellant. The appellant appealed to the Court of Appeal but the appeal was dismissed. Dissatisfied, the appellant appeal to the Supreme Court. Unanimously dismissing the appeal, the Supreme Court held *inter alia* as follows:

> The measure of damages in cases of detinue is as follows:
> (a) The market value of the goods detained.
> (b) The sum of money representing the normal loss through the detention of the goods
> (c) In cases where the goods have not been profit-making, the damages for loss arising from the owner's inability to make

[175] (2014) 3 NWLR (pt. 1213) 256

> use of the specific goods which may be classified into general and special damages.
> In a claim for detinue the plaintiff is entitled to damages for his loss arising from his inability to make use of his goods and this can be recovered under either general or special damages. Furthermore, if the plaintiff is able to show that he has suffered special damage by the detention of his goods such damage if reasonably foreseeable, is recoverable. In an action for detinue, the plaintiff if successful is entitled to damages till judgment.[176]

The above decision of the Supreme Court raises a question as to whether for damages to be recoverable for damage to property detained the injury must be reasonably foreseeable. The answer to this poser is that where goods converted or detained are damaged the appropriate remedy should be in negligence since the damage is reasonably foreseeable.[177] With regards to the measure of damages in the tort of conversion, the Supreme Court also held that in conversion, damages are assessed on the value of the goods at the date of conversion. That is, the market value at the date of conversion. But damages in detinue are much higher than in conversion.[178] One point worthy of note is that where the conversion is one by detention, the measure of damages could be the same as detinue.

4.8 Differences between Conversion and Detinue.

Before going into the detailed discussion on the differences between conversion and detinue as enumerated by Professor Gilbert Kodilinye in his book, the Nigerian Law of Torts,[179] it is pertinent to state that the author shares the same opinion with this researcher that… detinue thus covers the same ground as conversion by detention,[180] He however, went further to differentiate the torts as follows:

[176] Ibid at pp.300-301
[177] Kodilinye, G. and Aluko, O. op.cit at p.295
[178] *Enterprise Bank vs Aroso*, supra at p. 1
[179] Kodilinye G and Aluko O, Op. cit at p. 12
[180] Ibid

1. The defendant will not be liable for conversion by detention where prior to the demand for the return of goods by the plaintiff, the goods were lost or destroyed whether by accident or by the negligence of the defendant. But the defendant will be liable in detinue in such circumstances. In reply to this, my opinion on this is that the scenario captured by the learned professor, can still qualify as conversion by destruction which is another form of conversion. The same scenario could also give rise to a cause of action in negligence because of the presence of fault element of negligence, if the goods were lost due to the negligence of the defendant.
2. Refusal to deliver after demand according to the learned Professor is the essence of detinue. But it is also the essence of the tort of conversion by detention[181]
3. In detinue the plaintiff can claim specific restitution of the goods but cannot do so in conversion. But the same claim can be made by the claimant even in the case of conversion if the goods were not destroyed. Demand and refusal to return goods are the essentials of the tort of conversion by detention.
4. In conversion damages are generally assessed on the value of the goods at the date of the conversion, whereas in detinue they are assessed on the value of the goods at the date of the trial. This may be partly correct because especially in the case of bailor-bailee relationship which is the only remnant of the use of detinue, in jurisdictions where detinue is still recognized as a tort independent of conversion.

Despite the differences highlighted above, by Kodilinye the fact still remains that conversion has in the cause of its encroachment into the territory of detinue virtually consumed it. Therefore, Professor Kodilinye's arguments are not one hundred percent convincing for three major reasons. Firstly, it is never in doubt that conversion by detention and detinue are one and the same thing. This, the author has acknowledged in his work.

[181] See *Henry Stephens Engineering Co. Ltd vs S. A. Yakubu (Nig.) Ltd*, Op. cit at p/ 3

Secondly, all the English cases cited by the learned author in support of his argument were pre – 1977 cases,[182] when detinue was abolished in the United Kingdom as a tort. Therefore, if the same cases were to be decided in England today, they would have been captured under conversion and not detinue anymore.

Thirdly, even in Nigeria some judicial authorities which defined the tort of conversion can also qualify as detinue and vice versa. In the case of *Henry Stephens Engineering Co. Ltd vs S. A. Yakubu (Nig.) Ltd*[183] the respondent sued the appellant at the High court of Lagos state claiming the sum of N750,000 (Seven Hundred and fifty Thousand Naira) being due and payable to the respondent for the wrongful conversion of its concrete mixer and for damage suffered for the loss of the mixer. The respondent told the court that he had delivered the concrete mixer together with a compressor to the appellant. The respondent after delivery of the items to the appellant demanded the payment of a deposit which the respondents had obliged instalmentally at three different occasions, with the last being made on October 21, 1986. That between 1988-1992 when this action was filed at the Supreme Court the respondent orally, demanded the return of the concrete mixer and the compressor on numerous occasions but the appellant failed to return them to the respondent. After general demands, the respondent averred further that the appellants wrote a letter pledging the return of the machinery in due cause; which they did not do so; as a result of which this action was instituted for conversion of the said items. Part of the decision of the Supreme Court in the instant case is that the detention of the plaintiffs' (appellants') chattel becomes conversion only if it is adverse and inconsistent with the rights of the owner or other person entitled to its possession. Therefore, to be liable for conversion, the defendant must be shown to have demonstrated an intention to detain or withhold the chattel in defiance of the plaintiff. The usual mode of establishing that a

[182] See cases such as *Coldman vs Hill* (1919) 1 KB 443 and *Whitely vs Hill* (1918) 2 KB 806
[183] Supra at p. 17

detention of a chattel by a defendant is adverse to the right of the owner or other person entitled to its possession and therefore, constitutes the tort of conversion is demand by the plaintiff and refusal to deliver up by the defendant.

Another instant which can both qualify as the case of detinue and conversion was also illustrated by the case of *N.A.C.C.E.N (Nig) Ltd vs B.E.W.A.C. Automotive producers Ltd.*[184] In that case the appellant, a business partner of the respondent bought two tippers from the respondent. At some point the appellant took the tippers to the respondent for repairs and the tippers remained in the possession of the respondent for sometimes. When the appellant sent its staff to collect the vehicles it was discovered that the engine of one of the vehicles was replaced with a strange engine as such the respondent was no longer in a situation to deliver the vehicles and the appellant sued the respondent and claimed the sum of 1,319,464.94k being the price for a brand new vehicle, insurance and freight duty as well as clearing charges and for loss of use over a period of time. The court granted the claims of the appellant. On appeal to the Court of Appeal the judgment of the trial court was set aside. The appellant appealed to the Supreme Court where it was held *inter alia* that detinue is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and this continues until the delivery up or judgment action in *rem* which the plaintiff may sue:

(g) For the value of the chattel as assessed and also damages for its detention, or

(h) For the return of the chattel as assessed and also damages for its detention; or

(i) For the return of the chattel and damages for its detention.

A critical look at the facts and holding of the above two cases reveals that one thing is common among them; goods of the defendants were wrongfully taken and despite several demands by the plaintiff the defendant refused to deliver them up. This is despite

[184] Op cit at p. 17

the fact that the two cases deal with different torts, the first dealing with conversion and the second dealing with detinue. Also, the case of NACCEN is the perfect illustration of the last remnant of the tort of detinue; because the relationship which gave rise to the cause of action is that of bailor and bailee. However, the argument of this researcher is that in view of the widening of the scope of the tort of conversion to the extent that it has virtually consumed detinue, there is no need of maintaining detinue as a tort separate from conversion, just as it is the case in England and other jurisdictions. Had the position in England been adopted in Nigeria the case of NACCEN would have been the case of conversion by detention.

However, the Supreme Court of Nigeria had in the case of *NACCEN vs BEWAC Automotive Producers Ltd*,[185] attempted to justify Professor Kodilinye's distinction between conversion and detinue, when it stated that:

> Unlike an action for conversion which is purely a personal action and judgment is for single sum which is the value of the chattel at the date of the conversion detinue is in the form of an action in rem whereby the plaintiff seeks specific restitution of his chattel resulting in judgment for the delivery up of the chattel or payment of its value as assessed at the time of the judgment or damages for its detention.[186]

Despite the above attempt at distinguishing the two torts, the distinction can only remain valid in jurisdictions like that of Nigeria; But in jurisdiction where detinue has been categorically abolished, the distinction will not stand, especially in view of the arguments earlier canvassed in the chapter to the extent that conversion can be committed by detention, sharing the same character and features with detinue. It is for this reason that the present researcher is of the opinion that there is no reason for the continued existence of detinue as a separate tort since virtually the territory of detinue has been covered by conversion by detention. It will therefore not be out of place to highlight the reforms

[185] ibid
[186] See p. 209

carried out in other jurisdictions which abolished detinue as a tort in order to make comparison, and show how Nigeria's should be.

4.9 Reform of the Torts of Conversion, Detinue and Trespass to Chattel in other Jurisdictions

As stated earlier, the three torts have now been reformed in some jurisdictions in view of how they overlapped into each other. This has brought precision in the law and minimized confusions in those jurisdictions.

4.9.1 England

England happens to be the only common law jurisdiction where a report of the Law Reform Committee led to a legislation relating to interference with goods[187]. The law reform committee sought to simplify the law by recommending the creation of a single tort to be known as "Wrongful Interference with Goods" comprising conversion, detinue and trespass to chattel. It also recommended the abolition of detinue stressing that one remaining instance of the tort, (bailor-bailee relationship), which did not at the time constitute conversion should also be regarded as such. The committee did not recommend a codification of the whole laws of interference with goods, but proposed that any legislation should retain the existing incidents of conversion. The distinction amongst the rewards available for conversion, detinue and trespass; should be rationalized while courts have been given the discretion to decide whether or not to allow the specific return of goods.[188]

Based on the England Law Reform Committee's report the Torts (Interference with Goods) Act was enacted in 1977; and Section 1 of the Act defines wrongful interference with goods to mean conversion, trespass and negligence or any other tort so far as it damages goods or an interest in goods. The principal effect of the Act is that regimes of procedure and remedies have been created for the common treatment of the torts which

[187] The 18th report of Conversion and Detinue cond 4774, translated into the Tort (Interference with Goods) Act of 1977
[188] Hawes, C. op.cit at p.5

come within the rubric of unlawful interference.[189] In other words, there is a similar regime of treatment to all torts dealing with interference with goods in terms of remedy and even procedure. The law in Nigeria as it is today still remains the common law categorization, which is also the same in countries like New Zealand.

4.9.2 Canada

The Ontario Law Reform Commission[190] and the Law Reform Commission of British Colombia[191] advocated the reform of the law of wrongful interference with goods by recommending legislations to replace the common law position. The Ontario report for example, pointed out that the existing law of Wrongful Interference with Goods was complex, deficient and in need of a legislative reform, though not in a radical manner. The report recommended that the creation of a statutory tort to be called "Wrongful Interference with Goods", which would retain the existing actions. It also sought to retain the traditional common law remedies while proposing new remedies. The commission also proposed that the new torts which would be created should be less directed towards strict liability than were the torts which it encompassed. That the recovery of goods should also be more generally available and statutory provision should be made for the recaption of goods.

The British Colombia Commission on its part also recommended a legislative approach to the law of wrongful interference with goods, which remained "as if frozen in amber, a movement to the past". According to the report, the English and Ontario proposals for reform essentially built on, or retained, the existing law, and that neither led to contemplate the complete replacement of the law with a statutory tort. One thing that is common among both the English and the Ontario Commission is that none of them was in favour of a completely new statutory tort which did not codify the existing law on wrongful

[189] Ibid at p. 226
[190] Study paper on Wrongful Interference with Goods 1989
[191] Report on Wrongful Interference with Goods, LRC 127, 1992.

interference with goods. The legislation proposed and drafted by the British Columbia Reform Commission was based on four general principles

(a) Remedies should be made available through a single cause of action (such as wrongful interference with goods to encompass all the three torts).

(b) The action should be available to anyone with an interest in the property.

(c) Award of damages should compensate for claimant's actual loss; and

(d) The courts should be able to select from a full range of remedies.

The draft legislation aimed to achieve two things. Firstly, it stated that a person in possession of property owned by another, must not interfere with, or harm directly or indirectly the property or the owner's interest in the property without lawful justification. Secondly, that a person receiving property owned by another must return it on the request of an owner entitled to possession of it. Breach of any of these duties would give rise, to one or more of a range of remedies stated in the draft legislation. The remedies would include declaration as to entitlement to property, as well as orders for damages for reasonably foreseeable loss resulting to loss regulating from the breach of duty, loss of profits, the return of property, sale of property, compensation for improvements or expenses, etc. Others include aggravated, exemplary or punitive damages.

CHAPTER FIVE

REMEDIES AND DISCHARGE OF TORTS RELATING TO PROPERTY

5.1 Introduction

The benefit which an individual derives from tortious action is that he is compensated for the tort committed against him. The nature of compensation is mainly in the form of damages but where damages cannot give enough compensation, other remedies, such as injunction and self-help may be resorted to. This chapter analyses the three major remedies available in the torts dealing with property, namely, damages, injunction and self-help. Discussion on these remedies is restricted to their application in torts dealing with property, especially those discussed in the work.

5.2 Damages

Damages can be simply defined as the monetary compensation awarded to a claimant for the tortious act committed against him or her. The Supreme Court, however, defines damages as: "pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether the act or default is a breach of contract or tort"[1]. The purpose of the award of damages is to compensate the plaintiff for the injury he has suffered as a result of the defendants tortious conduct[2] Generally, damages are awarded in the form of a lump sum providing a once and for all assessment of the losses flowing from the tort committed by the defendant against the claimant.[3]As a general rule, the award of damages must be unconditional (not dependent on any condition precedent), nor can the court impose any control on the money in the hand of

[1] *IGP & Anor vs Peter O. Ikpila & Anor* (2016) 9 N.W.L.R (pt. 517) 361 at 362
[2] Enemo, I. P. Op cit at p. 411.
[3] *Clerk and Lindsell on Torts*. Op cit at p. 1556

the claimant.[4] There are however, two exceptions to this rule which could be summarized as follows:

> First, where damages are received by a person under a disability viz, a minor a mental patient, the court can issue directions relating to the investments or other dealing with the money. Secondly, in some personal injury cases involving assistance rendered by a third party, damages have been awarded on the condition that the claimant pays them over to, or holds them on trust for the third party[5].

5.2.1 Nominal Damages

Nominal Damages are generally awarded in cases where the plaintiff establishes a violation of his rights by the defendant, but could not show that he has suffered actual damage resulting from the tort.[6] These kinds of damages are only awarded for torts which are actionable *per se* (such as trespass)[7].They are therefor, small awards made as the ground that the injury suffered by the plaintiff is merely technical in nature.[8]

5.2.2 Exemplary Damages

Exemplary damages are also referred to as punitive damages. The purpose of exemplary damages is to punish instead of compensating; and to deter the defendant from exhibiting similar behaviour in the future[9]. Exemplary damages are awarded with the object of punishing the defendant for his conduct in inflicting injury on the plaintiff.[10] They can be made in addition to normal compensatory damages and should be made only:

(a) In a case of oppressive arbitrary or unconstitutional acts by government servants.

(b) Where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff.

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[4] Ibid.
[5] *Limpoo Choo vs Camden* (1980) A.C 174 at 191 and *Dennis vs London Passenger Transport Board* (1948) 92 S. J. 350
[6] Kodilinye, G. and Aluko, O. Op cit at p. 258.
[7] Ibid.
[8] *Imah vs Okogbe* (1993) 9 N.W.L.R (pt. 316) 159
[9] Kodilinye, G. and Aluko, O Op cit at p. 259
[10] *CBN vs. Okogie* (2015) 14 NWLR (Pt. 1479) 231 at p. 263.

(c) Where expressly authorized by statute[11].

Exemplary damages are somehow special in nature, and as stated above, they can only be awarded by the Court where situation demands. In this regard therefore, the Supreme Court of Nigeria, states the principle governing the award of exemplary damages as follows:

> For exemplary damages to be awarded it need not be specifically claimed but the fact for it to be justified, it must be specifically pleaded and proved. Thus, once facts in the pleadings support the award of exemplary damages the court should award it since the adverse party is in no way taken by surprise. Furthermore, since rules of court nowhere says that exemplary damages must be specifically claimed, it can be granted if facts are pleaded and evidence led to justify it.[12]

From the above one may conclude that the award or otherwise of exemplary damages, is one done at the discretion of the court based, on the facts and the evidence laid before it. This is without prejudice to other factors mentioned earlier, which could also guide the court to determine whether or not such damages could be awarded.

5.2.3 Aggravated Damages

Aggravated damages belong to a specifie of compensatory damages in that the purpose is to compensate the plaintiff for the injury to his feelings of dignity and pride[13].Aggravated damages are mostly given in cases of insolent and high-handed trespass to land or to person[14], Where an injury is aggravated by the act of the defendant, aggravated damages may also be awarded by the Court.[15]

5.2.4 General Damages

These are the type of damages which the law presumes or takes as proximate to and flowing naturally and directly from the injury suffered, such as pain and suffering or loss of

[11] Ibid.
[12] Per Rhodes Vivor JSC in *CBN vs. Okogie* ibid at p. 265.
[13] Kodilinye, G. and Aluko, O. Op cit. at pp 259-260.
[14] *Dosunmu vs. Lagos City Council* (1966) LL.R. 65.
[15] Ezeani, A.O.N. and Ezeani, R.U. (2014) *Law of Torts (with cases and materials)*, Odade publishers Lagos, p. 898.

earning power.[16] Damage in all cases of libel, which by law is actionable *per se*, is natural and the court would presume it and award as appropriate once the injury is proved. General damages often consists of all items of loss which a plaintiff is not required to specify in his pleadings in order to allow him to recover monetary compensation in respect of them at the trial.[17] The manner in which general damages are quantified is by relying on what would be the opinion and judgment of a reasonable man in the circumstance.[18] This presupposes that general damages are allowed to the discretion of the court, which treats all cases on the basis of their own merit, in each circumstance.

5.2.5 Special Damages

Special damages are those which flow as a matter of law, naturally and directly from the injury suffered by the plaintiff; and it is not presumed.[19] Special damages flow from such kind of loss (called special damage) as will not be legally presumed to have been followed from the defendant's wrongful act, but which must be specifically claimed in the pleadings to be proved by evidence to have been incurred by reason of the defendant's breach of duty.[20] The nature of special damages has been clearly stated in detail by the Supreme Court of Nigeria in the case of *MTN Nig. Communications Ltd vs. Aqua culture cooperative farmers' society Ltd*[21] as follows.

> Special damages are special in nature unlike general damages. Special damages are damages which the law does not infer from the nature of an act but which are exceptional in character. It denotes pecuniary terms of cash and value before trial specifically pleaded in a manner clear enough to enable the defendant to know the origin or nature of special damages being claimed against him to prepare his defence.[22]

[16] *Kopek vs. Ekisola*. Supra at p. 14
[17] *MTN Nig. Communications Ltd vs. Aqua-culture Corporate Farmers Society Ltd*. Supra at p. 50
[18] Ibid.
[19] Ezeani, A.O.N. and Ezeani, R.U. op. cit at p. 899
[20] Gandhi, B. M. (2011) *Law of Torts,* Eastern Book Company, Lucknow India. p. 133
[21] Supra at p. 50
[22] Ibid.

As the name suggests, special damages are special in nature and therefore, for a claim in special damages to succeed it must be proved strictly[23]. Strict proof in the context of special damages, according to the Supreme Court of Nigeria, "means that the person making a claim in that type or class of damages, must do so by credible evidence of such character as would satisfy the court that he is entitled to an award under the head.[24]

5.3 Measure of Damages

Measure of damages is the determination of how much money the court would order the defendant to pay the plaintiff as a compensation for the latter's loss or harm.[25] Generally damages are measured by a fair compensation not punishment but the law allows for exemplary or aggravated damages (where necessary)[26]. The general principle by which damages are measured in tort is *restitutio in integrum*[27]. By this principle, the injured party is supposed to be returned to the position he was in before the injury, which is possible through the award of monetary compensation.[28] Although monetary compensation is enough to return the plaintiff to the position he would have been in before the injury, this is not always possible in personal injury cases and death[29] In actions for torts, damages are awarded once and for all in respect of a cause of action in the form of a lump sum rather than a series of periodical payments[30]. This may be divided into categories of heads of damages according to the different aspects of loss sustained[31] into pecuniary and non-pecuniary losses[32].

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[23] Ibid.
[24] Ibid
[25] Gandhi, B. M. Op. cit at p.132
[26] Ibid.
[27] *NEPA vs. Alli* (1992) 3 NSCC 141
[28] Ezeani, A.O.N and Ezeani, R. U. Op. cit at 599
[29] Ibid.
[30] Enemo P. I. Op cit at p. 419
[31] Ibid.
[32] Ibid.

Generally in tort damages could be awarded under three separate headings, i.e. personal injuries, fatal accidents and damage to property[33]. Discussion in this work is however, restricted to the tort dealing with property of different kinds as the entire work is only limited to analyzing torts dealing with property..

5.4 Assessment of Damages in property related torts.

Assessment of damages in torts as stated above falls under three major heads, personal injuries, fatal accidents and damage to property. The main focus of this work is damages as it affect damage to property.

5.4.1 Nuisance and the Rule in *Ryland vs Fletcher*

The basis for assessment of damages in the tort of nuisance is dependent on the nature of the nuisance.[34] Where the nuisance affects damage to property the plaintiff is entitled to the amount by which its value has been diminished.[35] Therefore, where a building has been destroyed completely by a nuisance, the proper measure of damages is the value of the building and not the cost of replacement.[36] But where the kind of damage has to do with interference with use and enjoyment of land, the quantum of damages to be awarded is essentially at the discretion of the court.[37] According to Dosunmu J. in the case of *Abiola vs Ijeoma*,[38] "the plaintiff is entitled to damages and the fact that he suffers no ill health is immaterial. But this is sometimes difficult to assess in terms of money and I will only do my best to award a sum in respect of the nuisance on him over the months".[39]

[33] Ibid.
[34] Kodilinye, G. and Aluko, O. Op.cit at p. 292
[35] Ibid.
[36] *Ige vs Taylor Woodrow (Nig) Ltd* (1963) LLR 140 at p.149
[37] *Tebite vs Nigeria Maintime & Trading Co. Ltd. Supra at p.* 72 and *Abiola vs Ijeoma* (1970) 2 All NLR 268 at p.278
[38] Ibid
[39] Ibid

What may be clearly gleaned from the above is that even though assessment of damages with respect to use and enjoyment of land is at the discretion of the court, it has in it some level of subjectivity. The court in doing so can only do its best because as admitted by the learned trial judge, it is difficult to quantify such inconvenience in monetary terms.

With regards to the tort committed under the rule in *Rylands v Fletcher* (and other cases of strict liability), the measure of damages is assessed based on the type of harm inflicted.[40] Where the damage complained of consists in personal injury or damage to property, the same methods will apply as in other torts.[41] In other words, where the injury inflicted is personal, the method of assessment of damages to be adopted would be similar to what is generally adopted in all cases of personal injuries. The same way, damage to property even under the rule in *Rylands v Fletcher*, would take the same format as it is in the case of nuisance and other torts dealing with property.

In cases of continuing nuisance however, majority of claimants seek an injunction, and the availability of injunctive reliefs… is one of the factors making a distinction between negligence and nuisance.[42] An injunction is an equitable remedy and as such is not available to parties as of right, which is left to the discretion of the court.[43] Since injunction cannot be granted as of right, what the court normally do where it realises there are reasons why it cannot stop the defendant's activity, is to limit the times during which the activity may be carried out.[44] But where nuisances have no continuing element, but are action in respect of damage or interference that has already been suffered… claimants may be awarded damages to compensate for their injury in the usual way.[45]

[40] Kodilinye, G. and Aluko, O. op.cit at p.29
[41] Ibid
[42] Steele, J. (2007) *Tort Law: Text, Cases and Materials*, Oxford University Press, New York, p.650
[43] Ibid.
[44] Ibid.
[45] Ibid

5.4.2 Trespass to Land

Trespass to land is actionable *per se*, i.e. without proof actual damage.[46] If therefore the defendant trespassed upon the plaintiff's land without any proof of causing damage to it, the plaintiff can maintain an action in trespass because his right has been violated, to recover nominal damages.[47] Where however, the defendant's trespass to land was carried out in a flagrant, high-handed or outrageous manner, the court may award aggravated damages.[48] According to Ikpeazu J. in the case of *Dosummu v Lagos City Council*;[49] the manner of the conversion of the vehicle may give rise to a matter of aggravation of damages.[50] The Supreme Court of Nigeria has made categorical, the measure of assessing damages in the case of *Okeke v Nnolim*[51], where it states:

> A plaintiff is entitled to nominal damages for trespass even where no damage or loss is caused. If damage or loss is caused, he is entitled to recover in respect of his loss. Where by the trespass the plaintiff has been wholly deprived of his land, he is to be compensated according to the value of his interest and if he is a free holder entitled to possession, the damages will be te value of the produce of the land during the period of deprivation, subject to the expense of management or in the case of permanent deprivation, its selling value. Where the defendant has by the trespass made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason.[52]

Trespass to land being one of the torts which are *damnun sine injuria* (legal injury without damage), is generally committed once there is a direct and unlawful interference with a land in possession of another without his consent; and once this has been established liability is attached automatically because it is a tort actionable per se (without proof of actual or physical damage). This is why in the above decision the Supreme Court states that

[46] *Asoboro vs Pan-ocean Oil Corporation (Nig) Ltd* (2017) 17 NWLR (pt.1563) 42
[47] Kodilinye, G. and Aluko, O. op.cit at p.294
[48] Ibid
[49] (1966) LLR 63
[50] Ibid.
[51] (2015) 3 N.W.L.R (pt. 1453) 444
[52] Ibid at p. 478

nominal damages can be awarded to a victim of trespass to land even without suffering any loss or injury.

5.4.3 Conversion and Detinue

These torts, together with the tort of trespass to goods/chattel, deal with wrongful interference with goods, and for the most part, the same principles on assessment of damages, apply to them.[53] The principle has been explained by Kodilinye as follows:

> Where the goods in question have been damaged, lost or destroyed by the defendant's tort, the measure of damages is founded on similar principles to those applicable in the tort of negligence. Thus, for instance where the plaintiff's chattel has been wrongfully taken out of his possession by the defendant and then lost or destroyed, the defendant will be liable for its market value, or if the chattel is not readily available in the market to its original cost minus depreciation. The plaintiff may also recover general damages for loss of use of the chattel during the period reasonably necessary for acquiring a replacement.[54]

Where however, the plaintiff's goods have not been destroyed, or damaged but have been kept out of possession for some time, the plaintiff can claim only for the detention including general damages for the loss of use and special damages for any proved loss of earnings during the period.[55]

Part VII of the Enugu State Torts Law,[56] has provided the method for assessment of damages in cases of conversion and detinue as follows:

> The damages awarded in an action for detinue where the goods are not returned, shall be the market value of the goods at the time of judgment, provided that if the value of such goods at the date of the judgment is attributable in part of expenditure on work thereon, done by the defendant, allowance for that should be made in his favour in assessing the damages.
> Where a person sues in conversion, the damages recoverable by him shall be equal to the value of the goods at the time of conversion, and if the goods have arisen in value between conversion and judgment he shall be entitled to recover the difference in value as additional damages save to the extent to which he ought to have mitigated any loss sustained by him.[57]

[53] Kodilinye, G. and Aluko, O. op.cit at p.295
[54] Ibid.
[55] Ibid at p.296. See also *Davies vs Lagos City Council* (1973) 10 CCHCJ 151
[56] Cap 150, Laws of Enugu State, 2004
[57] Section 90(1) and 91, Enugu State Torts Law, Ibid

As a corollary to the above, the Supreme Court of Nigeria provides the procedure for assessment of damages for conversion and detinue in the case of *Enterprise Bank Ltd vs Aroso*[58] as follows:

> The measure of damages in cases of detinue is as follows:
> (d) The market value of the goods detained.
> (e) The sum of money representing the normal loss through the detention of the goods
> (f) In cases where the goods have not been profit-making, the damages for loss arising from the owner's inability to make use of the specific goods which may be classified into general and special damages.
> In a claim for detinue the plaintiff is entitled to damages for his loss arising from his inability to make use of his goods and this can be recovered under either general or special damages. Furthermore, if the plaintiff is able to show that he has suffered special damage by the detention of his goods such damage if reasonably foreseeable, is recoverable. In an action for detinue, the plaintiff if successful is entitled to damages till judgment.[59]

The above decision of the Supreme Court raises a question as to whether for damages to be recoverable for damage to property detained, the injury must be reasonably foreseeable. The answer to this poser is that where goods converted or detained are damaged the appropriate remedy should be in negligence since the damage is reasonably foreseeable.[60] With regards to the measure of damages in the tort of conversion, the Supreme Court also held that in conversion, damages are assessed on the value of the goods at the date of conversion; that is, the market value at the date of conversion. But damages in detinue are much higher than in conversion.[61] One point worthy of note is that where the conversion is one by detention, the measure of damages could be the same as detinue.

[58] (2014) 3 N.W.L.R (pt.1394) 256
[59] Ibid at pp.300-301
[60] Kodilinye, G. and Aluko, O. Op.cit at p.295
[61] *Enterprise Bank vs Aroso*, op.cit at p. 301

5.5 Injunction and other Declaratory Reliefs

An injunction is one of the remedies being sought by victims of torts, to stop the tortious activities being carried out. This is more manifest in torts like nuisance where the victim normally asks the court to stop the nuisance constituting damage to either his property or the enjoyment of it. Typically, this is claimed or granted as a consequential relief to protect the legal right of the established case.[62] An injunction may also be granted to prevent a multiplicity of suits or to prevent irreparable damage or irremediable mischief.[63]

The principle upon which injunctions are granted is that the injury to be inflicted would be of such a character that the claimant could not practically be compensated in damages.[64] In some cases, the injunction takes a mandatory form, particularly where the defendant has created a permanent source of injury, such as the erection of a building which constitutes a nuisance to the claimant's light etc.[65]

By way of definition, an injunction is an order by a court to one or more of the parties in a civil trial to refrain from doing, or less commonly to do some specified act or acts.[66] It may also mean an official order given by a law court, usually to stop someone from doing something.[67] One notable thing about injunction is that it may be granted to stop a person from doing something or mandates the person to do something. The grant of injunction being an equitable remedy is always at the discretion of the judge.[68] The principles governing the exercise of the discretion differ according to the nature of the

[62] *Sorungbe vs Omotunwase* (1988) 19 NSCC (pt.3) 252 at 268, *Onagoruwa vs Akinremi* (2009) 6 SCN J 70
[63] Ezeani, A.O.N and Ezeani, R.U. op.cit at p.902
[64] *Clerk and Lindsell on Torts*, op.cit at p.1637
[65] Ibid
[66] www.britanica.com, visited on 14th November, 2018 at 12:48pm.
[67] www.dictionary.cambridge.org visited on 14th November, 2018 at 12:52pm.
[68] *Klerk and Lindsell on Torts* op.cit at p.1639

injunction sought.[69] The principle governing the exercise of the discretion could be summarised as follows:

> Where an injunction is sought to restrain the continuation of a wrongful act which interferes with the claimant's rights and is prohibitory in substance as well as in form then, in the absence of special circumstance, the claimant is entitled to his injunction as of course. The grant of a mandatory injunction, which is an injunction in positive terms, requiring the defendant to take some specific action involving typically, the carrying out of certain works on the other hand, can never be as of course and depends on a number of factors in addition to those which may affect the grant of prohibitory injunctions.[70]

In view of the fact that the grant of injunction is normally done at the discretion of the judge, certain principles have been enunciated to guide the exercise of such discretion as follows:

1. An injunction is granted to protect an intended violation of a right. This protection extends to the whole range of rights and duties recognised by law.
2. Granting of injunction is as stated above, within the sole direction of the court. The exercise of such discretion by the court in granting injunction is not arbitrary or capricious but is founded on sound common sense and is generally regulated by well-settled principles.
3. The court will find out if there is a *bona fide* case between the parties and will also look to the balance of convenience if the injunction is not issued.
4. Injunction will not issue in cases where compensation is the proper remedy.
5. Injunction is granted to maintain the *status quo ante.*
6. A plaintiff acting in an unfair and inequitable manner cannot have this relief.
7. No injunction can be issued against a person to restrain him from discharging his public duties.[71]

[69] Ibid
[70] Per Lord Upjohn in in *Moris vs Redland Bricks Ltd* (1970) AC 652 at 664, *Oduntan vs General Oil Ltd* (1995) 4 NWLR (pt. 387) at 18
[71] Gandhi, B.M. (2011) *Law of Torts*. Op.cit pp.140-141

On the foregoing it could be gathered that in spite of the fact that the court has been given the discretion to determine when to grant an injunction or not, the allowance is not unrestricted. This is to avoid an abuse of the discretion in favour or against some parties. Injunctions are of different types depending on the circumstance. The popular ones are prohibitory and mandatory injunctions.

5.5.1 Prohibitory Injunction

A prohibitory injunction is issued to restrain someone from committing or persisting in a tortious act.[72] It also forbids a threatened act which if not restrained, is likely to be repeated.[73] For this kind of injunction to be granted the court must be satisfied that the interference with the claimant's right is continuing as in many cases of nuisance and in some cases of trespass.[74] Or that it is likely to be repeated[75]. It is however, worthy of note that the mere proof of a legal wrong done in the past is insufficient to entitle the claimant to an injunction.[76]

5.5.2 Mandatory Injunction

This is the kind of injunction which orders or mandates a party to perform some positive act to rectify the consequences of what he has already done.[77] A mandatory injunction is never issued as of course and is always at the discretion of the court.[78] A mandatory injunction is therefore, an order of court requiring a party to do specific act or acts and it is often seen as a restrictive order invoked by the court to deal with a defendant who has no respect for the court of law.[79] In most cases the order of mandatory injunction is granted to undo what has already been done.

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[72] Enemo, p I, op. cit at p. 443
[73] Ibid
[74] *Clerk and Lindsell in Torts. O*p cit at p. 1639
[75] Ibid.
[76] Ibid.
[77] Enemo, P. I. op cit at p. 444
[78] *Clerk and Lindsell in Torts*. Op cit at p. 1642
[79] *Statoil (Nig.) Ltd vs S.D.W1P Ltd* (2015) 17 NWLR (Pt. 1487) 536 at 551

The Court of Appeal in the case of *Statoil Ltd vs S.D.W.P Ltd*,[80] has outlined the principles governing the grant of mandatory injunction as follows.

(a) The state of affairs which is complained of must be such that would have entitled the plaintiff to obtain prohibitory injunction.
(b) The state of affairs which might have been prohibited from happening must have arisen at the time when the material order was made.
(c) It must not become impossible for the defendant to restore the earlier position.
(d) It must appear that damages and other legal remedies are not sufficient to put the plaintiff in a favourable position as if he has received equitable relief in specie.
(e) It must appear in all the circumstances and particularly, in view of equitable considerations, such as larches, hardship, impossibility of performance or compliance and inconvenience as between the parties that the mandatory order to be granted.
(f) The plaintiff's case must be reasonably strong and clear; and
(g) Where it can be shown that the defendant attempted to steal a match on the plaintiff by rushing to complete the act a mandatory injunction will be to restore the plaintiff to the position, he would have been.[81]

From the foregoing, it can be clearly seen that the most commonly available remedy to victims of tort is damages. Equitable remedies such injunctions would only come into play where damages would be an inadequate remedy. Even where the court agrees to grant the remedy of injunction, an order of mandatory injunction would not be granted where it would affect a third party who was not a party to the action.[82] Also, injunction would not be granted where the applicant is by the application, seeking to reopen arguments in respect of the substantive matter, which has been considered and refused.[83] The rule is the same where the balance of convenience is against the applicant or where no exceptional circumstance has been shown by the applicant.[84] Generally, an order of injunction will not be granted as a remedy for an act which has already been carried out.[85]

[80] Ibid.
[81] Ibid at pp 554-555
[82] Ibid at p. 557
[83] Ibid
[84] Ibid.
[85] *AR Security Solution Ltd vs E.F.C.C* (2018) 6 NWLR (Pt. 1616) 552 at 559

5.5.3 Interim Injunction

Injunctions of all kinds may be granted as an interlocutory injunction, and such an application is made when the legal validity of the claim or the factual basis of it may be uncertain.[86]An interlocutory injunction being interim is made to achieve the following objectives:

> It was an application to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved and that the practice arose of granting him relief by way of interlocutory injunction… The object of the interlocutory injunction is to protect the plaintiff against injury by the violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.[87]

The court in Nigeria has also provided such guideline in the case of *Brittania – U (Nig) Ltd vs Seplat Petroleum Development Co Ltd*,[88] where it said:

> An interim injunction is not an open ended restriction order but one for a short period of time, preservatory in nature at the early stage in the proceedings. In like manner, an *ex parte* order of injunction is not intended to be a temporary victory to be used against the adverse party indefinitely; rather than an interim order of injunction to last for a short period pending the determination of motion on notice and not to hang on the opposing party or to overstay.[89]

The main purpose of granting an interim injunction, as suggested *inter alia* in the above case, is to maintain the *status quo ante*, and thereby preserve the suit.[90] Where the court is satisfied that a delay caused by the proceedings in the ordinary way, would entail irreparable and serious mischief or damage to the subject matter of the suit, the court may make a temporary order *ex parte* upon such terms as it deems fit.[91]

For an interim injunction pursuant to a motion *ex parte* to be granted, the applicant must fulfill the following conditions:

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[86] *Clerk and Lindsell in Torts*. Op cit at p. 1645
[87] *Per Lord Diplock in American Cyanam id Co. Ltd vs Ethicon Ltd* (1975) AC 396 at 406
[88] (2016) 4 NWLP (Pt. 1503) 541 at Pp. 613-614
[89] Ibid.
[90] Enomo, P. I. Op. cit at p. 446
[91] Ibid

i. That the situation is one of urgency or emergency calling for the quick and immediate intervention of the court in the absence of which irreparable damage or injury may result to the *res*.

ii. Those pecuniary damages will be inadequate to compensate him for the injury or damage that will be occasioned by the conduct of the respondent if not restrained.

iii. The applicant must make an undertaking as to damages that he will indemnify or compensate the respondent for any damage he may sustain as a result of the interim injunction, if the substantive suit proves vexatious or frivolous and fails.[92]

iv. The applicant must also satisfy the court that the balance of convenience is on his side.[93]

v. He must also satisfy the court that he has a legal right to be protected and that there are serious issues to be tried.[94]

5.5.4 Mareva Injunction (Interim Attachment of Property)

This is the kind of injunction where a creditor suing for debt due and owing can apply for and obtain the injunction against a defendant who is not within the country but has an asset in it.[95] The injunction would restrain the defendant from removing the asset out of jurisdiction or disposing of them.[96] The objective of mareva injunction is to ensure that the assets of a defendant would be available to satisfy if necessary, by means of execution being levied on them, any judgment the plaintiff may obtain in an action against the defendant.[97]

[92] *NTA vs Nyon*g(1994) 1 NWLR (pt. 318) 36
[93] *ACB Ltd vs Aweboro* (1999) 2 NWLR (pt.176) 711
[94] ibid
[95] Ibid.
[96] Enemo, P.I. Op.cit a tp.447
[97] Ibid p.448

The name mareva injunction was derived from the case of *Mareva Compagnia SA vs International Bulk Carrier Ltd.*[98] in that case, the English Court of Appeal held that the High Court of England had jurisdiction to grant this type of injunction under the Judicature Act, 1925. In the Nigerian case of *Setuminu vs Ocean Steamship Co.*[99] the plaintiff/appellant had *inter alia* asked the High Court of Lagos state to issue a mareva injunction against one of the defendants; a non-Nigerian. When the case went on appeal to the Supreme Court, Nnaemeka Agu, (J.S.C) held that by virtue of Sections 10, 13 and 18 of the High Court Law of Lagos, the High Court had jurisdiction and power to entertain, and in appropriate cases, grant Mareva injunction as was developed by the High Court of England.

5.5.5 Anton Pillar Injunction

Anton pillar injunction, which means an order for detention, preservation or inspection of property, is issued as an *ex parte* order to allow the plaintiff to enter the premises of the defendant to obtain evidence necessary for the former's case.[100] The Anton Pillar order according to the Supreme Court of Nigeria:

> "…is designed to deal with situations created by infringements of patents, trademarks and copyright, or more aptly put with acts of privacy. The order is intended to provide a quick and efficient means of recovering infringing items and of discovering the sources from which these items have been supplied and the persons to whom they are distributed before those concerned would have time to destroy or conceal them. The essence of the rule is surprise because it operates drastically and is made *ex parte*.[101]

Being an order which is intended to spring up surprise against a defendant Anton pillar order is made in terms as will give the maximum legally possible protection to the

[98] (1975) Lloyd's Report 309
[99] (1992) 5 SCNJ 17-22
[100] Enemo, P.I. Op cit at pp.448-449
[101] *Gallagher Ltd vs B.A.T. (Nig) Ltd*.(2015) 13 NWLR (pt.1476) 325 at p. 358

plaintiff, whose business the defendant's activity presents a major threat and has greatly jeorpadised.[102]

For the court to grant Anton pillar injunction, it is a condition precedent to fulfil the following conditions; as outlined by the Supreme Court of Nigeria:

> The Anton pillar order is unique, it is granted only in extreme cases; the three essential pre-conditions which must be met before it is granted are:
> a. There must be an extreme strong *prima facie* case.
> b. The damage, potential or actual, must be very serious for the applicant.
> c. There must be clear evidence that the defendants have in their possession incriminating things and that there is a real possibility that they may destroy such materials before any application *inter partes* can be made.[103]

Having ascertained the conditions necessary for the grant of the Anton pillar injunction, the next issue to address is the persons that are bound by Anton pillar order. Anton pillar order sets out and spreads its tentacles and net wide on the land and ocean[104]. It binds the respondents when there is a strong evidence of an act of infringement passing off against them; and also binds unknown respondents who are persons or class of persons who are either ascertained or not.[105] An Anton Pillar order is made against both ascertained and non-ascertained respondents so long as they can be said to belong to the same class[106].

One point worthy of note with regards to the Anton pillar order is that the fact that the defendant refuses to allow the plaintiff to enter his premises for the purpose of extracting the order, does not entitled the plaintiff to force his way into the premises.[107] Such behavior could however constitute contempt of court against the court which issued the order.[108]

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[102] Ibid.
[103] Ibid at p. 359
[104] Ibid at page 359-360
[105] Ibid
[106] Ibid
[107] Enemo, P.I Op.cit at p.449
[108] (1950) Fleet street Report, p.459

5.6 Self Help

Self-help is one of the remedies recognised in Law of Torts, even though it has its own limitations. This remedy seems risky if the person who is exercising it does not know how much he is entitled to do without exceeding his right.[109] The remedy is available for different types of torts; hence if a person is wrongfully imprisoned, he can escape. A trespasser or a trespassing animal may be expelled with reasonable force and goods taken may be peacefully retaken.[110] Where however, an unreasonable force is used, the remedy of self-help would fail.[111]

The remedy of self-help is predicated on the common sense that everyone has a right to defend his own property or his person when attacked by a wrong doer.[112] But in doing so, the plaintiff must as stated above, not use a force that is unnecessary or disproportional to the situation or provocation at hand[113]

Self-help has been defined as a process used to vindicate a legal right or privilege and complete prohibition on the ability to act without engaging legal process.[114] In other words, self-help is an instrument which the law allows victims of tortious breach to take law into their hands without resorting to court.[115] But one point worthy of note is that the law never allows complete freedom for parties to use self-help as even the most permissive of the existing rules put limit on behaviours.[116] Despite the limits set by law on the use of self-help Badawi is of the opinion that resort to court is not necessary in all cases of self-help especially when it can be done without violence.[117] According to him:

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[109] Enemo, O.I Op.cit at p.441
[110] Ibid
[111] Ibid
[112] Gandhi, B.M. Op.cit at p.156
[113] Ibid
[114] Badawi, B.A *self-help and the Rules of engagement* in: Yale journal of regulation vol. 29, No.1, 2012 pp. 2-43 at p.2
[115] *Clerk and Lindsell on Tort*. Op.cit at p.1669
[116] Badawi, op.cit at p.2
[117] Ibid at p.3

> When the law does permit some form of self-help it tends to gravitate towards two salient points along the spectrum. Perhaps most famously, creditors may repossess collateral without resort to court process as long as they do not create a breach of the peace during the repossession. Creditors have substantial leeway to retake property even if it means trespassing on the debtors land[118]

Whether self-help is deployed with the support of the court or not what is fundamental is that it should not lead to violence and once it can be violence-free, the court has allowed it even through the courts generally frowns at it. In Nigeria for example, the Supreme Court of Nigeria adopted the same approach in *Okochi vs Aninakwai*[119] where Niki Tobi JSC said:

> This is rather unfortunate conclusion; it is sad that a court of law should give the approval or credence to an act or conduct of self-help, which was condemned by this court in *Chief Ojukwu vs Governor of Lagos State.*[120]Certainly, self-help has no place in our civilized world as it is clearly against the rule of law in a democracy. Even if the property is built on the land of the respondents, the answer is not in self-help but in commencing a legal action to abate the trespass.

The issue here is that despite the contempt which the court always hold towards the remedy of self-help, at no time did the court argued that it is not part of our law and the attitude of the court to the remedy does not mean it is no longer part of our law. What the court did was to draw the attention of parties to the negative consequences, adopting self-help may bring if it is not adopted in a cautions manner. After all, in some cases, especially those dealing with trespass to land, resorting to self-help may provide a faster remedy than go to court where cases linger for several years before decisions are given. In this respect, the Supreme Court of Nigeria recently declares as follows:

> Act of self-help has not been criminalized by the Penal Code; rather, it operates largely in civil proceedings. However, a complainant can always resort to right of private defence under Sections 59 and 60 of the Penal Code. The right of private defence to property implies that a person in peaceful possession of property is entitled to maintain possession even by use of force if necessary. The law does not require a person whose property is forcefully trespassed into, to run away and

[118] Ibid at p. 2-3
[119] (2003) 18 N.W.L.R (p.551) 1
[120] (1986) 1 NWLR (pt.18) 621

> seek the protection of authorities. But if a person has a bare title to a property, his remedy in respect of any wrong to the property would be to seek redress in the court of law rather than to enforce it by the use of force himself.[121]

The above pronouncement by the Supreme Court is that parties are allowed to invoke the remedy of self-help to keep trespassers away in civil matters without necessarily seeking the assistance of the court. The assistance of the court may only be necessary where one is trying to assert his title to the property, in which only the court is empowered to do that on his behalf. This is perhaps, in view of the fact that only the court can determine who has title to land where it is in question, after hearing witnesses and reviewing other pieces of evidence presented before it.

5.6.1 Nature and Forms of the Remedy of Self-Help

The nature of self-help is such that a victim of tort can take law into his hand to defend either lives or property of his personality.[122] This may be possible in cases of trespass to person or property such as nuisance. Self-help may therefore be adopted in any of the following circumstances:.

5.6.1.1 Defence of property

An individual can defend his property as a remedy where he uses force that is not unreasonable.[123] This could be in the defence of real or personal property especially where there is trespass on the property irrespective of whether he is defending actual possession or immediate right of possession.[124] Also a forcible attempt to enter into the land of another may be resisted by force at once, without the necessity of a request to desist.[125] But where a person has entered peaceably a request to leave must be made to him before force can be

[121] Per Sanusi J.S.C in the case of *Spiess vs Oni* (2016) 14 N.W.L.R (pt. 1532) 236 at p. 287
[122] *Clerk and Lindsell on Tort*s . Op.cit at p.1669
[123] Ibid at p.1671
[124] Ibid; *Dean vs Hogg* (1843)10 Being 345
[125] *Webster vs watts* (1847)11 Q.B311

used to effect an expulsion unless in the meantime he has used violence.[126] Use of force cannot be justified where there is an attempt to trespass on the defendant's property.[127]

Although use of force is allowed as a self-help remedy in the defence of property, it is not a blank cheque. On this note the authors of clerk and Lindsell on Torts, articulate on the limit of this remedy as follows:

> The truth is thought to be that unreasonable force may not be used in resisting trespass to property; and extreme violence will rarely be reasonable to such an end; but that it is a question of fact. What is reasonable and extreme force could in rare circumstances be reasonable force. Land or goods may be defended by assault and battery but not by wounding. But a person who meets resistance when he uses such force in the protection of his property is entitled to try harder and the extent to which he may lawfully escalate the value of the property and the kind of harm threatened to it![128]

What can be deduced from the above is that even though defining whether a force is reasonable or not, varies from circumstance to circumstance. Also the kind of threat facing the property determines the kind force that could be reasonable in that circumstance. The higher the threat the higher the kind of force required to be reasonable and vice versa. In *Collins vs Remison*[129] the plaintiff sued for an assault committed against him by the defendants who threw the former off a ladder, which he had placed in the defendant's garden in order to carry out a minor repair to the plaintiff's house nearby. It was pleaded that the defendant trespassed and had persisted to desist from doing so. The defendant admitted that he only shook the ladder and gently over turned it and threw the plaintiff from it on the ground, and inflicted a minor injury to the plaintiff. It was held that this plea was bad as it disclosed a degree of violence which could not be justified for the purpose of preventing the trespass alleged.

[126] Ibid
[127] Ibid at p.1672
[128] Ibid
[129] (1754) I say 138

Drawing from the above, the level of violence or force required to eject a trespasser from the plaintiff's land would not be the same where the defendant after trespassing, decides to flog mangoes from a tree in the farm.

5.6.1.2 Re-entry on Land

Another form of self-help which is invoked without the assistance of the court is the re-entry on land. It was in fact held in a case that:

> He who is entitled to the immediate possession of property may make an entry, and may justify in a civil action the use of so much force as is necessary to enable him to effect the entry and to expel an intruder therefrom, provided the degree of violence used does not exceed what is reasonably necessary to effect his purpose.[130]

An owner or a person in possession who was dispossessed from his land or property may re-enter the same if he can do so without force and peaceably.[131] But the question is whether the provision of section 11 of Lagos State Tenancy Law[132] which suggests that re-entry is only allowed if it is granted by the court. According to the provision:

Subject to:

> (a) Any provision to the contrary in the agreement between the parties; and
> (b) The service of process in accordance with the relevant provisions of the law upon the breach or non-observance of any of the conditions or covenants in respect of the premises, the landlord shall have the right to institute proceedings for an order to re-enter and determine the tenancy.

In Kaduna State there is a provision similar to what is contained in the Lagos State, which is to the effect that only the court can order the eviction of tenants and even where the tenant refuses to obey the court for him to vacate the premises, the landlord cannot evict the former by himself[133].

[130] *Hemmings vs Stoke Poges Golf Club* (1920) I K.B. 720
[131] Gandhi, B. M. Op. cit at p. 147
[132] 2011
[133] Sections 26-28, Kaduna State Landlord and Tenant Law, No. 17, 2018

As suggested in some quarters, the above provision has a restrictive application as it can only apply where the person to be ejected is a tenant. Where however, a person found himself on the land as a result of trespass, the owner or the person in possession can eject him without recourse to the court because he was in the first place, on the premises without the consent of the owner or person in possession. Secondly, a trespasser found himself on the defendant premises in breach of the plaintiffs right of possession, hence he can be removed from the premises, even without the assistance of the court so far as the conditions necessary to invoke the remedy of self-help are fulfilled.

5.6.1.3 Re-caption of Goods

Re-caption could be defined as an action of taking back without legal process, property of someone that has been wrongfully taken or withheld.[134] It is also the process of taking back without violence of one's property or a member of one's family or household unlawfully in the possession or custody of another.[135]Another comprehensive definition of the term re-caption has been given as follows:

> The act of a person who has been deprived of the custody of another to which he is legally entitled, by which he regain the peaceable custody of such person, or of the owner of personal or real property who has been deprived of his possession by which he retakes possession peaceably. In each of these cases the law allows the re-caption of the person or of the property provided he can do so without occasioning a breach of the peace, or an injury to a third person who has not been a party to the wrong[136].

Re-caption is allowed where a breach of the peace would not be occasioned; or where violence would not erupt. A person who intends to adopt the remedy of reception may enter the land of the owner or occupier for recaption of the same if the same is brought or placed either by design or by accident.[137] But for one to use this remedy, previous request to surrender possession is necessary unless it would be futile or dangerous to do

[134] www.wytle.google.com visited on 26/11/2018 at 7:28pm.
[135] www.lect.law com visited on 28/11/2018
[136] ibid
[137] Gandhi, B. M. Op. cit at p. 147

so.[138] The use of force that is necessary is allowed in reception because "he who is entitled to the immediate possession of a chattel may use assault to recover it form everyone who has it in his actual possession and wrongfully detains it, provided that such possession was wrongful in its inception.[139]

5.6.1.4. Expulsion of a Trespasser

A trespasser can be expelled from the land by the owner or person in possession of such land. Therefore, if a person enters the land of another without the owner's consent, against his will, by force and violence, he may be immediately repelled and turned out of the land by the owner (or person in possession) without a prior request by him.[140] But if the entry is peacefully made, a prior request to leave must be made before the owner lays his hands on the trespasser.[141] Peaceful entry could perhaps be in the circumstance where the person who is being expelled was on the land by the invitation of the person in possession of the land or where the former happens to be a tenant.

5.6.1.5 Distress Damage Feasant

This is a self-help remedy that permits a possessor of land to impound a chattel which is wrongfully on his land as security for the payment of compensation for damage caused by it.[142] Distress may also be defined as a remedy by which a person may without legal process take possession of the personal chattels of another and hold them to compel the performance of a duty, the satisfaction of a debt or a demand or the payment of damages for cattle trespass.[143] Typical example of where this remedy could be invoked is where a farmer finds cattle causing damage to his crops. In this case, he may apprehend and detain the cattle until the owner of the cattle pays for the damage done by the animal.

[138] Ibid.
[139] *Clerk and Lindsell on Torts*. Op. cit at p. 1674
[140] Gandhi,, B. M. Op. cit at p. 146
[141] Ibid
[142] www.irwinlaw.comvisited on 27/11/2018 by 9.50am
[143]Gandhi, B. M. Op. cit at p. 147

The same is also true for a creditor who may detain the property of his debtor until the debtor repays the debt. The manner in which this remedy is invoked is mostly regulated by the common law, just like the case of distress for rent.[144] Being a common law remedy, the only person who can exercise this right is the one who has sufficient possession of land to entitle him to maintain an action in trespass to land.[145] Where an action for distress is maintained, it is a bar to an action in trespass.[146] This is perhaps in view of the fact that by adopting the remedy, the person in possession has already obtain whatever compensation he might have been entitled to as a result of the trespass.

The remedy of distress damage feasant principally relates to instances of nuisance and was often exercised in conjunction with certain strict liability torts such as liability under the rules in *Rylands v. Fletcher or* cattle trespass.[147] Also, at Common Law chattels are distrainable for all damage consequent on the trespass, whether the injury is to land or other chattels.

5.7 Discharge of Torts

Apart from going to court and self-help there are other methods through which torts could be discharged. In discharge of torts the circumstances are such that liability exists but remedy does not exist[148]. It is a process by which tort cease to exist and a wrongdoer is not liable for the wrong committed by him.[149] This may be discharged through death, accord and satisfaction, Release, Judgment, *Res Judicata*, waiver and election.

[144] *Clerk and Lindsell on Torts*. Op. cit at p. 1683
[145] *Bart vs Moore* (1793) 5 T. R. 329
[146] *Boden vs Roscoe* (1894) 1 QB 608
[147] www.revolving .com visited on 27/11/2018 at 11.30am.
[148] *Clerk at Lindsell on Torts* Op. cit at p. 1684
[149] Kaur, H. and Rathee, A (2016) *Discharge of Torts*, Posted at. www.lawschool.notes.wordpress.com, .retrieved on 27/11/2018 by 12:14m

5.7.1 Waiver and Election

Waiver of a tort is a term that has commonly been used to refer to the situation where a claimant seeks a restitutionary remedy (reversing the defendant's wrongful enrichment) for a tort rather than the usual compensatory damages.[150] It is a relinquishment by a plaintiff of his or her right to sue in tort by electing to sue in contract in a case where the plaintiff is entitled to such an election.[151] It constitutes a cause of action in its own right or it is a principle which applied to the choice of a plaintiff having established an actionable wrong.[152]

Election on the other hand refers to a situation where a claimant would choose between two remedies. By contrast a tort is discharged when the claimant chooses a right that is inconsistent with the tort he/she is complaining about.[153] According to Lord Atkin:

> It is essential to bear in mind the distinction between choosing one of two alternative remedies, and one of two non-consistent rights. If a man is entitled to one of two inconsistent rights, it is fitting that when with full knowledge, he has done an un equivocal act showing that he has chosen he one he cannot after wards pursue the other, which after the first choice is by reason of the inconsistency no longer to his choice[154].

A typical example of election as a discharge of tort is where someone is entitled to both damages and injunction (such as in cases of nuisance), and he decides to accept the damages alone in that case he cannot come-back later to claim the injunction, after he had chosen the former. Another instance is where a land lord decides to sue for rent rather than bringing ejectment proceedings by way of forfeiture for breach of covenant.[155]

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[150] *Clerk and Lindsell on Torts*. Op cit at p. 1687
[151] www.definitions.uslegal.com visited on 27/11/2018 at 12:34pm
[152] ibid
[153] Ibid
[154] *United Australia Ltd vs Barclays Bank Ltd* (1941) AC I pp 22-29
[155] *Clerk and Lindsell on Tort. O*p.cit at p. 1688

5.7.2 Accord and Satisfaction

Accord and satisfaction is a legal contract whereby two parties agree to discharge a tort claim, contract or other liability for an amount or based on terms that differ from the original amount of the contract or claim.[156] This process is also used to settle legal claims before they are brought to court[157] The accord is the agreement on the new terms of the contract while the satisfaction is the performance of those terms according to the agreement.[158] Any person who has a cause of action against another may agree with that person to accept any consideration in substitution of his legal remedy.[159] It follows therefore that even where a court has awarded damages for the claimant's claim, he may choose to accept a lesser amount as a satisfaction for the original sum awarded by the court. In the same vein, when the satisfaction agreed upon has been performed and accepted, the original right of action is discharged and the accord and satisfaction continue as a complete defence to any further proceedings on that right of action.[160] But the right of action is not discharged until the satisfaction is performed and part performance of such is not sufficient.[161]

An accord like any other agreement is not binding unless it is supported by consideration, hence delivery of something to which the claimant is entitled is not sufficient consideration.[162] Satisfaction made by a third party who is not himself liable and accepted by the party having the cause of action is a bar to any subsequent action.[163] This is on the condition that the third party acted as an agent of the party liable to the action and with his prior authority or subsequently ratifies the action of the former.[164] Accord and

[156] www.investopedia .com retrieved an 29/11/2018 by 2.45pm
[157] Ibid.
[158] Ibid.
[159] *Clerk and Lindsell on Torts. O*p.cit at p. 1690
[160] *Bell vs Galyaski* (1974) 2 Lloyd's Report 13
[161] *Way vs Milestone* (1839) M & W 21, *Carter vs Wormold* (1847) 1 Ex 81
[162] *Clerk and Lindsell on Torts*. Op.cit at p. 1691
[163] *Jones vs Broadhurst* (1850) 9 C.B 173 at 193
[164] *Walter vs James* (1871) L.R.G. Ex 124

satisfaction can be used as a form of compromise that benefits both parties when the original terms of contract cannot be upheld for whatever reason.[165] When an accord and satisfaction is reached to discharge a debt, the creditor still receives some payment of the debt while the debtor becomes a beneficiary of the situation by being exempted not being held accountable for the full obligation.[166]

5.7.3 Release

This is a contractual agreement by which one individual assents to relinquish a claim or right under the law to another individual against whom such claim or right is enforceable.[167] Any surrender of right of action may be described as a release but the term is usually applied where the surrender is by deed ad requires no consideration.[168]

A general release ordinarily involves contracts and torts; and it encompasses all claims that are in existence between the parties which are within their contemplation when the release was executed.[169] Although no particular form of language is required for a release, it must be supported by adequate consideration.[170]

5.7.4 Judgment Recovered

Judgment recovered refers to a formal plea raised by a defendant in a suit which is to the effect that the plaintiff has recovered the relief which he/she had sought in the suit.[171] Therefore, when an action is brought before a tribunal of competent jurisdiction and proceeds to final judgment, the original right of action is destroyed.[172] The unique nature of this type of remedy is that whether the claimant has succeeded or not he cannot bring same

[165] www.investopedia.com, Op. cit
[166] Ibid.
[167] www.it.dictionary.the freedictionary.com , retrieved on 27/11/2018
[168] *Clerk and Lindsell on Torts*. Op cit at p. 1693
[169] Il. Dictionary the freedictionaary.com
[170] Ibid.
[171] *Clerk and Lindsell on Torts*. Op.cit at p. 1693
[172] Ibid

action against the same party.[173] The judgment is binding and conclusive upon the parties to the same action unless the second action is brought in a different right.[174]

5.7.5 *Res Judicata*

Res judicata simply means "a case that has been decided by a court of competent jurisdiction, and not subject to re-litigation by the same parties."[175] *Res judicata* is a Latin expression, which means a thing adjudicated by the same parties.[176] The doctrine of res judicata is similar to the Criminal Law concept of double jeopardy. But in civil law setting, *Res Judicata* bars any party to a civil law suit from suing again on the same claim or issue that has previously been decided by the court.[177]

According the Supreme Court of Nigeria in the case of *Cole vs Jubunor* has outlined the circumstance and conditios for the application of the doctrine of *res judicata.*[178] In that case, the second respondent sued the appellant at the High Court of Lagos State and obtained judgment in the sum of N169, 000. The second respondent executed a writ of *fifa* against the appellant's immovable property but recovered only N15, 812. Subsequently, the second respondent sought and obtained a writ of attachment and sale of the appellant's property at No.23, Osipitan Street, Bariga, Lagos. The appellant applied to set the writ of attachment but the application was dismissed by the trial court. The Deputy Sheriff of the trial court then issued a notice of auction of the appellant's property and it was sold by public auction. For the sum of N450,000 to the first respondent. Twenty One days after the sale, a certificate of purchase was issued to the first respondent.

The appellant was dissatisfied with the sale of her property and she filed a fresh suit against the High Court of Lagos State in which she asserted that the sale of her property

[173] https://legaldictionary.net visited on 27/11/2018 by 7.50..
[174] ibid
[175] https://legaldictionary.net, op cit
[176] Ibid.
[177] Ibid.
[178] (2016) 9 NWLR (pt. 1503) 499

was tainted by fraud and sought to it to be nullified. The first respondent filed a preliminary objection to the jurisdiction of the trial court over the appellant's suit on the ground that the issue had been raised and determined in the second respondent's suit and the sale of the property had become absolute under the provisions of the Sheriff and Civil Processes Act. The trial court heard and dismissed the first respondent's preliminary objection and he appealed to the Court of Appeal.

The Court of Appeal held that the suit of appellant was barred by the doctrine of *res judicata* and under the provisions of Sheriff and Civil Processes Act. Dissatisfied, the appealant appealed to the Supreme Court. Unanimoulsy dismissing the appeal, the court held that, "the doctrine of *Res Judicata* is a fundamental doctrine aimed at bringing an end to litigation. Even public policy demands that once a court of competent jurisdiction has settled the matter in a dispute between parties by a final decision there should be an end to litigation".[179]

Based on the above therefore, where a court of competent jurisdiction has finally settled a matter in dispute between parties, neither party nor their privy may re-litigate the issue under the guise of a fresh suit because the matter is said to be res judicata.[180]

5.7.5.1 Conditions for the successful plea of *Res Judicata*

Parties are only allowed to plead res judicata where the following conditions are satisfied:

(a) The parties in the previous action and the present one must be the same.

(b) The subject matter of litigation in the previous action must be the same as the one in the present or new action.

(c) The claim in the previous action must be the same as the one in the present action.

(d) The decision in the previous action must be given by a court of competent jurisdiction.

[179] Per Galadima JSC at p. 540
[180] Ibid at p. 539

(e) The decision given in the previous action must be final or it must have finally disposed of the rights of the parties.[181]

The above conditions are enough to allow the defendant to make this plea of res judicata and at the same time serve as a discharge whatever tort he has committed against the claimant.

5.7.6 Joint or Composite Wrongdoers

The idea of joint or composite wrongdoers is to the effect that where two or more persons commit the same wrongful act, whether they are jointly or severally responsible, they would be responsible for the whole damage which the claimant suffers.[182] The circumstance where this occurs may be in cases of vicarious liability where one is the servant of another, agency or common actions.[183] Although agency, vicarious liability and concerted actions may be the instances where the idea of wrongdoers may manifest, this is not always the case. This is simply because the tort was committed by two or more persons.[184] The reason for this is that they may be joint wrongdoers or independent wrongdoers.[185]

Whether tortfeasors are joint and several, is determined by certain factors which have been stated by the authors of Clerk and Lindsell on Torts[186]as follows:

> One way of answering the question is to see whether the cause of action against each tortfeasor is the same. If the same evidence would support an action against each they are joint tortfeasors…Thus the agent who commits a tort on behalf of his principal and the principal are joint tortfeasors. So are the servant who commits a tort in the course of his employment and his master; so are an independent contractor who commits a tort and his employer in those cases in which an employer is liable for his independent contractor; so are persons whose respective shares in the commission of a tort are done in furtherance of a common design.

[181] Ibid. at p. 53
[182] Gandhi, B.M. Op cit at p. 149
[183] ibid
[184] ibid
[185] ibid
[186] Op cit at pp. 112-113

Although there are numerous cases beyond the ones mentioned above, where parties who participated in the commission of a tort can be joint tortfeasors, what is most important is for them to have a community of design in order for them to be declared as such.

At Common Law where damage is caused by two or more persons acting in concert to achieve certain common purpose, they are called "joint tortfeasors" and for them to be liable jointly they must have a community of design.[187] This community of design would also make them liable jointly and severally, which means the damages awarded to the injured party may be levied on all of them or on only one of them.[188]Therefore, where parties have community of design they would be considered as joint tortfeasors, but mere similarity of design cannot be enough to make them so. [189] This presupposes that where parties by their independent and separate acts cause the same damage to a claimant, without having that community of design, they would not be considered as joint tortfeasors. In the case of *The Koursk*[190]two vessels by their independent negligent acts collided with each other and sank another vessel. The owners of the vessel that was sank, the *Itria,* sued and recovered damages from the owners of the first vessel, the Clan Chrisholm. They also went ahead to sue owners of the second vessel, the Koursk. Argument canvassed to the effect that the judgment against the Clan Chrisholm was a bar to an action against the Koursk, on the ground that both were joint tortfeasors, was rejected. The English Court of Appeal held instead that there was no community of design and that the two vessels were independent tortfeasors.

The rule at common law is that where there is a joint cause of action against two or more persons, a discharge against one of them operates as a discharge against all of

[187] Ezeani, A.O.N and Ezeani, R.U (204) *Law of Torts (with cases and materials). O*p cit at p. 135
[188] Ibid.
[189] Ibid
[190] (1924) All ER 108

them.[191]The same is true where an accord has been made with one joint tortfeasor and satisfaction accepted or if he is released, the rest would also be released.[192] This is on the basis that the cause of action which is one and indivisible, having been released, all persons who might have been liable are therefore released.[193] This is irrespective of whether or not, the victim of the tort recovered his full loss, unless he can either show that his release of the first joint tortfeasor was merely an agreement not to sue him, or he had reserved his right of action against the other joint tortfeasors.[194]

In view of the discomfort which the common law position may occasion on claimants, the rule has been limited by the court in the case of *Bryanston Finance Ltd vs de Vries,*[195] where it was held that "a covenant or agreement not to sue does not get rid of the cause of action, and only operates in favour of the person with whom it was made". It was also held that an order of court staying an action against one joint tortfeasor, pursuant to such an agreement does not extinguish the cause of action against the others.[196] Anambra State Torts Law on its part has made an elaborate provision with regards to the liability of joint tortfeasors where it provides that "each of two or more persons who have committed a tort whether acting in concert or severally is liable as a joint and several tortfeasors for the damage arising therefrom."[197]

With regards to joint claimants however, the rule is that where two or more persons have a joint action in tort with respect to a joint interest, any one of them may release it, make accord and accept satisfaction or even waive it by election.[198] Where however this is tainted by defrauding his co-claimants and in collusion with the wrongdoers, the fraud may

[191] *Clerk and Lindell on Torts*. Op cit at p. 1704
[192] *Bulmer & Co vs Freshwater* (1933) A.C. 661
[193] Per Smith L.J in *Duck vs Mayeu* (1892) Q.B 511 at 513
[194] *Ogbonnaya vs Mbalewe* (2005) 1 N.W.L.R (pt. 907) 252 at 256
[195] (1975) 2 WL.R 713
[196] *Gardiner vs Moore* (1969) 1 Q.B 55
[197] Section 22 Enugu State Torts Law, Cap 140, Laws of Enugu State, 2004
[198] *Steads vs Steads* (1889) 22 Q.B.D 537

be a good equitable ground to prevent the transaction from being set up as an answer to the action.[199] Where however, one of the claimants institute an action without joining other claimants and they did not object to his behaviour, he can proceed and recover to the extent of his interest while the other claimants can maintain an action subsequently and recover with respect to their interest.[200]

5.7.6.1 Contribution Between Joint (Composite) Tortfeasors

The law has allowed a tortfeasor to seek for contribution from other tortfeasors who is, or who would have been liable in respect of the same damage.[201] The liability of tortfeasors and their contribution has been provided by statute as follows:

Where damage is suffered by any person as a result of a tort (whether also a crime or not);

(a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.
(b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it is suffered, or for the benefit of the estate or for the wife or wives, husband, child or parent of the person against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sum recoverable under the judgment given in those actions by way of damages shall not in the aggregate exceed the amount or the damages awarded by the judgment first given, and in any of those actions, other than that in which the judgment first given, the plaintiff shall not be entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action;
(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or who would if sued, have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however, that no person shall be entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.[202]

Although the law is clear that an action against one trortfeasor can never be a bar to an action against other tortfeasors, it has however, set a limit to the damages recoverable by the claimant to the extent that whatever damages awarded subsequently, shall not exceed

[199] *De pathernier vs De Mattos* (1858) E.B & E 461
[200] *Clerk and Lindsell on Torts*. Op cit at p. 1706
[201] Ezeani, A.O.N and Ezeani, R.U. Op cit at p. 137
[202] Section 22(a)-(c) *Kaduna State Torts Law*, Cap 152, 1991

the ones given in the first judgment. Also, the award of contribution by the court to any tortfeasor as against other joint torteasors is subject to other conditions as provided under Section 23 of the Kaduna State Torts Law, which states:

> In any proceedings for contribution under this part of this Edict (now law), the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount in a complete indemnity.[203]

Whether the court would ask any party to make contribution as a joint tortfeasor, is guided by the whims of the court because the court must satisfy itself that it is just and equitable to do so in the circumstance. What is just and equitable may not be easily discerned in all case, even though that would be done after assessing the level of responsibility of the person being asked to contribute in the tort. The court also has the discretion to after assessing the circumstance asked the person not to contribute anything, thereby exempting him completely from liability.[204] In giving indemnity to the party asked to make contribution the court may also consider whether there was any contract between them, but on the condition that the contract is enforceable.[205] The contract is unenforceable where the party seeking contribution knew or had reason to know that the contract was unlawful.[206]

In conclusion, the chapter has discussed the three major remedies available to a victim of torts against property, more specifically, damages, injunctions and self-help. It has also been shown in the chapter that despite the contempt with which courts hold self-help as a remedy, it is still valid so far as the conditions necessary for its invocation are

[203] ibid
[204] ibid
[205] Ezeani, A.O.N and Ezeani, R. U. Op cit at p. 138
[206] *Smith and Sons vs Clinton* (1908) 99 L.T 840

observed properly. The chapter has also shown that the provision in the Lagos State Tenancy Law which bars parties from invoking self-help in evicting tenants does not apply to torts like trespass to land where the trespasser is on the claimant's land without consent.

CHAPTER SIX:

SUMMARY AND CONCLUSION

6.1 Summary

This work titled "A Critical Analysis of the Liability Regime for Torts Against Property in Nigeria" has carried out a critical analysis of some torts dealing with property. In the work, property also includes immovable, I other words, known as chattels or goods. In the course of the research five different torts dealing with property were considered and critically analysed. These are trespass to land, (especially the doctrine of trespass *ab initio*), nuisance (specifically private nuisance), the rule in *Rylands vs Fletcher*, conversion and detinue. In the work, detailed discussion was made on the tort of trespass to land and the various dimensions which the tort can take, including the major doctrines of the tort. The work has discussed in detail, the historical evolution of the two major writs under which all torts were categorised (writs of trespass and writ of trespass on the case, or simply called the case). Discussion was also undertaken on the historical evolution of the doctrine of trespass *ab initio*, its application under common law and in Nigeria.

On nuisance, the work has analysed the tort of private nuisance and the tortious aspect of public nuisance. The research also looked at the approach of the courts in Nigeria to the issue of private nuisance which dwells on interference with use and enjoyment of land as against, one dwelling on sensible material damage to the property. The transformation which nuisance has experienced about two decades ago, which involve the encroachment of the tort of negligence into the territory of nuisance was also considered in the work.

The rule in *Rylands vs Fletcher* has also suffered encroachment into its territory by both negligence and nuisance to such an extent that one begins to wonder whether there is

the need for the rule to stand as an independent tort or even deserves to continue to exist as a tort separate from either negligence or nuisance. The research discussed the historical evolution of the rule and the transformation it has witnessed over the years as a result of the encroachment into its territory, a situation which led to its merger with negligence in Australia. Also, the work looked at the application of the rule by the court in Nigeria, within the context of the transformation which it has experienced over time. There was in the work a detailed discussion on the triplet torts of trespass to chattels, conversion and detinue, looking at their evolution and how they grew together as torts protecting interest in goods/chattels. Although in their process of development the three have coexisted over time they have witnessed transformation which led to the abolition of detinue in England and Australia. The work at the same time analysed the application of the torts of conversion and detinue by the courts in Nigeria.

6.2 Findings

Based on the above analyses, the research makes the following findings:

6.2.1 **The application of the doctrine of trespass *ab initio* not appropeiate**: The court in Nigeria is not in accordance with the spirit and letter of the doctrine as enunciated under common law several centuries ago. In applying the doctrine the courts in Nigeria have treated cases of trespass *simpliciter* as cases of trespass *ab initio*. Although the doctrine of trespass *ab initio* is from inception applicable to persons who enter premises under the authority of the law such as security agents and those authorised by law not those authorized by persons in possession, the courts in Nigeria, applied the doctrine to all manner of people without looking at the reason for their entry. Because the defendants in the Nigerian cases cited in this

research[1] were on the premises with the authority of the persons in possession of the land the doctrine of trespass *ab initio* should not have been applied to them. In other words, the court had wrongly applied the law on them and at the same time changed the law. Their liability should have been under 'trespass by remaining on the land' but not under the doctrine of trespass *ab initio* since their entry was based on the authority of the persons in possession not authority of the law. If the defendants were to be liable under the doctrine of trespass *ab initio* the law would have been unjust to them as they would be required to pay damages from their initial entry as against when they are held liable under trespass by remaining on the land since their entry was initially with the consent of the person in possession their liability for damages would only begin to run from the point they are no longer welcome in the premises. But where they are held liable under the doctrine of trepass *ab inito*, their liability would begin from their initial entry and that is the point from when damages against them would begin to run, which is far more than what they would ordinarily pay if they were sued under trespass by remaining on the land. Lumping the two together introduces confusion in the jurisprudence and may aggravate the liability regime for defendants.

6.2.2 **Limit the excesses of overzealous officers of the law**: The research finds that the purpose of the doctrine of trespass *ab initio* is to limit the excesses of officers of the law who may go out of their way to commit a misfeasance beyond what they were mandated to do in accordance with their official assignment. But in Nigeria the approach of the courts is such that the doctrine has been applied as an ordinary case of trespass that could be applied to all persons irrespective of whether they enter into premises is by virtue of the authority of the law or that of the persons in

[1] *Alhaja Silifatu Omotayo vs Cooperative Supply Association* (2010) 16 NWLR (pt. 1218) 1

possession. The distinction between the two is of utmost importance because applying the doctrine to persons who enter into premises with the consent of the person in possession as against authority of the law, could lead to an unjust and unfair treatment of the defendant as the amount of damages which he ordinarily should pay would be more than what would have paid when his case is treated under an ordinary case of negligence not one treated under the doctrine of trespass *ab initio.*

6.2.3 **Interpretation of Substantial Interference by the Courts is not favourable to Victims of Private Nuisance**: That the approach of the court in Nigeria towards victims of private nuisance is unfavourbale because the courts at appellate level do not pay much attention to the ingredient of unreasonableness of conduct of the defendant who uses his land in an unreasonable manner. This approach in majority of cases leaves claimants with no compensation despite the nuisance which inconveniences and makes their lives uncomfortable. Although, liability in the tort of private nuisance as it relates to use and enjoyment of land as against one dealing with damage to property, is predicated mainly, on substantial interference. Appellate courts in Nigeria most at times decides against claimants even where the inconvenience is so substantial that it prevents the claimant from enjoying his property in a proper manner, to such an extent that one has to relocate to another area. The attitude of the court, the research finds, is because the courts do not give priority to the ingredient of reasonable use. Instead, it treats the tort as one based solely on the idea of "live and let live" or" give and take". But even though private nuisance is based on "give and take", whether a particular use is reasonable or not, is fundamental to determining liability in private nuisance. Also, the fact that exchange of nuisance in the form of inconvenience between persons in possession

of neighbouring land, the act of the defendant becomes unlawful where the inconvenience is such that it is unreasonable because it has made life difficult for his neighbour. It has therefore, been found from cases cited earlier in the work that priority is mostly given to the idea of "give and take", instead of the unreasonableness of the defendant's conduct. This attitude of the court in majority of cases, does not serve the interest of justice as claimants in the circumstance, have to live with activities which interferes with the use and enjoyment of their land without any remedy.

6.2.4 **The Distinction Between Public and Private Nuisance has Been Abolished in Nigeria:** Although at common law, an individual cannot institute a private suit in public nuisance, in Nigeria this trend has been judicially changed, thereby modifying the position of the common law; and also in a way, abolishing the common law distinction between public and private nuisances.

6.2.5 **The Court in Nigeria Equate the rule in *Rylands vs Fletcher* by With Negligence:** It is never in doubt that rule in Rylands as enunciated in 1868 has passed through certain modifications and transformation, which substantially limits its boundaries in England and its abolition in Australia. This notwithstanding, the two torts are still the same, at least, in Nigeria. However, the courts in Nigeria confused by the requirement of "reasonable foreseeability", as a requirement for proving liability under the rule in Rylands, (which is the major requirement for proving negligence), equates the rule with negligence. This is in spite of the fact that, by their formulation, while the former is a strict liability tort, the latter is a fault-based tort. The problem here is that the courts in Nigeria did not say categorically, whether negligence has replaced the rule in *Rylands vs Fletcher* to

such an extent that all liabilities under the rule have now been transferred to negligence as it was done in Australia.

6.2.6 **The Encroachment of Conversion into Detinue Has Rendered Detinue almost in Useless:**The research also found that the twin torts of conversion and detinue which originally evolved as two separate torts have over time become substantially the same due to the encroachment into the frontiers of detinue by conversion. This encroachment has largely drive detinue into the point of virtual annihilation, especially in view of the fact that detinue is one of the means through which conversion may be committed in law of torts. With this encroachment the law dealing with conversion and detinue has been transformed in places like England, Australia and the United States of America, where detinue no longer enjoy separate existence from conversion. In fact, in England detinue has been abolished with the passage of the Torts (Interference with Goods) Act, 1977. In Nigeria however, the two torts remain separate despite the difficulty which the courts face in trying to differentiate them and this led to a confusion and inconsistency in the law. The research also finds that the only aspect of detinue which still subsists is the aspect dealing with bailor-bailee relationship, especially where the goods of the bailor gets missing in the hands of the bailee. But this kind of situation can be taken care of by the tort of negligence because this in most cases occurs due to the negligence of the bailee.

6.3 Recommendations

Based on the above findings the following recommendations are hereby made:

1. The court in Nigeria should adopt the doctrine of trespass *ab initio* only for persons who enter into premises under the authority of the law such as security agents and

other officers of the law as against those who enter under the authority of the person in possession, as doing the contrary would spell injustice to the defendant. In this regard, the decision in the case of *Alhaja Silifatu Omotayo vs Cooperative Supply Assocaitaion*[2] should be overruled. The court should ensure correct application of the doctrine to avoid miscarriage of justice.

2. **The Court Should pay more Attention to the Length of Time For Which Nuisance is Taking Place, Character of Neighbourhood and Reasonableness of the Defendant's Conduct in Determining Liability For Private Nuisance**: In determining whether the defendant's conduct amounts to a nuisance or not, the court shouldbe proactive by placing emphasis on the concept of "reasonableness of the defendant's conduct, to determine whether a pqrticular activity could qualify as nuisance or not. It may not be out of place if the court refer to other jurisdictions with legal systems similar to that of Nigeria to take a clue as to how to handle such issues.
3. **The court should take an unequivocal position by abolishing the rule in *Rylands vs Fletcher* thereby merging it with negligence:** This is to avoid the confusion in the jurisprudence and it would be properly addressed instead of the present position where in one breath the court gives an impression that liability in both the rule in *Rylands vs Fletcher* could arise from the same ingredients while in another it gives an impression that the two are different but only divided by a thin line that is not easily discernible. The law reform commissions of the various states on their parts, can adopt the same approach by bringing all circumstances covered under the rule to negligence.

[2] supra at p. 200

4. The tort of detinue should be abolished in view of the fact that the territory of the tort has been taken over by conversion by detention. Law reform commission of the various states n Nigeria have a significant role to play in reviewing and updating the laws dealing with tortious liability to bring them in line with 21st Century realities.
5. States who have not codified their torts law should do so and in the process make conversion and trespass to chattel the only torts that will guide liability with respect to chattel.
6. There is also the need for the law reform committees in the various states of Nigeria to reform the laws dealing with tortious liability to be in line with modern developments, especially the aspect dealing with conversion, detinue, negligence nuisance and the rule in *Rylands vs Fletcher*.[3]

[3] supra

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