**Name: Uche Adaeze Emmanuella**

**Matric no: 17/law01/278**

**Course: law of tort**

**Assignment**

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

**Meaning of Passing Off**

The selling of goods or carrying on of business under a name, description or mark in such a way as to mislead the public or consumers into believing that the goods or business is that of another person is passing off[[1]](#footnote-1). Where a party (defendant) makes false representation in order to sell his goods and services with the intention to deceive a purchaser (an innocent man) into thinking that the goods and services he is selling are those of another party (the plaintiff), that is Passing Off[[2]](#footnote-2).

**Elements of the Tort of Passing Off**

A claimant needs to establish the following in order to succeed in an action of passing off;

1. Goodwill: The claimant must show the court that there is business value (Goodwill i.e. the attractive force that brings customers) which is attached to the goods and services he produces in a suit for passing off.

2. Misrepresentation: The claimant/ plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully (whether intentionally or not) are actually the goods and services of the claimant[[3]](#footnote-3).

3. Damage: The claimant/ plaintiff needs to show to the court that a loss has been suffered due to the belief that the goods and services of the defendant are those of the plaintiff/ claimant. (The Claimant / plaintiff needs to show that the defendant’s activities are calculated to deceive the public).

These (3) three elements known as the Classic Trinity were stated in the House of Lord’s case of Reckitt & Colman products ltd v. Borden Inc. (HL 1990) per Lord Oliver[[4]](#footnote-4).

**Relevance of passing off as a form of economic tort in the 21st century**

Passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark. (Underlining supplied for emphasis).This means that a mark, brand, design, name must be registered as a trade mark before one can make a claim on trade mark infringement. In Omnia (Nig.) v Dyktrade [[5]](#footnote-5)Ltd , the Supreme Court held that a party is not entitled to sue for infringement of a trade mark which had not been registered and that the mere issuance of acceptance by the Registrar of Trade Marks of the applicant's application does not amount to registration until the issuance of the certificate of registration.

In the light of the above, the common law tort of passing [off serves to complement the provisions of extant statutes in the protection of business names and goodwill and act as a fall back legal remedy arising from the limitations of related Statutes. The tort of passing is also to enable businesses continue to earn profit and to protect the right of property that exists in goodwill (i.e. business value).One of the circumstances in which the law of passing off goes further in its protection than trade mark law it where descriptive words are concerned. The TMA prevents registration of descriptive words unless qualified by the proviso that they have acquired a ‘distinctive character’. The law of passing off was similar in that originally it required a “secondary meaning” which referred to the appellants business to allow descriptive words in a passing off action.

However the scope for passing off where descriptive words are in issue was extended in the case of Antec International v Southern Western Chicks . Here 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’

21st century Nigeria in a global internet age has also witnessed considerable internet commercial activities and all its paraphernalia such as the creation, ownership and operation of domain names and trademarks. This has understandably generated considerable disputes over unfair online practices and violations of propriety rights which are of interest to the law on passing off in Nigeria. Case law in this area in Nigeria is recondite. However in other jurisdictions passing has been brought to bear to protect owners of business or domain names. Reference shall therefore be made to other jurisdictions for legal guidance. For instance, the issues of passing off and trade-mark violations in relation to domain names and metatags on the Internet were recently considered in the decision of the British Columbia Supreme Court in British Columbia Automobile Assn. v. O.P.E.I.U.,[[6]](#footnote-6) Local The plaintiffs in this case alleged trade-mark infringement and passing off with respect to three versions of the defendant’s website. The court determined that there was a passing off in relation to the defendant’s first website, but not the second and third websites, and that there was no depreciation of the plaintiff’s goodwill relating to the three websites. The case is thus useful in setting out the required elements to support a claim of passing off and trade-mark infringement in the context of websites.

Passing off protects the goodwill of a trader from a 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. An example would be where an individual registers – ‘kongar.com’ (which is similar sounding to konga.com) and then operates an e-commerce platform as well. To bring an action for passing off, the claimant must show that he/she has a goodwill and reputation in the domain name, that the 3rd party has made false representations which have or are likely to lead the public to be confused that his goods and services are the those of the owner of the unregistered mark, or that his goods or services are associated with or somehow connected to the business of the owner of the unregistered mark; and, that damage resulting from such misrepresentations.

In conclusion, The above contains the relevance of passing off in the 21st century in the sense that it is the internet age. The meaning, element of passing off. The relevance of passing off in the 21st century is it enable businesses continue to earn profit and to protect the right of property that exists in goodwill (i.e. business value) and 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.

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1. R. F. V. Heuston, Salmond on the Law of Torts (16th edn, Sweet & Maxwell London, 1973) 408. [↑](#footnote-ref-1)
2. Diva Rai, ‘Meaning of Passing Off’ (The Tort of Passing Off, IPLEADERS) [↑](#footnote-ref-2)
3. Michael Carter, ‘How to prove “Passing Off”’, (Mondaq 13 December 2017) <https:www.mondaq.com/uk/x/65/578/Trademark/How+to+prove+Passing+Off> accessed on 4th August 2019. [↑](#footnote-ref-3)
4. HL (1990) [↑](#footnote-ref-4)
5. (2007) 15 NWLR (PT 1058) 576 [↑](#footnote-ref-5)
6. 378 (2001), 10 C.P.R. (4th) 423 (B.C.S.C.) (BCAA v. O.P.E.I.U)(Referred to by Aird and Berlic LLP, Canada: [↑](#footnote-ref-6)