**NAME: EBBAH OGHENERUKEVWE ALEX**

**MATRICULATION NUMBER: 17/LAW01/096**

**LEVEL: 300**

**COURSE: LAW OF TORT**

**COURSE CODE: LPB 302**

**ASSIGNMENT: DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY NIGERIA.**

**INTRODUCTION**

It is a reoccurring phenomenon in Nigeria today whereby businesses are being harmed by other businesses or individuals. These individuals or businesses may cause harm like; misrepresentation, stealing a valuable employee or interfering with the contracts of another business. To this end, the common law provides for Economic Torts in order to protect business interests. It gives a person the opportunity to seek redress against a person who has interfered with his business interest. There are various economic torts and the tort of Passing Off is one of them amongst others.

The goodwill of a trader is an intangible asset. It enables the trader earn profit more than the normal profit rate earned by other traders. It is an asset which can make a business different from other ones. It includes; brand, reputation, the quality of its employer or employees, intellectual property and so forth. The goodwill of a trader is paramount to a trader and should be protected at all costs. The tort of passing of gives adequate protection to the goodwill of traders. It prevents a person from misleading the public into believing that his/her brand is the same as a well known brand.

**THE TORT OF PASSING OFF**

The tort of passing off is one amongst other form of economic torts such as; malicious falsehood, conspiracy, interference with contracts and so forth which aim at protecting business interests. It is defined as the act of making a misrepresentation with the aim of inducing the public to believe that certain goods or product is the same as another well known good or product. It is the act of misleading the public into thinking that the plaintiff’s product is that of the defendant. It is committed where the plaintiff’s goods are passed off by the defendant as being his own.

According to the BLACK’S LAW DICTIONARY, passing of is: “*the act or an instance falsely representing one’s own product as that of another in an attempt to deceive potential buyers.*”

The basic and fundamental rule of passing of as stated in the case of ***N.R. Dongre v Whirlpool Corporation*** is that; “*A man may not sell his own goods under the pretence that they are the goods of another man*”.[[1]](#footnote-1)

The tort of passing off aims to protect traders from injury to his goodwill or business interests. Therefore, an individual whose products have been passed off by another person can bring an action in court against that person in respect of any losses which may have been incurred.

**ELEMENTS OF PASSING OFF**

Lord Diplock in the case of ***Erven Warnink BV v J Townend & Sons (Hull) Ltd*** identified five elements which he believed were essential to prove a case of passing of.[[2]](#footnote-2) He said that: “*it is possible to identify characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate customers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.*

These elements stated by Lord Diplock are self-explanatory and are therefore the five essential elements which the plaintiff needs to prove in order to succeed in a case of passing off.

**METHODS OF PASSING OFF**

1. Imitating the appearance of the plaintiff’s goods: In the case of ***White Hudson & Co Ltd v Asian Organisation Ltd***,[[3]](#footnote-3) the defendants sold cough sweets which went by the name “Peckos” which had a similar look to the plaintiff’s cough sweets called “Hacks” which was popularly known as “red paper cough sweets”. This confused the customers in Singapore who wanted to buy Hacks but bought Peckos instead because of the similar appearance. The court granted an injunction to the plaintiffs to restrain the defendants from passing of their goods as that of the plaintiff’s.
2. Trading under a name closely resembling that of the plaintiff:In the case of ***Ogunlende v Babayemi***,[[4]](#footnote-4) the plaintiffs who were civil engineering contractors owned a business called “Mercury Builder” were granted an injunction restraining the defendants from carrying out a business called “Mercury Builders Nig. Ltd” which had a similar name to the plaintiff’s.
3. Directly using the plaintiff’s name: in the case of ***Maxims Ltd v Dye***,[[5]](#footnote-5) the plaintiff who owned a restaurant in Paris called Maxims which had acquired a high level of fame and goodwill sought an injunction to restrain the defendant from opening a French restaurant with the same name in Norwich. The restaurant did not operate to the same standard as the one in Paris and thus, the plaintiff was granted an injunction.
4. A direct statement stating that the goods which belong to the plaintiff actually belong to the defendant: in the case of ***Lord Byron v Johnson***,[[6]](#footnote-6) the defendant who was a publisher advertised and sold a book of poems with the name of Lord Byron on the title page, when in fact the poems were written by someone else.it was held that the defendant had committed the tort of passing of.
5. Using the defendants name: this is when the defendants uses his name in such a way which confuses the public that his products are the same as that of a company with a name loosely similar to his. This can be seen in the case of ***Parker Knoll Ltd v Knoll International Ltd***,[[7]](#footnote-7) where a company used its own name and products in such a way which caused confusion to the public. In this case, both companies were furniture manufacturers. The plaintiffs were a well known company who traded in Great-Britain and the defendants Traded in America. When the defendants started to trade in Great-Britain, the plaintiff’s sought for an injunction to restrain the defendants from using their products without distinguishing it from theirs. The court granted the plaintiffs the injunction and stated that the defendant’s use of their name and product was likely to cause confusion to the public. The court also stated that the plaintiff need not show intention to deceive the public. It was enough to prove that the public would likely be deceived by the defendant’s use of their own name.

**THE RELEVANCE OF PASSING OFF TO 21ST CENTURY NIGERIA**

The tort of passing off has served as a great importance for many years and in many parts of the world today as well as Nigeria as so many businesses and trades have emerged.

In Nigeria today, so many businesses have been harmed because of the malicious acts of other traders who try to pass their goods off as that of other businesses. This is also a problem for buyers because buyers looking to buy a particular product may accidentally buy another one which possesses the same features. This is a big problem in Nigeria as goods are not properly labelled in stores. Therefore, the tort of passing off is introduced as a common law remedy for traders whose goodwill has been harmed by other traders. There are a number of ways in which the tort of passing off has served as a great importance in Nigeria today. They shall be explained below.

The tort of passing off provides protection to unregistered goods and services. This is one of the significant differences between trademark and passing off as trademarks on the other hand provide protection to registered goods and services. The tort of passing off is supported by **Section 3 of the Trademarks Act** which provides that:

“*No person shall be entitled to institute any proceeding to prevent, or recover damages for, the infringement of an unregistered trademark; but nothing in this act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof*”.[[8]](#footnote-8)

This is a very significant relevance in 21st century Nigeria as a huge amount of traders in Nigeria have unregistered businesses. Therefore, traders in Nigeria whose businesses are not registered can seek redress in court for passing off.

In the case of ***Trebor Nigeria Ltd v Associated Industries Ltd***,[[9]](#footnote-9) the plaintiffs sold peppermints and other confectionaries. The defendants then marketed their products to resemble that of the plaintiff. The court held that: the fundamental rule is that one man has no right to put up his goods for sale as the goods of a rival trader. The defendant was held to be liable in passing off. The plaintiff succeeded only in a passing off and not in a trademark infringement claim. Another relevance of the tort of passing off is that it helps to protect the goodwill of a trader and the reputation of his goods and services. As explained earlier, the goodwill and reputation of a trader is an intangible asset which sets his goods aside from other goods. The goodwill of a particular business can set it aside from other businesses. When a customer has a hard time choosing between two brands that produce the same goods, the goodwill created by a particular brand will set it aside from the other one. To this end, the tort of passing off is important in Nigeria as it aims to protect the goodwill of traders in the country.

Thirdly, the tort of passing of plays a very relevant role in securing the profit made by businesses. When the goods of an individual are being passed off as belonging to another person, he may lose profit from that he in supposed to acquire, to that other person. The tort of passing of is pertinent as it helps to secure the profit of traders.

Lastly, the tort of passing off is relevant for the promotion of a healthy competition amongst traders. The law aims to protect traders from this form of unfair competition. A healthy competition is one that involves delivering a quality product to the consumers and constantly looking for ways to improve it so that it is better than that of the competitors whereas, an unhealthy competition is one that focuses on pointing out the defects in a the product of a competitor. The law therefore aims to protect traders from this unfair form of competition. The tort of passing off therefore helps to prevent an unhealthy form of competition thereby encouraging a healthy one.

**CONCLUSION**

It can be seen from the aforementioned that the tort of passing off serves a great importance in the 21st century Nigeria. In a country where quite a number of businesses are unregistered and a good number of its citizens and inhabitants live in rural areas, the act of passing off becomes increasingly rampant. Many instances of passing off can be seen in Nigeria which ranges from the misrepresentation of products like, soaps, pencils, clothes and so forth. Businesses have been damaged and the reputations in which traders have built have been tarnished. To this end, the tort of passing off exists in Nigeria as a common law and statutory remedy to curb these instances of passing off.

**BIBLIOGRAGHY**

ONLINE REFERENCES

1. T & A Legal. (2018, June 5). An appraisal of passing off actions under Nigerian law. Retrieved May 6, 2020, <https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law>
2. Chopra, P. Passing Off Under Trademark. Retrieved May 6, 2020 from <https://www.legalservicesindia.com/article/1254/Passing-off-under-trademark.html>
3. Tort of Passing-Off Project Assignments For Law Of Torts. (2018, February 2). Retrieved from <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php>

BOOK REFERENCES

1. Olarinde, E. S., Chigbo, C.C., Ikpeze, N.G. (2018). The Modern Law of Torts: A Kaleidoscopic Perspective. Ado-Ekiti, College of Law: Afe Babalola University.

1. 1 (1996) 5 SCC 714 [↑](#footnote-ref-1)
2. 2 [1979] AC 731 [↑](#footnote-ref-2)
3. 3 [1964] 1 WLR 1466 [↑](#footnote-ref-3)
4. 4 (1971) I UILR 417 [↑](#footnote-ref-4)
5. 5 [1977] 1 WLR 1155 [↑](#footnote-ref-5)
6. 6 (1816) 35 ER 851 [↑](#footnote-ref-6)
7. 7 [1962] RPC 265 [↑](#footnote-ref-7)
8. 8 CAP T13 LFN 2004 [↑](#footnote-ref-8)
9. 9 (1972) NNLR 60 [↑](#footnote-ref-9)