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**MATRIC NO: 17/AW01/019**

**COURSE CODE: LPB302**

**COURSE TITLE: Law of Torts**

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**Assignment question;**

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

Use NALT guidelines for footnotes, you should also include a bibliography at the end.

Times New Roman Font size 12, 1.5 spacing, maximum of 5 pages

## Answer

Before the concept of passing off can be examined, we should first understand what an economic tort is.

Economic torts offer protection for a person's trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another and therefore to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.<sup>1</sup>

Therefore, this economic tort can be said to be the tort which inflicts economic or financial losses. There are different types of economic torts one of which will be discussed in this paper.

### THE CONCEPT OF PASSING OFF

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is a wrong and is known as the tort of "passing off"<sup>2</sup>. As held in the famous case of **N. R. Dongre Vs. Whirlpool Corporation**<sup>3</sup>

*"A man may not sell his own goods under the pretence that they are the goods of another man."*

Passing off can also mean using another person's name or trademark to divert finances to your own business. Eg, adidas and adibas. It is also the act of making some false representation likely to induce a person to believe that the goods or services are those of another.<sup>4</sup>

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

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<sup>1</sup> [https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/5798-SXJ1-F18B-7261-00000-00/The\\_economic\\_torts\\_overview](https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/5798-SXJ1-F18B-7261-00000-00/The_economic_torts_overview)

<sup>2</sup> All Answers Ltd, 'Tort of Passing-Off Project Assignment for Law of Torts.' (Lawteacher.net, April 2020)

<sup>3</sup> (1996) 5 SCC 714

<sup>4</sup> <http://www.duhaime.org/>

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 goodwill of the trader by whom the action is brought or will probably do so." This was gotten from a House of Lords decision, 1979 AC 731, as cited in *Erven Warnink Besloten Vennootschap v. J. Townend & Sons, NHL v Pepsi*<sup>5</sup>.

Passing off is a very big issue in Nigeria, especially in shops where items and goods are not properly labeled in their shelves and stalls. Take for instance, Mrs. Ramota went to a supermarket to purchase a seasoning powder, she was in a rush and merely picked the first bottle of her favourite seasoning powder, whilst cooking and about to add a dash of the powder, she was surprised to find that it was another seasoning powder with the same colours and package, the only difference was the substitution of a letter in the name. So, let's say she intended to purchase 'Turio' seasoning powder, what she held in her hands was 'Tunio' seasoning powder. There would be uncertainty and confusion, as well as the dominant feeling of a ripoff and maybe thoughts of having bought a substandard good which could be harmful.

An action for Passing off is a common law remedy and the claimant need not establish title for same but must show that the goods/services have distinctive features as shown in the case of **Trebor Nigeria Limited v. Associated Industries Limited**<sup>6</sup>.

What exactly is the purpose of Passing off?

The purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. The concept of passing off has undergone changes in the course of time. Today it is applied to many forms of unfair trading and unfair competition where the activities of one person cause damage or injury to the goodwill associated with the activities of another person or group of persons.<sup>7</sup>

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<sup>5</sup> 42 CPR 3d (1992) 390 (BCSC).

<sup>6</sup> (1972) NNLR 60

<sup>7</sup> <http://www.legalservicesindia.com/article/1254/Passing-off-under-trademark.html>

According to Section 9(2) of the Trade Mark Act,<sup>8</sup> A registered trade mark is infringed by a person who, not being the proprietor of the trade mark or a person authorized by him, uses in the course of trade a sign that is identical with the trade mark, in relation to goods or services that are identical with the goods or services for which the trade mark is registered

### **Elements of Passing Off**

The three fundamental elements of passing off are Reputation, Misrepresentation and Damage to goodwill. These three elements are also known as the CLASSICAL TRINITY, as restated by the House of Lords in the case of Reckitt & Colman Ltd V Borden Inc . It was stated in this case that in a suit for passing off the plaintiff must establish firstly, goodwill or reputation attached to his goods or services. Secondly, he must prove a misrepresentation by the defendant to the public i.e. leading or likely to lead the public to believe that the goods and services offered by him are that of the plaintiff's. Lastly, he must demonstrate that he has suffered a loss due to the belief that the defendant's goods and services are those of the plaintiff's.

The Jif Lemon case

**Reckitt & Colman Products Ltd. v. Borden Inc**<sup>9</sup>. 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 facts of this case go as such;

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 coloured 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;

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<sup>8</sup> TMA 1999 s9(2)

<sup>9</sup> [1990] 1 All E.R. 873

“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.”

### Relevance of Passing Off in the Twenty-First Century

The tort (of passing off) is no longer anchored, as in the early nineteenth century formulation, to the name or trademark of a product or business. It is wide enough to encompass other descriptive material, such as slogans or visual images, which radio, television or newspaper advertising campaign can lead to the market to associate with the plaintiff’s product, provided always that such descriptive material has become part of goodwill of the product. And the test is whether the product has derived from the advertising a distinctive character which the market recognizes as has been held in the Australian case of **Cadbury-Schweppes v. Pubsquash**<sup>10</sup>.

The relevance of passing off is based on the effectiveness with which it is meant to function as a form of relief to aggrieved business and company owners. In current times, the capacity of business owners and good producers has tripled thereby increasing the possibility of the commission of a passing off. If you go to any regular store today, the probability of seeing similar looking goods is more likely than it previously used to be. This is because businesses and companies are growing at an exponential rate and the idea of imitating the 'get up' of an already existing good seems like an ordinary thing to do.

Passing off aims at putting a stop to acts that could become commonplace thereby always resulting in a cycle of events considered as normal. Basically, imitating the get up of an already existing good, people tend to make money off of it at the cost of the other business. What this conundrum has always required is a simple and easy to understand way of securing businesses. In the 21st century (as a guide for gauging the relevance), there is more advancement in technology, jobs etc., more than we have seen before and new goods and ideas are always being made. At this point, there are only few limited options on new ideologies and inventions. It is therefore not so surprising that based on the vast number of goods already in the market, it will be very easy to manufacture goods of a similar get up to any particular already existing one and

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<sup>10</sup> [1981] R.P.C. 429

make profit at the cost of that other business. The bigger the company, the more damage is suffered. Since most shoppers usually identify goods based on their properties or features or even just the hint of their names, one can easily be confused and would mistake one good for the other (e.g. in cases where you have goods like Luma and Luna). In this sense, passing off definitely comes into play and its role is the identifying of such acts as a legal wrong and the medium through which the enforcement of proper action can be taken. The relevance therefore of passing off in the 21st century cannot be over emphasized.

### Remedies in a Passing off action

The following reliefs/ remedies can be claimed in a Passing up action as follows:

1. Injunction: This is an order of the Court to prohibit or suspend the use of a mark.
2. Damages: It has been established through decided cases that a successful litigant in a Passing off action is entitled to damages. Damages here could be general, special or punitive.
3. Anton Piller Orders: This is an order for inspection and delivery up of infringing materials in the possession or control of an infringer. *Ferodo Limited & Anor. V. Ibeto Industries Limited*<sup>11</sup>.
4. Account of profit<sup>12</sup>: Here the Plaintiff is entitled to profit on goods wrongly sold by the infringer.

### Conclusion

In conclusion, this writer has examined the tort of passing off, putting into consideration what it entails. It should be noted that this tort encompasses a far wider range than trademark violations and jurisdiction rests on the federal high court, however people are still ignorant about the relevance of such a cause of action especially in SMEs across the country and the world thereby indirectly providing a leeway to the abuse of privileges especially in rural areas with a considerable population size. Perhaps it is a good time to enact statutes or laws governing passing off.

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<sup>11</sup> (2004) LPELR-1275(SC)

<sup>12</sup> Nwabachili, Chudi C, Intellectual Property and Law in Nigeria

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