AFE BABALOLA UNIVERSITY, ADO-EKITI, EKITI STATE, NIGERIA.

NAME: YUNANA PRECIOUS SHEKWOKPELO

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LECTURER: MRS. OYEBANKE APARA

QUESTION: Discuss the relevance of passing off as a form of economic torts in 21st century Nigeria.

Use NALT guidelines for footnotes you should also include a bibliography at the end.

Times New Roman, Font Size 12, 1.5 Spacing Maximum of 5 Pages.

**ANSWER**

Economic torts are torts which inflict mainly economic losses i.e. they are torts which inflict financial losses or financial injury. Economic torts are torts which are concerned with economic, commercial or business sector of life. There are many forms of economic torts they include;

* **Interference with contracts:** the tort of interference with contract is the intentional inducement of a contracting party to break his contract with another person, thereby causing damage to that other person. This is a situation where a person induces a party to breach his contract with the plaintiff, thereby causing the plaintiff loss as a result. The plaintiff does not have to prove that the other party was unlawfully induced to breach the contract. In the case of **Lumley v Gye[[1]](#footnote-1)**, a singer had a contract with the plaintiff to sing at the plaintiffs servant. The defendant, who knew of this contract induced the lady singer to break the contract so that she would sing at the defendant’s theatre instead. The plaintiff brought action against the defendant for encouraging and inducing the singer to breach her contract. The court held that the defendant was liable for inducing breach of contract.
* **Breach of intellectual property rights**: this entails the breach of copyright, patents, trademarks, and other merchandise marks.
* **Injurious falsehood:** falsehood in whatever colouration or language is deemed to try and hide the truth. Injurious falsehood is a false and injurious statement discrediting the reputation of the goods, services or business of another person which causes loss of business and damage to him. This tort is a written or oral falsehood, maliciously published which causes damage to another person’s business. The English court of appeal in the case of **Radcliffe v Evans[[2]](#footnote-2) per Bowen LJ**, explained injurious falsehood as *“An action will lie for written or oral falsehoods … where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce actual damage”[[3]](#footnote-3)*
* **Conspiracy:** the tort of conspiracy an agreement between two or more persons or businesses to interfere with of damage the business of another person without lawful justification. In the case of Sorrell v smith, Lord Cave LC defined the tort of conspiracy as *“A combination of two or more persons willfully to injure a man in his trade is unlawful, and if it results in damage to him is actionable”[[4]](#footnote-4)*
* **Passing off:** The selling of goods or carrying on of business under a name, description or mark in such a way as to mislead the public or consumers into believing that the goods or business is that of another person is passing off.[[5]](#footnote-5) Passing off can also be described as the representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. It is the selling of one’s products, or carrying on of one’s business as if it were that of another person whose reputation and goodwill on thereby enjoys. i.e. it is the pretence by one person, that his products, services, or business are those of another person in order to capture the patronage of the customers of the rival trader.

The tort of passing off is practiced in Common Law countries like Nigeria, the United Kingdom, New Zealand, Australia etc.[[6]](#footnote-6).The tort of passing off is designed to protect traders/ businessmen against unfair competition acquired by false or misleading information and to prevent a rival trader from benefitting from the reputation already achieved by a trader/ businessman.[[7]](#footnote-7)

The major purpose or importance of the tort of passing off is the protection of an established trade goodwill already acquired by a trade mark or trade name from the unfair trade practices and sharp practices of other persons. Sir John Salmond in his book Law of Tort stated the reason for the tort of passing off thus: “the law … is designed to protect traders against … unfair competition which consists in acquiring for oneself, by means of false, or misleading devices, the benefit of the reputation already achieved by rival traders”.

**Elements of passing off**

In order to succeed in an action of passing off, a claimant needs to establish the elements which were stated in the case of *Reckitt & Colman products ltd v. Borden Inc.[[8]](#footnote-8)* the House of Lords per Lord Oliver. The following (3) three elements are also known as the Classic Trinity were stated as follows;

1. Goodwill: The claimant must show the court that there is business value (Goodwill i.e. the attractive force that brings customers) which is attached to the goods and services he produces in a suit for passing off.
2. Misrepresentation: The claimant/ plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully (whether intentionally or not) are actually the goods and services of the claimant.
3. Damage: The claimant/ plaintiff needs to show to the court that a loss has been suffered due to the belief that the goods and services of the defendant are those of the plaintiff/ claimant. (The Claimant / plaintiff needs to show that the defendant’s activities are calculated to deceive the public).

**Forms of Passing Off**

The forms of passing off include;

1. Trading under a name which is closely related to that of the claimant/ plaintiff such name being likely to mislead the public: - in the case of *Hendriks v Montagu* [[9]](#footnote-9), the Universal Life Assurance Society were granted an injunction by the court in order to restrain the company of the defendant which was incorporated later on from carrying on business under the name “Universe Life Assurance Association”. In Nigeria, the court has decided a similar situation in *Niger Chemists ltd. v. Nigeria Chemists[[10]](#footnote-10)* where Palmer J. granted an injunction restraining the defendants from using the name “Nigeria Chemists” as it was calculated to deceive those who had the intention to deal with Niger Chemists. It is important to note that both parties in the suit were engaged in a similar business. Thus, where a name is made to deceive a consumer or the public due to its similarity with that of a plaintiff then that is a form of passing off and there exists a tort.
2. **Trading under a name already given for goods of that kind by the plaintiff or trading under a name so similar to that of the plaintiff’s as to be mistaken for it:** Where a trade name is already in use by the plaintiff for his goods and services, it will be actionable passing off for a defendant to trade under the name of the plaintiff.[[11]](#footnote-11) A trade name is a name under which goods and services are sold by a certain individual and which by established usage has become known to the public to the effect that the goods and services are that of the individual.[[12]](#footnote-12) Descriptive names such as ‘water’, ‘beer’ ‘stout’ are not protected unless the plaintiff can prove that the descriptive name has acquired a secondary name exclusively associated with the plaintiff’s own product.
3. **A direct statement by the defendant that the goods and services are that of the plaintiff:** Actionable passing off occurs where the defendant markets his products as that of the plaintiff. In the case of ***Byron (Lord) v. Johnston* [[13]](#footnote-13)** the defendant publishers were restrained from advertising and selling a book of poems with the name of Lord Byron written on the cover and title page, when in fact the famous poet was not its author
4. **Where the defendant trades under the trademark of the plaintiff or any deceptive imitation of the plaintiff’s mark[[14]](#footnote-14):** A trademark refers to a mark used by a trader in order to indicate a connection between the marked goods and the trader and also to show that the marked goods are the trader’s merchandise[[15]](#footnote-15). In the case of ***Perry v Truefitt[[16]](#footnote-16)*** the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations.
5. **Imitating the Get Up or Appearance of the Plaintiff’s Goods:** Where there are characteristics in the Get Up or appearance of the plaintiff’s goods which identifies the goods as those of the plaintiff, any adoption or imitation of the appearance or get up of the plaintiff’s goods by another in a manner likely to deceive will give rise to the tort of passing off.[[17]](#footnote-17) Thus, where the defendant imitates the get up or appearance of the plaintiff’s goods, the defendant is liable for passing off. In the case of ***Trebor Nigeria ltd v. Associated Industries ltd*[[18]](#footnote-18)*,***the plaintiffs claimed that the defendants were guilty of passing off their products as that of the plaintiffs. The court per J. R. Jones held that the defendants had in every aspect from carton to tablet to manufacturing marketed a product as similar as possible to that of the plaintiffs.

In the case of ***U.K. Tobacco Co. Ltd v Carreras Ltd[[19]](#footnote-19)*** the defendants who were marketing cigarettes called “Barrister”, on which was a white man wearing a barristers wig and gown were restrained from imitating the appearance of the plaintiffs cigarettes called “Band Master” on which packet was a man in a band masters uniform.

**The remedies for passing off**

The following remedies can be claimed by the plaintiff in an action Passing Off;

1. Damages: - A successful plaintiff in a suit for passing off is entitled to damages. The court can award general damages, special damages or punitive damages. This is because it is presumed that the plaintiff must have suffered losses especially in the course of business.[[20]](#footnote-20)
2. Injunction: - A plaintiff can ask the court to restrain or prohibit the use of a mark subject matter of the passing off suit in court. Further, a perpetual injunction can be granted by the court when the suit has been concluded i.e. the defendant will never use the mark again[[21]](#footnote-21).
3. A plaintiff can also approach the court to grant him/her the delivery of the goods of the defendant which breach the trademark to be destroyed.

**Defences available to a Defendant**

The following are available defences for a defendant faced with a claim of Passing Off;

1. Dissimilarities in the mark between that of the defendant and that of the plaintiff. See Trebor Nig. Ltd. (Supra).
2. Consent of the plaintiff was sought before using the name or mark or slogan as the case may be.
3. The defendant can also plead innocent usage of the plaintiff’s name.
4. The plaintiff’s name or mark has become common/ generic.
5. The mark of the plaintiff is not distinctive.

**Passing Off and Trademarks Infringement**

It is pertinent to note that passing off and trade mark infringements are very similar and that they go together. The tort of passing off arises when a mark, sign or product is unregistered under the Trademarks Act of 1961. The plaintiff has to prove that the mark or sign has sufficient goodwill, an established usage and the identical mark will deceive the innocent man and as such seeks to be protected by the law of passing off. However, passing off claims are time consuming and less straightforward.[[22]](#footnote-22) Trademark infringement unlike passing off involves a registered trademark. Where there has been constant usage of an identical mark by the defendant and such usage is likely to cause deceit or confusion in the course of business. Then that is trademark infringement. It is important to note that once a trademark is registered, it gives the owner (the proprietor of the trademark) the exclusive right to use the trademark in business, marketing, etc.[[23]](#footnote-23)

**Conclusion:**

The tort of Passing off is a very important aspect of the Nigerian economic market industry considering how many similar new products are popping up every day. this has led to unhealthy rivalry however with the tort of passing off a person can defend and reclaim their products from opportunists who are trying to steal their good will and reputation.

The principle of passing off is that no man is entitled to represent his goods or his business as that of another. Passing off protects the property rights of individuals. It is therefore appropriate to say that Passing off is a common law concept which prevents the unlawful usage of a man’s mark, sign or goods and services.

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1. (1853) 118 ER 749, 1083 [↑](#footnote-ref-1)
2. (1892) CA 2 QB 524 [↑](#footnote-ref-2)
3. Ibid at 527. [↑](#footnote-ref-3)
4. (1925) HL 700 at 711 AC. [↑](#footnote-ref-4)
5. R. F. V. Heuston, *Salmond on the Law of Torts* (16th Ed. Sweet & Maxwell London, 1973) 408. [↑](#footnote-ref-5)
6. Ibid. [↑](#footnote-ref-6)
7. G. Kodilinye and O. Aluko, *Nigerian Law of Torts* (Spectrum Books Limited 1999) 221. [↑](#footnote-ref-7)
8. HL 1990 [↑](#footnote-ref-8)
9. [1881] 17 Ch. D 638 [↑](#footnote-ref-9)
10. [1961] 1 All NLR 171 [↑](#footnote-ref-10)
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13. 918160 2 Mer. 29 [↑](#footnote-ref-13)
14. R. F. V. Heuston, *Salmond on the Law of Torts* (16th edn, Sweet & Maxwell London, 1973 [↑](#footnote-ref-14)
15. Section 67 (1) Trade Marks Act CAP T13 LFN 2004. [↑](#footnote-ref-15)
16. (1842) 49 ER 749. [↑](#footnote-ref-16)
17. Ibid [↑](#footnote-ref-17)
18. (1972) NNLR 60 Suit no K/127/71 May 29 1972 Nigerian Law Intellectual Property Watch Inc. <https://nlipw.com/a-peek-into-passing-off-cases-in-Nigeria> accessed on 7 May 2020 [↑](#footnote-ref-18)
19. (1931) 16 NLR 1 [↑](#footnote-ref-19)
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21. ibid [↑](#footnote-ref-21)
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23. supra [↑](#footnote-ref-23)