

**NAME: LOYINMI PEACE OLUWASEYI**

**MATRIC NO: 17/LAW01/170**

**COURSE TITLE: LAW OF TORTS**

**COURSE CODE: LPB 302**

**ASSIGNMENT**

**QUESTION**

Discuss the relevance of Passing off as a form of Economic Tort in the 21st Century in Nigeria.

To begin with, what is Economic Tort?

Economic torts may arise from actions which may have caused loss in the commercial

transaction of the plaintiff. Economic torts have become more complex that the Courts had to

respond with positive judicial discretion –to protect the interest of businessmen[[1]](#footnote-1). In the case of

Keeble v Hickeringill[[2]](#footnote-2) Holt, CJ, made a broad statement on the question of economic interest when he stated thus: “He that hinders another in his trade or livelihood is liable to an action for so hindering him.”

This statement suggests an action in tort may be sustained where any act interferes with economic interest. In simple terms, economic torts are torts which causes in its entirety, economic loss. It could also be taken to mean torts that occasion financial damages or financial injury or losses on the business reputation of another. Economic torts are committed within the curb of economic, commercial or business environment. These torts may be categorised into: the tort of passing off, deceit, injurious falsehood, unlawful interference with contract and civil conspiracy etc. The aim of economic tort is to provide remedies to aggrieved parties whose business reputations have been interfered with unlawfully. These torts are essential to preventing a trader from acquiring for himself by means of and a misleading device;the benefit of reputation achieved by rival traders[[3]](#footnote-3)

In respect of the tort of passing off, it is ideal to say that it is part of a much wider canvas of legal remedies controlling unfair competitive Practices.[[4]](#footnote-4)Any personality who attempts to cause

deception by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable in the tort of passing off. This is because, the tort of passing off entails where a person passes off somebody’s business or goodwill as though he owns it. Hence, it is ideal to state that the essence of this tort is to avoid confusion in the minds of the public as to economic activities. In the case of Perry v Truefitt[[5]](#footnote-5) Lord Langdale MR explaining the tort of passing off stated thus: “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, nor to use the means which contribute to the end”.

**THE TORT OF PASSING OFF**

The tort of passing off is a civil wrong that is committed by a person where he passes off somebody else’s business or goodwill as though it were his. The tort of passing off means also, the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff. Passing off is 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 a wrong and is known as the tort of passing off. The law on this tort is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefits of the reputation already achieved by a rival trader. Where this tort is successfully established, the aggrieved party will be entitled to damages for any loss he has incurred therefrom[[6]](#footnote-6).

tort of passing off is committed where A who is a rice producer produces bags of rice weighing 10kg each for the purpose of sale but rebrand each bag with a tag that is associated with B’s business name to mislead the public into believing the bags of rice sold are B’s. To add to the former, in the famous case of N. R. Dongre v Whirlpool Corporation[[7]](#footnote-7). It was held that a man may not sell his own goods under the pretence that they are the goods of another man.

 Furthermore, 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. So basically it is an intangible asset. It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favorable location, reputation of the brand in the community, or the quality of its employer and employees. The value of goodwill of a brand can be calculated by a number of methods, like subtracting the value of all tangible assets from the total value to establish the value of the intangible assets the amount of earnings that are in excess of those normally earned by a similar business averaging the past five years net income and subtracting a reasonable expected rate of return for tangible assets and salary requirements capitalizing the resulting value. Goodwill can be classified into two zones, viz. institutional goodwill and professional practice goodwill. While institutional goodwill associates itself with business houses, their market position, professional practice goodwill, as is quite obvious from the name, associates itself with professional practices like law, medicine, architecture, engineering and many others.[[8]](#footnote-8)

**FORMS OF THE TORT PASSING OFF**

Passing off takes different or various forms, the common of which are the following:

1. Marketing a product as that of the plaintiff.

2. Imitating the appearance of the plaintiff’s goods.

3. Trading with a name resembling that of the plaintiff.

4. Marketing goods with the trademark of the plaintiff or its imitation.

5. Selling inferior or expired goods of the plaintiff as current stock.

6. False advertisement by copying the plaintiff’s advertisement.

**INGREDIENTS NECESSARY TO ESTABLISH PASSING OFF**

Hereunder are ingredients a person who alleges that the tort of passing off was committed against him must establish:

1. That he possesses a reputation or goodwill in his goods, name, mark, or other identifying feature that associates the public with those particular goods, and distinguishes them from others;

2. There must be misrepresentation by the other party which has led others to believe the goods are actually those of the claimant. Confusion will not be sufficient to prove misrepresentation, and;

3. That the Public is likely to be confused by the act of the tortfeasor: In the determination

of this ingredient, the plaintiff must certify that likelihood of the public to be confused

and misled by the activities of the defendant. The court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer.[[9]](#footnote-9)

4. The likelihood of deception: The plaintiff is with the burden to prove that deception is likely to occur in the future and not necessarily proving that deception has already taken place. On the event the plaintiff proves this he may be awarded a quia timet injunction[[10]](#footnote-10)

 5. The Effect of Fraud by the Defendant: Where fraud is proved on the part of the defendant, it helps the plaintiff to prove the likelihood of damage, and it makes it easier

for the court to award aggravated or punitive damage.

**REMEDIES AVAILABLE IN THE TORT OF PASSING OFF**

In successful passing off claims, the following remedies are available:

i. Damages or an account of the defendant’s profits; It has been established through decided cases that a successful litigant in a Passing off action is entitled to damages. Damages here could be general, special or punitive. These usually emanate from losses which are presumed to have been suffered by a Plaintiff in a Passing off action.

ii. An order for the delivery up or the destruction of the infringing articles or products; This is usually claimed where physical goods are involved. This occurs where goods are produced in breach of the trademark of another identical product. Thus, the Plaintiff usually claim for the goods to be delivered up especially so that it can be destroyed.

iii. An injunction to prevent further actions that amount to passing off: This is an order of the Court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of the mark pending the outcome of the case and a perpetual injunction when the case has been concluded to totally stop the use of the mark.

iv. Interim injunction if you need to act quickly;

v. An enquiry to establish loss.

**DEFENCES AVAILABLE IN THE TORT OF PASSING OFF**

In a claim for the tort of passing off, a defendant may plead a number of defences. The below are some of these defences:

* Consent, such as licence given to him by the plaintiff to produce and or market the product[[11]](#footnote-11)
* Innocent passing off: Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.
* The mere descriptive name of the product: An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.[[12]](#footnote-12)

**RELEVANCE OF TORT OF PASSING OFF IN 21ST CENTURY**

* The tort of passing off protects the goodwill of a trader from misrepresentation.
* The law of passing off prevents one trader from misrepresenting goods or services as being the goods and services of another, and also prevents a trader from holding out his or her goods or services as having some association or connection with another when this is not true.
* In common law countries such as the UK, Australia and New Zealand, passing off is a common law tort which can be used to enforce unregistered trade mark rights
* This tort aims to protect the right of property that exists in goodwill.
* It aims to protect traders from unfair competition

**CONCLUSION**

The purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another.

In a country where a considerable percentage of the population lives in rural areas, it is very easy to pass off goods. Thousands of instances of passing off can be found out throughout India. Right from garments to tobacco to toothpaste to pencils to pens, you name it, you find it. Unfortunately, a legal solution has evaded most of these. But with the Trademarks Act, 1999 providing protection against passing off, situation has improved, as can be observed from a huge splurge in the number of Indian cases concerning passing off in the recent past. Passing off has come a long way through the common law system and now has some well defined principles and ambit. Perhaps the time is ripe to bring in legislation and enact a statute concerning passing off.[[13]](#footnote-13)

**BIBLIOGRAPHY**

* Olusegun Yerokun: Casebook on Law of Tort: [Princeton Publishing Co. Ltd.] p.787. 2
* Omotesho: The Law of Tort in Nigeria: [Lagos: Malthouse Press Ltd] p.XIV.
* Winifield & Jolowicz on Torts (2006): 17th ed. [London: Sweet & Maxwell] p. 535. 5(1842) 49 ER 749 at 725.
* <https://drive.google.com/file/d/1m0cOqlid2CA36WtBwmhJLddFCTnq322Q/view>>
* <https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law>
1. Olusegun Yerokun: Casebook on Law of Tort: [Princeton Publishing Co. Ltd.] p.787. 2 [↑](#footnote-ref-1)
2. (1706) 103 Eng. Rep. KB. [↑](#footnote-ref-2)
3. A. Omotesho: The Law of Tort in Nigeria: [Lagos: Malthouse Press Ltd] p.XIV. [↑](#footnote-ref-3)
4. Winifield & Jolowicz on Torts (2006): 17th ed. [London: Sweet & Maxwell] p. 535. 5(1842) 49 ER 749 at 725. [↑](#footnote-ref-4)
5. (1842) 49 ER 749 at 725 [↑](#footnote-ref-5)
6. . Aluko: The Nigerian Law of Torts: Revised Edition [Ibadan: Spectrum Books Ltd] p.221. [↑](#footnote-ref-6)
7. 11(1996) 2 ARBLR 488 SC. [↑](#footnote-ref-7)
8. <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law- essays.php>. [↑](#footnote-ref-8)
9. UK Tobacco Co Ltd v. Carreras, Supra. [↑](#footnote-ref-9)
10. Niger Chemists Ltd v. Nigeria Chemists, Supra. [↑](#footnote-ref-10)
11. Lee v. Haley(1869)5 ChApp155. [↑](#footnote-ref-11)
12. British Vacuum Cleaner Co v. New Vacuum Cleaner Co (1907) 2 Ch 31 [↑](#footnote-ref-12)
13. <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php> [↑](#footnote-ref-13)