NAME: UZOWA IBUCHIM FAVOUR

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RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA.

Economic Torts are simply seen as Torts which inflicts financial loss/ injury, or economic loss. They are torts which occur mainly in the economic, commercial or business sector of life. It protects intangible interest and such interest must have being in contract. The privity of contract, doesn’t allow for a 3rd party to be sued but ECONOMIC TORT WHICH IS SIMILAR TO CONTRACT BUT MOSTLY INVOLVES MONEY AND IS WIDER, ALLOWS 3RD PARTIES to be sued.

Economic Torts Include: PASSING OFF, INTERFERENCE WITH CONTRACTS, CONSPIRACY TO INTERFERE, INJURIOUS FALSEHOOD, BREACH OF INTELLECTUAL PROPERTY RIGHTS; SUCH AS BREACH OF COPYRIGHTS, PATENTS AND OTHER MERCHANDISE MARKS.

WHAT THEN IS PASSING OFF?

Passing off/ Infringement of Trademark is a pretence by one person, that his goods or business are those of another person in order to capture the patronage of the customers of a rival trader and enjoy his goodwill. It is a FALSE REPRESENTATION of one’s product or business as that of another person, thereby deceiving buyers to patronise it, Involves B passing off his goods as that of A. In the tort of passing off, A person carries on his business or sell his goods under a name, trade mark, description, or imitation of another person’s product in order to deceive the public to patronise it. An illustration is the famous Dominus pizza, imagine another company coming up with a similar name in order to deceive the public into believing that it’s still the same Dominus and buy such only to discover it tastes differently or badly compared to the Original owner’s, this is where the Tort Of passing Off comes into play, To help Safeguard the Business name or Trade mark/slogan of a business owner or prospective business owner, it also helps to protect UNREGISTERED TRADE MARKS which may not be Protected by THE TRADE MARK ACT, As there’s no liit to the list of situations to which passing off applies. The principle underlying the tort of passing off is that, “A MAN IS NOT TO SELL HIS OWN GOODS UNDER THE PRETENCE THAT THEY ARE THE GOODS OF ANOTHER MAN***.” PERRY V.TRUEFITT***[[1]](#footnote-2) .

The Common Forms Of Passing Off includes: Trading with a name resembling that of plaintiff, marketing a fake products as that of the plaintiff by using the plaintiff’s label or design, marketing a product with the plaintiff’s trademark or its imitation, imitating the appearance of the plaintiff’s product, selling inferior or expired goods of the plaintiff as current stock, false advertisement by copying the plaintiff’s advertisement, And so forth.

In Addition, All plaintiffs have to prove that the activity of the DEFENDANT’S ACTIVITY IS LIKELY/”CALCULATED” TO DECEIVE THE PUBLIC Liability in the Tort of Passing OFF is STRICT, therefore INNOCENT PASSING OFF CANNOT APPLY AS A DEFENCE. In the case of ***NIGER CHEMISTS LTD V. NIGERIA CHEMISTS***[[2]](#footnote-3) **PALMER J stated that** *“It is not necessary to prove, that there was any intention to deceive: this has been held in long series of cases, and is not disputed.”*

RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY.

The tort of passing off has been of great issue which needs to be addressed, Imagine buying a trusted product in the market only to realize that it is the counterfeit or identical of the intended brand of the product you had in mind to buy. Or rather not being able to know or discover the original brand of the said product required by an individual. The Tort of passing Off is of great importance in the 21st century where this is prevalent to help THE ORIGINAL OWNER OF A BUSINESS CONTINUE TO EARN PROFIT, it also Ensure that OWNERS OF A BRAND OR TRADE MARK CAN SUE INDIVIDUALS WHO UNLAWFULLY USES ANY OF THEIR TRADEMARKS WITHOUT THEIR CONSENT. It also tend to Assure/ Protect future business owners that their businesses or brands would be protected.

Firstly, 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. It protects the traders GOODWILL in Relation to their goods and services. “Goodwill” is the brand reputation which is built-up in relation to specific goods or services and which attracts customers. SIR JOHN SALMOND in his book LAW OF TORTS stated the relevance 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*.”

Additionally, in 1875, a statutory system of registering trademarks was introduced whereby registering a mark which acts as an indication as to the identity or origin of a product, protects that mark from being used by anyone other than the proprietor of the trademark. This solved the earlier problems of having to show title to the mark by establishing goodwill as is necessary for passing off. The law has been subsequently amended by numerous statutes until The Trade Mark Directive was finally implemented into English Law in the form of the Trade Mark Act[[3]](#footnote-4). Which is where the law stands today, but although the relevance of PASSING OFF CANNOT BE OVER EMPHASIZED EVEN WITH THE IMPLEMENTATION OF TMA, AS PASSING OFF IN THE 21ST CENTURY HELP TO COVER UP LAPSES IN THE TRADE MARK ACT. We shall be discussing the relevance of Passing Off in the 21st century:

For cases involving false endorsement and things such as unauthorised images of a celebrity on merchandising, a trademark may not be enforceable and the common law tort of passing off may be the only course of Action. A passing off Action would be relevant in that case in the fact that well-known celebrities WOULD HAVE ACCRUED A CERTAIN AMOUNT OF GOODWILL IN THEIR NAME, IMAGE OR SLOGAN. If these are then affiliated with another product because of unauthorised use by a trader it may cause public to assume the celebrity’s consent has been given to such marketing and as such increase the trader’s sale. THE DAMAGE CAUSED TO THE CELEBRITY IS FINANCIAL LOSS OF THE FEE THEY COULD HAVE POTENTIALLY EARNED THROUGH ENDORSING THE SAID PRODUCT. It should be noted that, IN TODAY’S COMMERCIAL MARKET SUCH ENDORSEMENT DEALS CAN BE PARTICULARLY LUCRATIVE FOR CELEBRITIES AND IN SOME CIRCUMSTANCES THEIR MAIN SOURCE OF INCOME, That is the need for a claim in PASSING OFF is needed essentially for Celebrities in this 21st century in order to protect their goodwill and prevent financial loss. In ***IRVINE V. TALKSPORT***[[4]](#footnote-5) Lord Justice Laddie HELD THAT: “Manufacturers And Retailers recognise the realities of the Market place when they pay for well known personalities to endorse their goods.....There appears to be no reason why the tort of PASSING OFF Shouldn’t apply to cases of false endorsement especially in the 21st century.”

Moreover, The courts have been reluctant to allow protection under trade mark law of shapes. In ***COCACOLA V.A.G. BARR& COMPANY LTD***[[5]](#footnote-6), Cocacola attempted to register the shape of their bottle as a trade mark. Such bottle is distinctive and clearly infers a specific origin of the product, however Lord TEMPLEMAN stated that this was merely: “Another attempt to expand the boundaries of intellectual property.” The relevance of Passing OFF can also come into play in respect of protecting shapes or the get-up of a product to prevent any attempt to mislead the public into thinking there’s a distinction between the two products. This was in the case of ***RECKITT & COLMAN V. BORDEN[[6]](#footnote-7)*** in which a passing off action was successful, not because the shape of the bottle for lemon juice had been copied because as it was noted this was a monopoly which the law did not permit.” But because the defendant had attempted to mislead the public and ride off of the back of the applicants Goodwill.

More so, Passing off is of great importance in the 21st century because it helps in the protection of THEMES, for example in advertising, which are not capable of specific representation. This was seen in the case of ***CADBURY SCHWEPPES V.PUB SQUASH CO[[7]](#footnote-8)***, In which a distinctive advertising concept to which goodwill had attached was copied by a competing trader. Lord SCARMAN HELD that; PASSING OFF COULD BE STRETCHED TO: “Slogans or Visual Images, which radio, television or newspaper advertising campaigns can lead the market to associate with the plaintiff’s product, provided always that such descriptive material has become part of the GOODWILL OF THE PRODUCT.”

The Tort of Passing Off is relevant when descriptive words are used, which was not covered by the Trade Mark Act. In the case of ***ANTEC INTERNATIONAL V.SOUTHERN WESTERN CHICKS[[8]](#footnote-9)***, The requirement of a secondary meaning was held only to be relevant in cases concerning a word or phrase describing the goods in question with “some precision”.

An action for passing off maybe successful in circumstances an action brought under Trade Mark Law would not. Passing is of importance in relation to place names which the Trade Mark Act prevents registration of marks that can be taken as an indication of geographic origin. In ***CHELSEA MAN MENSWEAR V.CHELSEA GIRL LTD[[9]](#footnote-10)***,Here the action for passing off was successful. The plaintiff brought an action against the defendant who also started marketing products under the same name, despite the fact that Chelsea could be easily mistaken as the origin of the product, there was no need to show any “long-standing or intensive use”. This therefore means that Passing Off is necessary or relevant in such a situation.

Lastly, In ***ASPREY*** ***GARRAD V.WRA GUNS[[10]](#footnote-11)***, it was HELD that where a trader was trading under their personal name and in doing so it led to possible confusion with another trader who had registered a trade mark in that name, “The defence, such as it is, about use of one’s own name is something borne out of necessity.” The Tort of Passing off is of great importance in the 21st century in conferring a high level of exclusivity on a personal name even against a defendant with the same personal name, which is a common issue today.

CONCLUSION

Conclusively, As stated earlier, they are lapses in the trade mark act and passing off helps to cover those lapses which are vivid or crystal clear and relevant in the 21st century.

The Tort of Passing Off is essential for BUSINESS OWNERS to protect them when there is a risk of destruction to the goodwill of the business, passing off should be relied on for such protection because as per Lord **Macnaghten** in ***IRC V.MULLER[[11]](#footnote-12)*** Goodwill is the “attractive force which bring in custom”. Passing Off retains its Importance in the protection of goodwill of a business. It was developed to pass out the message that nobody has a right to represent his goods as that of somebody else’s.

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1. (1842) 49 ER 749 [↑](#footnote-ref-2)
2. (1961) ALL NLR 180 [↑](#footnote-ref-3)
3. (1994) TMA [↑](#footnote-ref-4)
4. (2002) WLR 2355 [↑](#footnote-ref-5)
5. (1961) Reports of patent,Design And trade mark cases [↑](#footnote-ref-6)
6. (1990) 1 ALL E.R 873 [↑](#footnote-ref-7)
7. (1981) 1 WLR 193 [↑](#footnote-ref-8)
8. (1998) EWHC patents 330 [↑](#footnote-ref-9)
9. (1985) FSR 567 [↑](#footnote-ref-10)
10. (2001) EWCA CIv 1499 [↑](#footnote-ref-11)
11. (1901) AC 217 [↑](#footnote-ref-12)