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**COURSE: LAW OF TORT.**

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**DEPARTMENT: LAW.**

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

## INTRODUCTION

In order for the reader to have a solid understanding of the aforementioned question, certain foundation such as keys terms like “**economic tort**” and “**passing off**” must be established on paper. **Economic torts** are tortious interference actions designed to protect trade or business. Economic torts inflict financial losses or financial injury, therefore legal action are aimed to offer protection for a person’s trade or business from acts which the law considers to be unacceptable.

## PASSING OFF

Passing off is one of the principles of economic tort which protects the goodwill of a trader from misrepresentation. In other words, it protects business names, names of product, and trademarks among others from anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud which deceives potential buyers. It should also be noted that it is a fundamental element of business that businesses compete with one another, however, one business may succeed to the disadvantage of another. Therefore, the law aims to protect traders from this form of unfair competition.

## ELEMENTS OF PASSING OFF

To succeed in a claim for passing off, the plaintiff must be able to prove the following:

1. **The effect of fraud by the defendant:**

Where fraud is proved on the part of the defendant, it helps the plaintiff to prove the likelihood of damage, and it makes it easier for the court to award aggravated or punitive damage. The use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiff’s business.

2. **Whether the public is likely to be confused:**

In order to determine whether the public is to be confused and misled by the activities of the defendant, the court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer. One must prove the defendants who are engaged in a common field have used a name, mark, sign so resembling to the

plaintiff's that it is likely or calculated to deceive or cause confusion in the minds of the common customer.

### **3. The likelihood of deception:**

In order to succeed in a claim of passing off, all that a plaintiff has to prove is that the activity of the defendant is calculated to deceive the public. Liability in the tort of passing off is strict. Therefore, innocent passing off is not a defence, and once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction.

## **Remedies for Passing Off**

The remedies for the tort of passing off include the following:

1. Damages.
2. Account for profit or loss of sales.
3. Injunction.
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

## **Defences to Passing Off**

In a claim for the tort of passing off, a defendant may plead a number of defences by saying that the passing off complained of is a;

### **1. The mere descriptive name of the product:**

An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.

### **2. Consent:**

The defendant may plea if he had obtain the products by consensual means such as licence given to him by the plaintiff to produce and or market the product.

### 3. **Innocent passing off:**

It should be noted that where a defendant pleads innocent passing off he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.

### 4. **Dissimilarities in the mark of the Plaintiff and Defendant.**

### 5. **Functional design or package.**

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

As stated in the previous aforementioned sub-topics and paragraphs, passing off as a form of economic torts as a relevance to the Nigerian economy protects business names, names of product, and trademarks among others from anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud which deceives potential buyers. In the case of *Trebor Nigeria Limited v. Associated Industries Limited*<sup>1</sup>, Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Supermint claiming that the wrapper used to package the product by the defendant was similar to that of the plaintiff and that they were guilty of passing off their products like that of the defendant. The defendants raised dissimilarities in the two products as a defence to the action, the Judge however found the defendants liable for passing off their products as that of the plaintiff. In this instance, passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same.

Also, in the case of *Niger Chemists Limited v. Nigeria Chemists*<sup>2</sup>, the plaintiff had an established chemist business using the name “Niger Chemist” while the defendants established the same business on the same street with the plaintiff using the name “Nigeria Chemist”. The plaintiff sued the defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The court agreed with the plaintiff and granted an

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<sup>1</sup> 14 NIPJD [HC. 1972] 127/71.

<sup>2</sup> [1961] 1 All NLR 171.

injunction against the defendant on the use of the name. In this instance, passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

In regards to which courts has jurisdiction to an action for passing of, the constitution provides that the Federal High Court as the Court with exclusive jurisdiction in Passing off action<sup>3</sup>.

## Bibliography

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4. NOU Faculty of Law, 'Law of Tort' p130-137 < <https://nou.edu.ng/sites/default/files/2017-03/LAW%20324%20law%20of%20torts%20II.pdf>> accessed 2<sup>nd</sup> May 2020.
5. Wikipedia.
6. CFRN 1999.

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<sup>3</sup> Section 251 (f) of the 1999 Nigerian Constitution.