**NAME: ELVIS ELOHO YVONNE**

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**COURSE TITLE: LAW OF TORTS II**

**COURSE CODE: LPB 302**

**QUESTION: Discuss the relevance of passing of as form of Economic Torts in the 21st century in Nigeria.**

**Introduction;**

Passing off is a wrong and an Economic Tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is a wrong and it’s known as the tort of “Passing Off”. The fundamental rule under this tort is “***one man has no right to put off his goods for sale as that of the rival trader”***

For one to succeed in an action in a claim of passing off, such person needs to be able to prove the elements of passing off. Also, a plaintiff can only claim for damages if he can prove that he has suffered damage from the defendant’s action.

WHAT IS PASSING OFF?

Passing off is a tort under economic tort which protect a person’s trade or business from acts which the law considers to be unacceptable. The tort of passing off according to Kodilinye is the selling of goods or carrying on a business in such a way that will mislead or deceive the public that the defendant’s product or business is that of the plaintiff. Passing off is also described as an unfair competition by misrepresentation or literally speaking “the cause of confusion or deception”.

The position of law on the tort of passing off is designed to protect traders against any form of unfair competition which consist of acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by the rival trader. According to **Lord Kingsdown** in the case of **LEATHER CLOTH CO LTD V AMERICAN LEATHER CLOTH CO[[1]](#footnote-1),** ***“the fundamental rule is that one man has no right to put up his goods for sale as the goods of a rival trader”***. This simply means no one has the right to trade his goods as if it belongs to another person; it is legally wrong.

Basically, from the above definitions and explanation of the tort of passing off, it can be inferred that the defendant is trying to benefit from the plaintiff’s already existing reputation and financial profit by deceiving or attempting to deceive the consumers that his goods are the same with that of the plaintiff’s either by opening a company that has the plaintiff’s company name or something very similar that will easily mislead the public or selling goods that is imitating the appearance of the plaintiff’s goods. For instance, Joyce went to the supermarket to purchase Milo, she was in a hurry and didn’t really bother to examine it. When she was about to use the milo, she was surprised to find out that it was another product with the same colour and package with that of Milo, the only difference was a substitution of a letter in the name. That is instead of ‘Milo’, what she had in her hands was ‘Mino’.

**METHODS OF PASSING OFF**

The passing off of a plaintiff goods as if they were the defendant’s goods can take place in different ways/methods, they include;

1. **A direct statement that the goods belong to the plaintiff, when in fact they belong to the defendant (marketing a product as that of the plaintiff);**

It is actionable passing of for the defendant to sell merchandise with a direct statement that the goods were manufactured or the goods belong to the plaintiff, when in fact they are not. For instance, marketing your ‘biscuit’ as “cabin biscuit” when in fact it is not ‘cabin biscuit’ neither is it manufactured by Cabin Company. In the case of **LORD BYRON V JOHNSON[[2]](#footnote-2)**, the defendant who was a publisher advertised some poem which he has published as being written by Lord Byron when in fact it was written by someone else. The court held that the defendant had committed the tort of passing off. There are cases where a rice company by name “Rice land” that is doing well in terms of profit and every other thing and then another party manufactures his own rice and use “Rice Land” bag to package his own rice, takes it to the market and tells the consumers that it is ‘Rice land’ rice when in fact it is not. They do this with the already existing reputation of Rice Land Company and divert the financial benefits to themselves. The original company can sue the other company and avoid such unfair competition which will inflict financial injury.

1. **Trading under a name so similar to that of the plaintiff that is likely to deceive the public into believing that defendant’s business and that of the plaintiff are one and the same;**

This basically entails that when the defendant trades under a name that is so similar to that of the plaintiff that would most likely deceive the public into believing that the defendant’s business and that of the plaintiff are one and the same, the defendant would be liable for the tort of passing off.

In the case of **NIGER CHEMIST LTD V NIGERIA CHEMIST[[3]](#footnote-3)**, the plaintiff had carried on a business as a chemist and druggist for several years and had several branches in Onitsha and other towns. The defendant later founded a firm carrying on exactly the same time of business in Onitsha under the name “Nigeria Chemist”. The plaintiff sued the defendant for use of similar name to their own as actionable passing off. The court held that the defendant was liable and granted an injunction to restrain its further use.

According to **Palmer J** in this case, ***“it seems to me in common sense trade in the same town, same street and same line of business one calling itself “Niger chemist ltd” and the other “Nigeria chemist”, there must be a grave risk and deception.***

Also, a similar thing occurred in the case of **OGUNLEDE V BABAYEMI**; the defendant was held liable for the tort of passing off.

1. **Imitating the appearance of the plaintiff’s goods;**

Where there is anything in appearance of the plaintiff’s goods which particularly identify those goods as the merchandise of the plaintiff’s goods, the defendant would be held liable for passing off. In **DE FACTOWORKS LTD V ODUMOTUN TRADING CO LTD[[4]](#footnote-4)**, the defendant were held liable in passing off where they sold bread wrapped in yellow and brown paper with the name “Odus” written in large letters in chocolate colour, this being an imitation of the plaintiff’s bread which for some time previously had been wrapped in a yellow and brown paper with the name “DE Facto” written in large chocolate coloured scroll letters. Also in **U.K TOBACCO CO LTD V CARREARS LTD**; it was held to be an actionable imitation of the get-up of the plaintiff’s cigarettes.

1. **Marketing goods with the plaintiff’s trade mark or any deceptive imitation of such mark;**

A trademark is any design, pictures or mark affixed to goods which indicates that those goods belong to the plaintiff, manufacturer or seller. If a defendant the plaintiff’s trademark or something very similar that will mislead the public, the defendant will be held liable for the tort of passing off. Example given; more than half of the population knows the trade mark of ‘Shoprite’ if any other company uses that mark to sell their goods, they will be held liable.

Trade mark receives protection not only under the tort of passing off but also, if registered, under the **Trade Marks Act 1965[[5]](#footnote-5)**, under which most actions are brought.

**ELEMENTS OF PASSING OFF**

1. **The defendants conduct must be calculated to deceive;**

The defendant must have intended to deceive the public. Also, in some cases, the defendant may be liable even though his actions were sincere and honest (i.e. he did not intend to deceive) this is because liability under the tort of passing off is strict (i.e. the defendant will be liable even if he is not at fault; even if the defendant was honest about his actions, but it turns out that his actions mislead the public to think that his business is that of the plaintiff, he will be liable.

According to **Palmer J** in the **Niger Chemist** case**,** “***it is not necessary to prove that there was an intention to deceive”***. However, the presence or absence is not completely irrelevant because even though liability is strict, where fraud is established the burden of proving the likelihood of damage is light unlike where fraud is absent and the plaintiff needs to prove really hard that he suffered damage.

1. **It is not necessary to prove that the deception has actually taken place;**

It is not necessary to prove that the deception has actually taken place but it is sufficient to prove that the deception is likely to occur or that it would occur in future and if the plaintiff can prove this, he will be granted a ***quia timet*** injunction.

**Palmer J** in the **NIGER CHEMIST** case said the question was “whether the words were calculated to deceive, not whether they have in fact deceived”.

1. **In determining whether confusion/deceit is likely, the court will take into account the experience, standard of the prospective purchasers of the goods;**

When the court is determining whether the public would have been confused or was confused by the products, the court will take into account the experience and standard of literacy of the purchasers. In the case of **U.K TOBACCO CO LTD V CARREARS LTD** emphasized that “***it is a well-established principle that the likelihood of deception varies with the intelligence and literacy of the consumers”, and that a trademark which may not confuse a literate or educated person may easily confuse an illiterate or uneducated person”.***

**REMEDIES FOR THE TORT OF PASSING OFF**

There a two remedies for the tort of passing off, they are;

* Injunction.
* Damages.
* **Injunction;**

Injunction is an order given by the court refraining the defendant from carrying out activities that will not benefit the plaintiff but inflict injury on the plaintiff. Under this tort, the court will award injunction to restrain the defendants from disposition of goods and services that are similar to that the plaintiff which is inflicting financial injury on the plaintiff.

* **Damages;**

A plaintiff may seek remedy in damages from the loss which he has suffered as a result of the defendant’s activities, or he may seek from the defendant an account of the profits which he has made as a result of the passing off.

**RELEVANCE OF PASSING OFF IN THE 21ST CENTURY NIGERIA;**

The relevance of the tort off passing of in the 21st century Nigeria is that it helps in protecting one’s work or business from copyright and infringement. Nigeria is known for its high level of corruption and fraud, so many people’s work or business have been infringed upon. Without this tort, there will be a lot of people benefitting from one’s already existing reputation and financial profit by imposing that such person’s business is theirs.

Basically, from all that have been said, the relevance of passing off in the 21st century Nigeria is to ensure that the property rights of the plaintiff are protected and not taken for granted by the defendant.

**CONCLUSION;**

In conclusion, from the above explanation (definition of passing of, its methods, elements and remedies) it can be inferred that the relevance or essence of passing off is to prevent the defendant from benefitting the plaintiff already existing reputation and profit and inflicting the plaintiff with financial injury.

The Trademarks Act has provided protection against passing off and the situation has improved, this can be observed from a huge splurge in the number of cases concerning passing off. However, in my own opinion, I think the Trademarks Act should be amended due to the happenings in our society today, also, business owners should be enlightened and more conversant with the law of passing off; they should be able to use this law to their own advantage.

**BIBLOGRAPHY:**

1. Ese Malemi Law of Torts, Princeton Lagos, 2013
2. Kodilinye and Aluko Nigerian Law of Torts, Specturum, Ibadan, 2008

1. (1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435 [↑](#footnote-ref-1)
2. (1816) 35 ER 851 [↑](#footnote-ref-2)
3. 4 NIPJD ( SC. 1961) [↑](#footnote-ref-3)
4. (1959) LLR 33 [↑](#footnote-ref-4)
5. (1965) TRADE MARKS ACT [↑](#footnote-ref-5)