***IDIATA BENEDICT OSEMUDIAMEN***

***300 LEVEL***

***17/LAW01/135***

***LAW OF TORTS***

***LPB 302***

***QUESTION: Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria.***

***Passing Off:***

According to Black’s Law Dictionary, Passing Off is the act or an instance of falsely representing one’s own product as that of another in an attempt to deceive potential buyers. It is actionable in tort under the law of unfair competition. It may also be actionable as trademark infringement.[[1]](#footnote-1) Passing Off is the selling of goods or carrying out of a business in a way to deceive the public into believing that the goods or business of the defendant is that of the plaintiff’s. The law on this matter is designed to protect traders from unfair competition which involves acquiring for oneself the benefit of the reputation achieved by the rival traders.[[2]](#footnote-2) Where a person uses another person’s name, trademark, and description or uses any other form to take advantage of another person’s goodwill and reputation by making the general public believe that the product belongs to that other person, he is said to have committed the tort of passing off. Passing off is in consonance with the fundamental maxim of ***‘ubi jus ubi remedium’*** which means that when there is a wrong, there is a remedy. In the sense that an unregistered owner of certain goods and services is not without remedy when there is an infringement on his products, trademark, trade name etc.[[3]](#footnote-3)

This is the making of some false representation likely to induce a person to believe that the goods or services are those of another. It the act of a defendant whereby he carries out his business or sells his products in other to deceive the public by taking the reputation or goodwill of the plaintiff by copying the plaintiff’s name, trade mark, description or by imitating the plaintiff’s products.

***The Purpose of the Law of Passing Off***

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 services as that of the plaintiff is injuring the right of property, product, services and business of the plaintiff. 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 expand their business; hence the tort of passing off was designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons. The purpose is to protect the reputation and goodwill of a business. It 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** stated in his work “*Law of Tort”* stated the reason for the tort of passing off as:

*“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.”[[4]](#footnote-4)*

In the case of ***Niger Chemists Limited v Nigeria Chemists & D.K. Brown,[[5]](#footnote-5)*** The plaintiff sued and the court held and granted an injunction against the defendant on the grounds that their use of the name ‘Nigeria Chemists’ was intended to deceive the members of the public into believing that there was a relationship between Nigeria Chemists and Niger Chemists. The case establishes the principle that an action in passing off lie in cases of misuse of trade names, trademarks or design get-up of the goods or businesses.

Also, **Lord Langdale Mr** stated while explaining the law in the case of ***Perry v Truefit*** that,

*“A man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception or to use the means which contribute to that end”[[6]](#footnote-6)*

***Elements of Passing Off***

The features/elements of passing was established in the **Jif Lemon case,** which is actually the case of ***Reckitt & Colman Products Ltd v Borden Inc[[7]](#footnote-7)*,** where **Lord Oliver,** brought about three principles now known as the classical trinity which included:

* Reputation/goodwill
* Misrepresentation
* Damage

1. ***Reputation/Goodwill***

The claimant would have to show that there is business value which is attached to the goods and services he produces for him to succeed in an action for the tort of Passing Off. This means that the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of persons in the public of the relevant market actually belongs to the plaintiff. Thus, where a plaintiff has no distinct goodwill, he cannot, *prima facie* be heard of, to say that the defendant has infringed upon his trade-mark or name or converting his goodwill.[[8]](#footnote-8)

1. ***Misrepresentation***

This means that the defendants who are engaged in a common field have used a name, mark, sign so resembling to the claimant’s that it is likely to cause confusion in the minds of the common customer. This can be seen in the case of ***Diageo North America Inc v Intercontinental Brands (ICB) ltd,[[9]](#footnote-9)*** where the defendant marketed a drink named “Vodkat”, which was actually not vodka, but the marketing did not actually make it clear that it wasn’t so. The plaintiffs were the biggest manufacturers of vodka and they filed a suit against the defendants for passing off and it was held so.

1. ***Damage***

The claimant would have to prove that the defendant’s activities were calculated to deceive the public and hence cause damage/loss to the claimant. That is the use of the mark, name, and sign is likely to cause damage or has already caused damage, actual or probable to the goodwill of the plaintiff’s business.

***Forms of Passing Off***

1. ***Marketing products with the plaintiff’s trademark or its imitation***

In the case of ***Perry v Truefitt,[[10]](#footnote-10)*** the plaintiff obtained an injunction to restrain the defendant from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations.

1. ***Marketing a product as that of the plaintiff***

In the case of ***Lord Bryon v Johnson[[11]](#footnote-11),*** the defendant publishers were refrained from advertising and selling a book of poems with the name of Lord Bryon written on the cover and title page, when in fact the famous poet was not its author.

1. ***Imitating the appearance of the plaintiff’s product***

In the case of ***U.K Tobacco Co. Ltd v Carreras Ltd[[12]](#footnote-12),*** the defendants who were marketing cigarettes called “Barrister”, on which packet was a white man wearing a barrister’s wig and gown were restrained from imitating the appearance of the plaintiff’s cigarettes called “Band Master” on which was a man in band master’s uniform.

1. ***Trading with a name resembling that of the plaintiff***

In the case of ***Hendriks v Montague[[13]](#footnote-13),*** this was very well established in this case where the plaintiffs who were insurers trading as “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 the business under the name “Universe Life Assurance Association.”

***Relevance of Passing Off in the 21st century Nigeria***

One of the need or importance of starting up a business is to achieve or gain profits. Hence in creating a business, a very important requirement is the business name, which would be registered under the legally recommended body; this enables the business to be unique and upon that name the business or company owner can build a goodwill/reputation which the public would appreciate and thus patronise the owner by buying their products, goods and services. The body responsible for registration of business names in Nigeria is the ***Corporate Affairs Commission*** and the law that provide its guidelines is the ***Companies and Allied Matters Act 2004 (2004).*** Thus when a business registers its name, he has exclusive right over that name and also the right to sue anybody that uses that name or a name similar to it to such an extent as to deceive the public.

The tort of Passing Off is relevant to protect the right of property that exists in goodwill (business value). It protects the intellectual property rights a person has in their creation where another person seeks to exploit a similarity between that creation (business) and another. By virtue of ***Section 579(1) (d) CAMA,*** it explains that a name is prohibited and restricted where it is identical with or similar to a name by which any firm, company or individual is registered under the Act. Also, ***Section 30(1) (a) (d) CAMA,*** a name is prohibited and restricted where it is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive… or in the opinion of the commission would violate any existing trade mark or business name registered in Nigeria. This is put in place in other for the owner of the business or company to maximize profit and gains from the production and sales of goods and services to the customers which is attributed to the business owner’s goodwill/reputation.

Summarily, the relevance of passing off includes;

* To enable businesses to continue to make profits
* To protect the right of property that exists in goodwill/reputation[[14]](#footnote-14)
* To reduce and eradicate the sale of substandard and fake products
* To protect a person’s business interests from the unfair trade practices and sharp practices of others.
* To secure and protect the reputation and goodwill of a business

***Remedies for Passing Off***

The tort of Passing Off injures the property rights of the plaintiff especially in business. The following are remedies which can be claimed by the plaintiff in an action for the tort of passing off;

* Damages
* Change its name
* Injunction
* Account for profit; or for loss of sales
* Delivery up for destruction of infringing goods
* Intervention by the relevant agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

***Defences***

In a claim for the tort of passing off, the defendant can bring up the following defences to exonerate him from the tort, there are:

* Consent; such as licence was given by the plaintiff
* The plaintiff’s name or mark has become generic/general
* Dissimilarities in the mark between that of a defendant and that of the plaintiff
* The mere descriptive name of the product
* Innocent passing off

***Conclusion***

The purpose of passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built by another. Hence the principle of this tort is one is not entitled or allowed to sell goods or carry out a business in a way to deceive the public into believing that the goods or business is one’s own (defendant) but rather it is that of another (plaintiff). The tort of passing off is an economic tort, which is very relevant as it seeks to protect the plaintiff, the owner of the goodwill/reputation, from an unlawful conduct of the defendant such as marketing products with the plaintiff’s name or trademark, the result of which is the damage or loss caused to the business of the plaintiff.

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5. (1961) All NLR 171 [↑](#footnote-ref-5)
6. (1842) 49 ER 749 at 725 [↑](#footnote-ref-6)
7. (1990) 1 All ER 873 [↑](#footnote-ref-7)
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12. (1931) 16 NLR 1 [↑](#footnote-ref-12)
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