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**COURSE: LAW OF TORT II (LPB 302)**

**MATRIC NO: 17/LAW01/080**

**QUESTION**

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

Economic tort can simply be seen as a tort which inflicts financial loss or economic loss and individual interference with contract, conspiracy and passing-off. It protects intangible interests and such interests must have been in the contract.

Economic tort is broad and that is why this paperwork is aimed at explaining the concept and evolution of ‘passing-off’.

**Passing-Off**

Passing-off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage[[1]](#footnote-1).

Passing-off is a wrong, a common law 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 wrong and is known as the tort of passing off.

Passing-off is making some false representation likely to induce a person to believe that the goods or services are those of another. Passing-off is to misrepresent that one’s business is that of, or connected with another in a way likely to cause damage[[2]](#footnote-2).

Lord Parker in the case of ***AG Spalding & Brothers v AW Gamages Ltd***[[3]](#footnote-3) held that the basis of passing-off is a false representation of the defendant and it must be proved in every case that a false representation has been made.

Liability in the tort of passing-off ultimately boils down to misrepresentation. The 17th century case of ***Southern v How***[[4]](#footnote-4) which is the earliest documented case where there was an indication of passing off. In this case, the mark of an eminent brand was used to dupe a customer, who bought the defendants low grade clothing thinking it was the plaintiffs brand. The defendant was held liable. This though was more a case of deceit, but the principle of passing-off clearly started its journey from this case.

Later in the 18th century, all cases of passing-off were classified as cases of deceit, where the action was usually brought not by the deceived, but by the one whose mark was used to deceive ***Blanchard v Hill***[[5]](#footnote-5).

In the 19th century, in the case ***Millington v Fox***[[6]](#footnote-6), it was decided that proof of fraud was not necessary in such a wrong and it was from here that the actual tort of passing off began building its own definition.

The law aims at protecting traders from this form of unfair competition. Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. It is an intangible asset basically. The House of Lords in the case of ***IRC v Muller Margarine***[[7]](#footnote-7), described goodwill in relation to the tort of passing off as ‘the benefits and advantage of the good name, the reputation and connection of a business. It is the attractive force which brings in customers’.

**Passing-Off in 21st century Nigeria**

Passing-off focuses on a representation of a person’s business or product by another in such a way that it deceives the society as to the relationship between the products. If someone opens a company with the name ‘Ala Ltd’ and another person opens a company ‘Ale Ltd’, this can confuse the general public and they can believe that the two companies have a relationship to each other.

The growth and importance of intellectual property rights and law in Nigeria cannot be underemphasized. In a country such as Nigeria where there is high competition among goods, the tort of passing-off occurs frequently and I for one have fallen victim to this when I bought a product thinking it was another because it had the same colour and identical logo. The study of the law of passing-off and its application in Nigeria is necessary because there is a high rate of infringement regarding trademark and products in Nigeria.

The most common form of passing off in Nigeria includes:

1. Using a name that closely resembles the name of an existing product[[8]](#footnote-8)
2. Imitating the appearance of the plaintiff’s products
3. Producing fake products using the plaintiff’s trademark
4. Copying the plaintiff’s advertisement
5. Selling the plaintiff’s expired or inferior products thereby causing an injury to the plaintiff’s reputation

Nigeria’s legal and institutional infrastructure for protecting property rights is in need of further development.

Legal protection of products in Nigeria is regulated by the Copyright Act 1988 as amended in 1992 and 1999, Trademarks Act of 1965 and the Patent of Designs Act of 1970. In Continental Pharmaceutical Ltd. V Sterling Products Nig. Plc and Smith Kline Beckham Plc, the plaintiff were manufacturers of a registered trademark designed with the words in quote ‘Conphamol’ and brought an action against the defendants for allegedly infringing on the salient features only substituting Conphamol for Panadol. It was held that passing off had occurred due to the infringement of the plaintiff’s registered trademark.

Passing-off law does not only highlight what constitutes an infringement in that aspect, rather it grants appropriate remedies to those whose products or business have been infringed upon whether there is a proof of actual damage or not (actionable per se), so long as the ingredient of what constitutes an infringement is satisfied.

Passing-off needs to be taken seriously in this country because a lot of people have fallen victim due to lack of knowledge[[9]](#footnote-9) on how to protect their goods or ensure that they get the right remedy when such infringement occurs.

**Reference**

1. University of Jos Institutional Repository (UNIJOS)
2. The Law of Passing-off and its Application in Nigeria
3. Penprofile on Passing-off in Nigeria
1. Passing-Off: Definition, Remedies and Defences <nibusinessinfo.co.uk> [↑](#footnote-ref-1)
2. Duhaimeorg; Legal Dictionary [↑](#footnote-ref-2)
3. [1915] 84 LJ Ch 449 [↑](#footnote-ref-3)
4. [1618]; The judges categorised it as more of deceit or defamation [↑](#footnote-ref-4)
5. [1742] 2 Atk 484, 26 Eng Rep 692 Ch; The decision of Lord Hardwicke LC in Blanchard v Hill in 1742 is the earliest reported case on the equitable jurisdiction to grant injunctive relief against trade mark piracy. [↑](#footnote-ref-5)
6. [1838] 40 ER 956 [↑](#footnote-ref-6)
7. [1901] AC 217 [↑](#footnote-ref-7)
8. A business name indicates what a business stands for. The Companies and Allied Matters Act (CAMA) in S30(a) and S79(d)(e) requires individuals, firms or business in Nigeria to register itself with the Corporate Affairs Commission within 28 days of the commencement of such a business. [↑](#footnote-ref-8)
9. Lack of knowledge is no excuse. [↑](#footnote-ref-9)