**UDECHUKWU CHIAGOZIEM C**

**17/LAW01/281**

**RELEVANCE OF PASSING OFF IN ECONOMIC TORTS IN NIGERIA**

As with all legal terms in trying to understand the definition, it is to be remembered that law is kaleidoscopic and as such numerous definitions have been offered and accepted as being good definitions

According to Wikipedia, economic torts can be defined as a tort which provides 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 are also tortuous interference actions designed to protect trade or business. Economic torts simply seek to ensure that businesses are protected from unnecessary and inacceptable interference. ***Mogul Steamship co ltd v Mcgegor Gow and co.[[1]](#footnote-2)***

Economic torts are torts that affect the economic, commercial and business sectors of life, the principal torts are

* Passing off;
* Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
* Injurious falsehood/Malicious falsehood
* Interference with contracts
* Conspiracy to interfere, that, civil conspiracy and so forth.

**PASSING OFF**

“Passing off prevents one trader from misinterpreting goods or services as being the goods and services of another, and also revents one trader from holding out his or her services a having assosication or connection with another when this is not true.”[[2]](#footnote-3)

Passing off is simply a wrong, a common law tort which protects the goodwill of a trader from misinterpretation. Passing off occurs when a person misleads members of the public to believing falsely, that the brand being projected is the same as another well known brand. The law this tort is to prevent misinterpretation in the course of trade to the public, that there might be an association between the two traders. A good scenario for this would be is a store were to open up today with the name as Shoprite this would cause people to believe that there was some sort of association between the two, whereas nothing of the sorts exist.

“A man may not sell his own goods under the pretence that they are the goods of another man” ***N. R. Dongre V Whirlpool Corporation[[3]](#footnote-4)***

***Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd*** [[4]](#footnote-5)

The **Advocaat case**  – is a leading decision of the House of Lords that further developed the common law tort of extended passing off for the Commonwealth as originally established in Bollinger v. Costa Brava. Prior to this case "collective goodwill", as required for an action in passing off, only applied to names indicating geographic origin.

Warnink was one of the primary market producers of a Dutch liqueur made from a blend of hen egg yolks, aromatic spirits, sugar, and brandy, which it sold under the name "Advocaat". Townend produced a similar alcoholic drink but using egg and Cyprus wine which it sold as "Keeling's Old English Advocaat".

The Court held that Townend was passing off their goods as those of Warnink. In applying the test for passing off, the Court developed what is known as the "extended" tort of passing off which included any situation where goodwill is likely to be injured by a misrepresentation.

Lord Diplock established five criteria for a claim of extended passing off. There must be:

1. Misrepresentation
2. By a trader in the course of trade
3. To prospective customers of his or ultimate consumers of goods or services supplied by him,
4. Which is calculated to injure the business or goodwill of another trader, and
5. Which causes actual damage to the business or goodwill of the trader bringing the action.[[5]](#footnote-6)

In ***Reckitt and Coleman Products Ltd v Borden Inc[[6]](#footnote-7)*** Lord Oliver reduced the guidelines laid out by Lord Diplock in ***Erven Warnink v Townend and Sons Ltd[[7]](#footnote-8)*** to three elements:

1. Goodwill owned by a trader
2. Misrepresentation
3. Damage to goodwill

Goodwill can be defined as the business value over and above the value of identifiable business assets. Simply put this means the way a business is identifiable due to its public reputation or monopolization of such market. The laintiff has the burden of roving that the brand, symbol, mark belongs to him

The laintiff also has the burden of roving that there was misrepresentation by the defendant to deceive the ublic into believing that the roduct being sold is of his roduce and that it is associated with him.

In the element of damage to goodwill there does not have to be actual damage, forseeable damage is enough. There must at least be reasonable forseeable damage and the reasonableness is to be determined by the reasonable mans test.

The discretion of the court is to be used when judging the case, as it is to base its judgement on evidence and not witnesses.

***A.G. Spalding & Brothers v. A.W. Gamage, Ltd.[[8]](#footnote-9)***

The defendants had organised a sale where they announced they would sell the plaintiffs’ footballs at a nominal price. But in reality, the intention of the defendants was to sell a different ball, belonging to the plaintiffs’ company of course, than the one advertised.

An action was brought by the plaintiffs seeking to recover damages, which they contended, they had incurred from the dip in sale of their genuine footballs.

It was held that in this type of a wrong, actual passing off was unnecessary. What was important was a description of this wrong in terms of representation. Referring to the defendants’ contention that the writ was issued before there was any kind of sale, there lay no basis in the action and hence, it could not succeed, it was declared that offering to sell was an actionable act. It was also declared that there could be no sort of a limit for awarding damages for such a wrong.

***Hendricks v. Montagu***[[9]](#footnote-10)

The plaintiffs, the “Universal Life Assurance Society” brought an action against the defendants to stop them from carrying on business with the trade name “Universal Life Assurance Association”. The injunction sought was granted and it was mentioned that since the names were too similar for differentiation, the tort of passing off was indeed committed.

Conclusion

In relation to the relevance of the passing off goods in Nigeria, it is evident in such a society, where a majority of the people living there, are at the lowest possible standard of living and therefore a large number in the poverty rate. In such community the tort of passing off is necessary as it protects the thousands of passing off instances in Nigeria and would help businesses thrive and also protect their goodwill.

# Bibliography

Ese Malemi [2008] LAW OF TORTS, Lagos, Prineton Publishing Co

G. Kodilinye [1999] NIGERIAN LAW OF TORTS, Ibadan, Spectrum Books Ltd.

1. 1889 LR 23 QBD 598, 614 [↑](#footnote-ref-2)
2. www.Wikipedia.org [↑](#footnote-ref-3)
3. [1996] 5 scc 714 [↑](#footnote-ref-4)
4. [1979] AC 731, [1980] R.P.C. 31 [↑](#footnote-ref-5)
5. www.lawteacher.net [↑](#footnote-ref-6)
6. [1990] 1 All ER 873 [↑](#footnote-ref-7)
7. [1979] AC 731, [1980] R.P.C. 31 [↑](#footnote-ref-8)
8. [1915] 32 RPC 273 [↑](#footnote-ref-9)
9. [1881] 17 Ch. D 638 [↑](#footnote-ref-10)