NAME: JACOB-OLADELE OLUOMACHI OMOMUOLADE

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

**INTRODUCTION**

The concept of passing off also referred to as the law of “common law trademarks” has undergone various changes over the years, as it extends its boundaries into various aspects of law, from its original use in the nineteenth century, therefore making it a significant tort which has been discussed and applied by various scholars and academic texts.The tort of passing off is yet another tort that seeks to protect the financial interest of an individual from the misuse of another. It protects business names, names of products, trademarks and others. Attempts made in this tort are usually connected with other illegal activities such as deciet, imitation, fraud etc

**CONCEPT OF PASSING OFF**

Passing off has been defined as “the selling or 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.”[[1]](#footnote-2)

*Stroud judicial Dictionary* defines passing off as when a trader by some device induces or endeavors to induce purchasers or persons who may become purchasers, to believe that the goods offered for sale are of a kind, quality or from a source, or having a reputation other than their own eg by improperly using trade mark or a trade nameor its distinctive part[[2]](#footnote-3).”

However, **from my perspective**, the term passing off is simply a situation whereby a trader falsely presents his goods or services to the public, under the guise of having a connection to the plaintiff’s trademark in order to sell his goods.

Where a party (defendant) makes false representation in order to sell his goods and services with the intention to deceive a purchaser into thinking that the goods and services he is selling are those of another party (the plaintiff), that is Passing Off. The tort aims to protect the commercial goodwill and to ensure that people's business reputations are not exploited. Since 'goodwill' in business is an asset, and therefore, a species of property, the law protects it against encroachment.

In *Patkun Industries Ltd. v Niger Shoes Manufacturing Co. Ltd*,[[3]](#footnote-4) Wali JSC observed that the law of passing-off is founded on the ordinary expression ‘pass-off.’ According to His Lordship, when it is said that something is passed-off as something else, it means no more than saying that the thing is falsely represented as something else.The Trade Marks Act employs the ordinary language expression and describes passing-off as ‘rights of action against any person for passing off goods as the goods of another person’ The Court of Appeal in *International Tobacco (Nig.) Ltd. v British American Tobacco (Nig.) Ltd [[4]](#footnote-5)i*n considering the nature and essential ingredients of the tort of passing off stated as follows:

The tort of passing-off consists of the making of some false representation to the public, or to a third person(s), which is likely to induce them to believe that the goods and services of another are those of the plaintiff. This misrepresentation may be done by imitating appearances of the plaintiff’s goods or by use of plaintiff’s trade name or mark. The applicable test is not whether a customer can distinguish the two marks when placed side by side but whether when he has only his own recollections of the one he likes to go by, he may not accept the other in mistake for it.

**ELEMENTS OF THE TORT OF PASSING OFF**

The tort of passing off as earlier stated has undergone various changes since its conception. Before the nineteenth century, the tort of passing off was usually performed under the tort of deciet and misrepresentation, until the case of *Southern V. How[[5]](#footnote-6)*. This is the earliest indication of the tort of passing off, in which the defendant used the mark of a popular clothing brand to decieve a customer into buying his goods. The defendant was held liable. The tort was further developed in subsquent cases such as the case of *A.G spalding & ÁbrothersV. A.W. Gamage Ltd[[6]](#footnote-7), J BollingerV. Costa BravaWine co.ltd[[7]](#footnote-8)* and others

However, in the case of *Ervin Warnick Bv V. J Townend & sons( Hull) Limited[[8]](#footnote-9)*, the judgement of *Lord Diplock,* extended the principles of this tort, in clear terms. In this case, the plaintiff had been selling a sprit based drink under the *Advocaa*t trademark , in the United kingdom since 1911. The trademark having a good and postive reputation; the defendants took advantage of the name by misleading the public into thinking their wine-based product was of the same as ADVOCAAT. The court held that the defendants were indeed passing off their goods as the plaintiffs. In further development of this tort, LORD DIPLOCK identifed 5 vital and significant elements which must be present in order to claim extended passing off. This are:(1)Mispresentation (2) By a trader in the course of trade (3) To prospective customers of his or ultimate consumers of goods or services supplied by them (4)Which is caculated to injure the business or goodwill of another trader (5) Which causes actual damage to the business or goodwill of the trader bringing up the action

**FORMS OF PASSING OFF: 1.Imitating the appearance of the product**: this is a form of passing off, whereby the defendant tries to imitate the appearance of the plaintiff’s product. For example, imitating the label, design or brand of the plaintiff’s product as seen in the case of *White Hudson & CO ltd V. Asian Organisation ltd[[9]](#footnote-10),* in this case the public identified the plaitiff’s product by the red cellophane used to wrap it, subsequently, the defendant had taken up using the same red cellophane to wrap his product, it was held that most of the sales of the defendants products were as a result of the public confusing his products for the plaintiffs. The court held this to be a form of passing off. Another case of passing off is seen in the case of *Trebor Nigeria ltd v. Associated Industries Ltd[[10]](#footnote-11).*  The plaintiff were well known manufacturers of trebor peppermints and other confectioneries brought an action against the defendants who are makers of Minta supermints. The claim succeeded based on the principle that ‘no man has the right to put off his goods for sale as the goods of a rival.

2. **The defendant’s goods bearing a name that resembles the plaintiffs goods**: this is a form of passing off because, a name that closely resembles the plaintiffs goods may result to confusion or mix-ups. This is illustrated in the case of *Hines V. Winnick*, where the plaintiff had seeked an injunction to restrain the defendant from using a name similar to his, in a program.In *Niger Chemists Ltd. v. Nigeria Chemists[[11]](#footnote-12)* where Palmer J. granted an injunction restraining the defendants from using the name “Nigeria Chemists” as it was calculated to deceive those who had the intention to deal with Niger Chemists. Another case is the case of *Reddway v. Baham[[12]](#footnote-13)*

3**. Marketng goods bearing the trademark of the plaintiff or similar to the trademark of the plaintiff**: it is actionable under the tort of passing off, if the defendant imitates the trademark of the plaintiff. This is seen in the case of *Perry V. Truefit[[13]](#footnote-14)* where the plaintiff ordered for an injunction to restrain the defendant from using the same trademark, which he uses on the company’s hair cream product. Another prominent case is the case of *Continental Pharmaceticual Ltd V. Sterling products Nigeria plc.*

4.**Marketing a product which belongs to the defendant, as that of the plaintiffs:** in the case *of Bryon V.Johnson*,[[14]](#footnote-15) it was held that the defendant had committed the tort of passing off, by using the name of the famous poet *Bryon* in his title page, when actually it has no connection with the plaintiff.

5.Trading under a name already given for goods of that kind by the plaintiff or trading under a name so similar to that of the plaintiff’s as to be mistaken for it. Under this head, where a trade name is already in use by the plaintiff for his goods and services, it will be actionable passing off for a defendant to trade under the name of the plaintiff.

6. **False support, adveristment or endorsement of the plaintiffs trademark**: this is seen in the case of *Cadbury Schweeps pty ltd V. Pub squash[[15]](#footnote-16) co* ltd.

7. Marketing goods bearing any deceptive imitation of the plaintiffs trademark

**RELEVANCE OF THE TORT OF PASSING OFF IN 21ST CENTURY NIGERIAN LAW:** In Nigeria, the underlying the purpose of the tort of passing off is to protect an established trademark owned by a trader. This is a common law tort which is statutorily protected in *Section 3 of theTradeMarks Act*.[[16]](#footnote-17) *Section 251 (F) of the 1999 constitution*, providesthat both the federal and state high court have jursdiction. The tort of passing off is usually attached with trade mark infringement, violating the rights of an established trademark.

In *Patkun Industries Ltd V. Niger Shoes Ltd*,the supreme court held that the fedral high court has jursdiction presding over passing off actions whether registered or unregistered.However in the case of *Ayman Enterprise Limited V, Akuma Industries Limited & or*s[[17]](#footnote-18) added that unregistered trademarks should not be taken to the fedral high court but to the state high court, because infrigment of unregistered trademarks and passing off does not infringe any federal enactment but is only supported in common law and as such should not be placed under the jursdiction of the federal high court. 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 the light of this, 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 off is still a relevant subject especially in nigeria because, it is oe of the many methods which are used by traders to seek redress and protection of their business and trademarks. It remains a vital form of protection of intellectual property despite the introduction of a registered sytem of trademark, especially when such system is limited in application.

CONCLUSION

This paper has examined the relevance of the tort of passing off,showcasing it’s vitalness in economic tort and its mode of application. This tort is not only used as a defence of business and proprietary interest but as complementary to existing statutes in this area such as the TradeMark Act.

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