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

Just as torts provide for the protection of a person who has been exposed to harm or injury through another's negligence, lack of duty of care or intent, it also provides protection for negligent or intentional acts of harm done to a person's business.

Although competition is imperative in business, it is also important that protection is provided for business owners against illegal means of eliminating competition. It is a norm in business that one person tries to forward his business at the expense of another but Economic Tort exists to stop or prevent unlawful interference or acts to another's business.

Economic torts, which are also called business torts, are torts that provide the common law rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss.

Economic torts can also be seen as actions designed to protect trade or business. The principal torts are:

Passing off, injurious falsehood and trade libel, conspiracy or inducement of breach of contract, tortious interference, negligent misrepresentation

The writer would be focusing on Passing off and its relevance as a form of Economic Torts in the 21st Century Nigeria

**WHAT IS PASSING OFF?**

According to the Duhaime's Law Dictionary, Passing off is "Making some false representation likely to induce a person to believe that the goods or services are those of another."

It was stated in a leading House of Lords decision that it is "A misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and which causes actual damage to a business or of the trader by whom the action is brought or will probably do so." (This was cited in *Erven Warnink Besloten Vennootschap v. J. Townend & Sons* which is also

known as the Advocaat case)

In an article 'An Appraisal of Passing off Actions Under Nigerian Law' written by T & A Legal, Passing off is "...described as an unfair competition by misrepresentation or literally speaking "the cause of confusion or deception". It went further to say that "Generally, an action for Passing off arises where the deception is made in the course of trade, which could lead to confusion amongst customers."

From various definitions gathered from various writers and scholars and from my understanding of the concept, I, the writer would attempt a definition of the concept. Passing off can be defined as the deceiving of possible buyers through a misrepresentation made by the seller that injures or damages the business of another seller or trader.

Before we move on to the main purpose of this paper which is the relevance of Passing off as a form of Economic Torts in the 21st Century Nigeria, I would briefly discuss the elements of passing off for a better understanding of the concept

#### ELEMENTS TO BE PROVEN IN PASSING OFF

There are three elements of Passing off which I would discuss very briefly. The three elements also known as the classical trinity were brought about by Lord Oliver in the case of Reckitt & Colman Ltd v Borden Inc also known as the Jif Lemon case.

These elements must be proved to successfully win a suit alleging passing off. They are;

- Goodwill
- Misrepresentation
- Damage

#### GOODWILL (REPUTATION OF THE GOODS OR SERVICES OF THE BUSINESS)

Goodwill is defined as the part of business value over and above the value of identifiable business assets. It is viewed as what makes provision for the identity of a business along with its goods and services. Basically it is what distinguishes it from other businesses.

Although difficult to successfully prove, for a plaintiff to succeed in a claim for passing off, he must be able to prove first that he has established a reputation or goodwill in his trademark, brand, name or products through his use of it in his trade or business in such a way that the public relates its use to solely his goods and services or name. There must be proof that this mark is solely their means of identification and it is a distinction between the claimant's business and any other, for instance, the Gucci logo is used by the Gucci company only.

#### MISREPRESENTATION

Misrepresentation is the second element that must be proven by the plaintiff alleging passing off against the defendant. The defendant must have made some sort of misrepresentation which must have or

would have deceived the public or caused them confusion, misleading them to believe that their goods or services were that of the plaintiff.

In the case of A.G. Spalding & Brothers v. A.W. Gamage Ltd where the defendants had advertised that they would sell footballs of the plaintiff when in reality, they wanted to sell a different football. The court had decided that passing off was not necessary itself and held them liable under the act of misrepresenting their football as that of the plaintiff's. It was stated that their offering to sell was actionable and the awarding of damages to their wrong was without limit.

## DAMAGES

This is the last element to be proven by the plaintiff. He must show that the misrepresentation of the defendant had caused harm, injury or damage to his business, reputation or goodwill.

## RELEVANCE OF PASSING OFF IN THE 21ST CENTURY NIGERIA

Lord Langdale, M.R., in the case of Perry V Truefitt stated that "A man is not to sell his own goods under the pretence that they are the goods of another man" Irrespective of whether the trader has done so intentionally or not as the end result is always the same.

The tort of passing off is very common in Nigeria as many Nigerians create products and pass it off as products of famous brands and companies. An instance is the fake Gucci products made by local traders, more commonly known as 'aba boys' and these products are referred to as 'aba products'.

Usually you notice that these products are fakes as sometimes the logo is done wrongly or the brand is not spelled correctly, for instance instead of 'Gucci', the product could have 'Guchi' on it. But there are times that you don't notice and end up buying these fake products, honestly believing they are the real ones.

This is why the law of Passing off is very important in Nigeria. It is necessary that there is a law that protects traders against the copying of their marks, brands or names.

The law of passing off is necessary to protect a trader's business by stopping or preventing another trader from making a misrepresentation of his goods or services. For instance, Mr Ademola has a famous tea brand called Ademola tea, the law of passing off would prevent Mr Adeosun from making a similar product and passing it off as Mr Ademola's product. In the case of Trebor Nigeria LTD.V Associated Industries LTD, the defendant had packaged and marketed its products to look identical to that of the plaintiff. It was held by the court that no person has the right to pass off his goods as that of another trader.

The law of passing off also prevents a trader from misleading the public to believe his goods have some sort of connection with that of another trader when it doesn't. In the case of Niger Chemists Limited V Nigeria Chemists and D.K. Brown, the defendant had used the name of the plaintiff to carry out the

same business as them in the same location. The court held the defendant liable and granted an injunction on the grounds that the use of the plaintiff name was used with an intention to deceive people they had a connection with the plaintiff's company.

The law of passing off does not only prevent but it also serves to remedy businesses that have already fallen victim to the act of passing off. An instance is where Mrs Dumi sells a product using the brand of Mr Demilade. The law of passing off will remedy Mr Demilade and provide him justice. In the case of *Southern V How*, the defendant had used the plaintiff's clothing brand to sell low grade clothes to an innocent buyer who honestly believed it was the plaintiff's brand. He was held liable. In a Nigerian case, *Continental Pharmaceutical LTD V Sterling Products Nigeria Plc. and SmithKline Beecham Plc.*, the case had lasted for 16 years and eventually, on Monday June 27, 2011, the court had awarded damages against the defendant to pay 500 million (a part of a N1.2bn award) to the plaintiff for passing off and infringing on the registered trademark of the plaintiff.

Goodwill, according to the Duhaime's Law Dictionary is an intangible business asset which includes a cultivated reputation and consequential attraction and confidence of repeat customers and connections. Usually a trader passes off his business as that of another person in order to partake of the Goodwill that has been created by the other trader and this act eventually leads the other trader to lose his business and sometimes its good reputation as the product being passed off might be inferior or lower in quality than the original and so the law of passing off seeks to protect the interest, goodwill and property in the business of a trader which is likely to be harmed or injured as a result of the misrepresentation or deceit of another trader.

Without the law of Passing off, businesses will suffer damages and losses and the owners of these businesses will be without remedy to these losses. The culprits of these acts will also go scot free and will keep enjoying the benefits of the businesses they are pretending to work under and that is why it is so important that we have the law of passing off in Nigeria.

## Footnotes

- A.G. Spalding & Brothers v. A.W. Gamage Ltd (1915) 84 LJ Ch 449, (1915) 113 LT 198, (1915) 31 TLR 328, (1914-15) All ER Rep 147, (1915) 32 RPC 273
- Continental Pharmaceutical LTD V Sterling Products Nigeria Plc. and SmithKline Beecham Plc. Suit no FHC/L/CS/460/95
- Duhaime's Law Dictionary
- Erven Warnink Besloten Vennootschap v. J. Townend & Sons (1979) AC 731, (1980) R.P.C 31
- Niger Chemists Limited V Nigeria Chemists (1961) 1 All NLR 171
- Perry V Truefitt (1842) 6 Beav. 66
- Reckitt & Colman Ltd v Borden Inc (1990) 1 All E.R. 873
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