NAME: EDEM EDIDIONG ANIETIE

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COURSE TITLE: LAW OF TORT.

ASSIGNMENT;

Discuss the relevance of passing off as a form of Economic Torts in the 21st century Nigeria.

*Abstract:*

*The world of business is said to have its own perks, there is a lot of competitions, rivalry and so forth, in some cases the competitors want to use the same business name, logo, slogan or sign. When such arises in a business the tort of passing off comes into play. They are other things in which passing off tackles, profit or loss, trademarks, branding, competition and consumers. It is important to also know the meaning of passing off, aims of the tort of passing off, the elements and possible defense to the tort of passing off and its relevance in Nigeria.*

MEANING OF PASSING OFF:

The classic definition of the tort of the tort of passing off can be found in the judgement of Lord Diplock in *Eruen Warrink v J Townend & Sons (Hull) ltd.* Lord Diplock identified the five essential elements of the tort.

The tort of passing off is committed where the plaintiff’s goods are passed off by the defendant as being his own. The person whose goods has been passed off in this manner may have an action in tort in respect of any losses he has incurred. Although this tort has been recognized for a number of years now, commentators continues to disagree on its classification. There is a link between passing off and the tort of malicious or injurious falsehood. There is also a link between passing off and the tort of deceit as the person who passes off his goods as belonging to the public deceives the public. Passing off is also defined as the selling of goods or carrying on a 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. The tort of passing off is practiced in Common Law countries like Nigeria, the United Kingdom, New Zealand, Australia etc. it 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 or businessman.

1. R. F.V. Houston, *Salmond on the Law of Torts (*16th edn, sweet & Maxwell London, 1973) 408.
2. Ese Malemi, *Law of Torts* (2nd edn, Law of Tort, 2017)
3. A Modern Law of Torts (*A Kaleidoscopic Perspective).*

**Aims of the Tort of Passing off:**

The following are what the tort of passing off seeks to achieve in every common law system:

1. To enable business continue to earn profit.
2. To protect the right of property that exists in good will (i.e business value).

The tort of passing off is common in a competitive business community or economy.

People resort to every strategy to market their products and services, to survive and to expand their business. The tort of passing off is designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons. Its object is to protect the reputation and goodwill a business has built up for itself. It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business. It protects that attractive force of the business which brings customers to it. The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the goodwill and reputation of the business. 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”.*

In the words of LORD KINGSDOWN in Leather Cloth Co v American Cloth Co;

*“The fundamental rule is that one man has no right to put off his goods for sale*

*As the goods of a rival trader”*

LORD LANGDALE MR. explaining the law in Perry v Truefitt stated that;

*“A man is not to sell his own goods under the pretense that they belong to another*

*Person; he cannot be permitted to practice such a deception, not to use the means which contribute to that end.*

In the law of passing off, the basis of the legal action is that the passing off by the defendant of his goods and or business as that of the plaintiff, is injuring the right of property, product services and business of the plaintiff.

4.Salmond op cit. para 149.

5. (1842) 49 ER 749 at 725. Draper v Trist (1939) 3All ER 513 at 526.

6. Ese Malemi, *Law of Torts* (2nd edn, Law of Tort, 2017).

7. G. Kodilinye and O. Aluko, *Nigerian Law of Torts* (Spectrum Books Limited 1999) 221.

In Nigeria, passing off is a big issue where goods on the shelf are not labelled properly. Identical products looks exactly like the original product. You have to look closely at these products to tell the difference, especially when it’s of the same kind and supposedly does the same action for what you requested for.

For instance, Mrs Daniel, went to the supermarket to purchase a seasoning powder, she was in rush and merely picked the first bottle of her favorite seasoning powder, whilst cooking she discovers its another seasoning powder with the same color and package, the only difference was the substitution of a letter in the name. it is actually sad that similar cases like this happens in Nigeria. After the original business spends time and money in creating awareness about their products but an identical brand just dubs their slogan, business name or packaging.

**Passing off and Trademark Infringement:**

It is important to state that trademarks infringement go hand in hand and are very similar in nature. Whilst passing off is an action on unregistered marks that have become notoriously attributable to one person or company. A trademark infringement action involves a registered mark. This means that a mark, brand, design, name must be registered as a trademark before one can make claim on trademark infringement. Another distinction is whilst an action for infringement of trade mark is statutory remedy conferred on the owner of a registered trade mark, for the enforcement of a right to use the trademark in relation to the goods/services for which the mark has been registered; an action for passing off is an action against the deceit on the colorable imitation of a mark adopted by a person/company in relation to goods/ services which has acquired a distinctive reputation in the market and is known as belonging to or produced by that person/company only. It is arguable to state that passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by Section 3 of the Trademarks Act which provides that:

“No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark: 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 therof”.

8. Black’s Law Dictionary Ninth Edition.

9. (1961) ANLR 180.

10. (1988) 5 NWLR (Pt 93) 138.

11. Nwabachili, Chudi C, Intellectual Property Law in Nigeria.

in the case of Trebor Nigeria Limited v Associated Industries Limited, Trebor Nigeria ltd the makers of trebor peppermint brought an action against associated industries limited the makers of minta supermint claiming that the wrapper used to package the products by the defendant was similar to that of the plaintiff and that they were guilty of passing off their products like that of the defendant. The defendant raised dissimilarities in the two products as a defense to the action. The judge however found the defendants liable for passing off their products as that of the plaintiff. In this instance passing off occurred by the use of a package strongly similar with that of another product such as to deceive the republic that they are one and the same.

An action for infringement of registered trademarks should always be instituted in the Federal High Court only because the action arises in relation to a federal enactment which is the Trademark Act. However, the courts have variant decisions on the jurisdiction of the courts on passing off actions.

In the case of Patkun Industries Ltd v Niger Shoes Ltd, a 1988 decision, the supreme courts held that the federal high court has jurisdiction in trademarks infringement and passing off actions stemming from the infringement of trademarks, whether registered or unregistered.

The constitution provides that; “ if there is any other law that is inconsistent with its provisions, the constitution will prevail, and that other law shall, to the extent of the inconsistency, be void. These provisions in the grundnorm places the correct position in perspective and emphasizes the position of the Federal High Court as the court with exclusive jurisdiction in passing off actions.

**Passing off and Trademark Registration;**

Trademark registration in Nigeria begins with an availability search of the mark and ends with the issuance of a certificate of trademark registration. This process takes as long as two years, however in between the availability search and the issuance of the certificate, each applicant is issued an acknowledgement form and thereafter an acceptance form. These forms do not indicate registration of the mark. Only the issuance of a certificate by the registrar of Trademarks indicates trademarks registration which is the only after the publication of the mark and the receipt of no objections from the public.

12. 1999 constitution, which is the supreme law of the federal republic of Nigeria,

13. CAP T13 Laws of the Federation of Nigeria, 2004.

14. (2007) 15 NWLR (Pt. 1058) 576.

**Components to prove Passing Off:**

1. Proof that the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of the public or persons involved in a trade in the relevant market as coming from a particular source.
2. That the use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill to the plaintiff’s business.

**Remedies in passing Off:**

in many cases of passing off the victim will seek a remedy an injunction to restrain the defendant from continuing to pass off his goods as if they were the plaintiff’s. the injunction may be granted on terms, such as where the defendant is permitted to continue to manufacture the goods as long as he distinguishes his goods from those of the plaintiff. In deciding to grant an injunction a judge may take into accounts the behavior of the parties and refuse to grant an injunction if the plaintiff has failed to respond to reasonable enquiries and the defendants have as a result, expanded much time and expense in marketing their product. *Dalgety Spillers Foods Ltd v Food Brokers Ltd.*

Account of profits: the plaintiff is entitled to profit on goods wrongly sold by the infringer.

**Defenses available to a Defendant in a passing off Action:**

In a claim for the tort of passing off, a defendant may plead a number of defenses by saying that the passing off complained of is a;

1. Functional design or package.
2. The mere descriptive name of the product,
3. Consent, such as license given to him by the plaintiff to produce and or market the product.
4. Innocent passing off that is innocent usage of the plaintiff’s name.

15. Ese Malemi, *Law of Torts* (2nd edn, Law of Tort, 2017)

16. (2004 )LPELR-1275(SC)

17.(1977) 1 ANSLR 144

18. The Modern Law Of Torts (*A Kaleidoscopic perspective).*

**Conclusion:**

The sole purpose of passing off is to protect a trade from exploitation and damaging by another. This means that no man is entitled to represent his goods or his business as that of another. It is therefore necessary that the framework for passing off actions be strengthened to defend the goodwill and reputation of the business.

It is also important that the Trademarks Act be further amended to reflect the times, happenings and changes in Nigeria.

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