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QUESTION:

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

Economic torts offer protection for a person's trade or business from acts that are considered unacceptable by the law. It is a known fact that businesses need to compete against each other to exist, but economic tort aims at protecting such businesses from acts of unacceptable interference. Economic torts impose financial losses and injury. They occur in economic, commercial or business sectors of life. Economic torts include:

- a) Passing off
- b) Breach of intellectual property right such as copyrights, patents etc.
- c) Injurious falsehood or malicious falsehood
- d) Interference with contracts
- e) Conspiracy to interfere i.e. civil conspiracy.

The aforementioned torts protect a person's "business interest" from unlawful interference. Damages for breach of contract are put in place to put the claimant in a position they would have been in if the contract had been performed.

PASSING OFF.

Passing off is a wrong, it is a common law tort that protects the goodwill of a trader from misrepresentation. Passing off occurs when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages goodwill of a person or business, causing financial or reputational damage. Misleading the public into believing falsely that, the brand being projected is the same as a well-known brand is passing off.

The essence of passing off is 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. This tort was designed to protect traders against such forms of unfair competition which consists in acquiring for oneself, by means of

misleading devices, the benefit of the reputation already achieved by rival traders.¹ The basic underlying principles of the tort of passing off which closely resemble the protection accorded to Trademark Laws² has long been stated to be that, “a man is not to sell his own goods under the pretence that they are the goods of another man³”. It was held in *N.R Dongre v. Whirlpool Corporation*⁴ that ‘a man may not sell his own goods under the pretence that they are the goods of another man’. This fundamental rule was also reiterated by **LORD KINGSDOWN** in *Leather Cloth Co v. American Leather Cloth Co*⁵. where he stated that ‘one man has no right to put off his goods for sale as the goods of a rival trader’. *Reckitt & Colman Products Ltd. v. Borden Inc.*⁶. is popularly known as the *Jif Lemon case*. The judgment in this case finally formulated three basic principles of the tort of passing off. The plaintiff was a manufacturer of lemon juice and, since 1956, had been selling such juice under the name “Jif” in plastic containers resembling real lemons. The defendant’s product, manufactured in 1985-86 marketed three different kinds of lemon juice in containers precariously similar to those of the plaintiffs’, the only difference being a differently colored cover and a different brand name, “ReaLemon”. The plaintiffs’ brought an action for passing off and were successful, with both the Court of Appeal and the House of Lords upholding the decision. Walton J., observed that a careful shopper might be able to distinguish between the different brands, but, to quote him; “the slightest peradventure that the effect of the introduction of any of the defendant’s lemons on to the market would be bound to result in many housewives purchasing them in the belief that they were purchasing the well-known and liked Jif brand”. The fact that the brand “Jif” was identified by the shape of its container and not by its label provided the ultimate evidence.

Classifying acts under this tort aims at to protect the right of property that exists in goodwill (goodwill being the part of business value over and above the value of

¹ Salmond op. cit. para 149.

² Trademark Act 1994(United kingdom) and Trademark Act Cap T. 13 LFN, 2004

³ Perry v. Truefitt (1842) 6 Beav 66, 49 ER 749.

⁴ [1996] PTC (16) 583 (SC).

⁵ [1865] 11 HL Cas 523, 1865 EngR 199, 1865 11 HLC 523, 1865 11 ER 1435.

⁶ [1990] 1 All E.R. 873

identifiable business assets). The tort of passing covers those cases where one trader falsely misrepresents his goods as those of another trader/ brand, which has a good reputation or goodwill in the market and thus leading to damaging his goodwill.

Apart from straight passing off, other forms include;

- a) Extended passing off – where a misrepresentation as to the particular quality of product or service causes harm to another’s goodwill. In the case of *Diageo North America Inc. v Intercontinental Brands (ICB) Ltd*⁷, where the defendant marketed a drink named “Vodkat”, which was actually not vodka, but the marketing did not actually make it clear that it wasn’t so. The plaintiffs were the biggest manufacturers of vodka and they filed a suit against the defendants for passing off and it was held so.
- b) Reverse passing off – where a trader markets another’s business’ goods or services as being his own.

ELEMENTS OF PASSING OFF.

For a claim in passing off to succeed, the following requirements must be established

- a) GOODWILL; the plaintiff must prove that he owns a reputation in the mark that the public associates with his specific product or service.
- b) MISREPRESENTATION; the plaintiff must establish that the trader has caused confusion and deceived or misled customers into believing that their goods and services actually belong to him i.e. the plaintiff.⁸
- c) DAMAGE; the plaintiff must also prove that the misrepresentation damaged or is likely to damage his goodwill, or cause actual/ foreseeable financial or reputational loss.

REMEDIES.

⁷ [2010] EWCH 17 Ch

⁸ Michael Carter, ‘How to prove “Passing Off”’, (Mondaq 13 December 2017)

- a) An injunction to prevent the business from continuing use of the plaintiff's trademark or goodwill
- b) Destroying of the infringing goods
- c) Damages⁹

DEFENCES.

The defendant may argue that;

- a) The mark in question is not distinctive
- b) The mark is generic
- c) They have used carefully and honestly their own name
- d) That the plaintiff has no goodwill in mark
- e) Consent
- f) The plaintiff cannot demonstrate damage or loss.

RELEVANCE OF PASSING OFF IN IN 21st CENTURY NIGERIA. Passing off is a relatively huge problem in Nigeria today especially where goods on store shelves are not properly labelled. Since the aim of economic torts is to protect people from interference with their trade, the tort of passing off equally aims at protecting traders from unfair competition. The tort of passing of go hand in hand with trademark infringement in Nigeria and virtually around the world. Therefore the tort of passing off has a huge impact in modern Nigeria. In Nigeria, the 'Informal' Protection of rights by the tort of passing off closely resembles the formal rights created by trademark law. In Nigeria, as elsewhere, the major purpose underlying the tort of passing off is the protection of an established trade goodwill already acquired by a trade name. We live in a society where various well-known brands have been passed off by traders. Several cases have been brought before the court on passing off,

⁹ T & A Legal, 'Nigeria; An Appraisal of Passing off Actions under Nigerian Law' (Mondaq 5 June 2018) www.mondaq.com/Nigeria/x/714160/Trademark/An+Appraisal+of+Passing+Off+Actions+under+Nigeria+n+law accessed on 20 September 2019.

this goes to show that this civil wrong is widespread. For instance in the case of *Trebor Nigeria Ltd. v. Associated Industries Ltd*¹⁰, an action was held to lie in passing-off where the defendant packaged and marketed its product to resemble those of the plaintiff. The court held that the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader. The court further observed that the defendant attempted to manufacture and market a product as similar as to that of the plaintiff. The plaintiff's action therefore succeeded. Therefore the relevance of this tort in 21st century Nigeria is essentially to provide business owners/ traders with solutions where their brands have been passed off by rival traders.

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¹⁰ 1972 NNLR 60.

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