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**COURSE TITLE: LAW OF TORTS II**

**COURSE CODE: LPB 302**

**Question**

Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria and Use NALT guidelines for footnotes, you should also include a bibliography at the end.

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

## ANSWER:

### WHAT ARE ECONOMIC TORTS?

Economic torts are torts that offer protection for a person's trade or business from acts that the law considers unacceptable. Economic torts seek to ensure that businesses are protected from acts of unacceptable interference. Economic torts inflict economic losses or financial losses. There are various economic torts but the major one I will be discussing about is PASSING OFF. A major case under economic torts is *Donoghue v. Stevenson*<sup>1</sup>, in this case, the plaintiff could not have claim for economic loss.

### WHAT IS PASSING OFF AS AN ECONOMIC TORT?

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". Another definition of passing off is that it is an act or an instance of falsely representing one's own product as that of another in an attempt to **deceive potential buyers**<sup>2</sup>. Passing off is actionable in tort under the law of unfair competition. Therefore, passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party and it can be seen that this act of misrepresentation often damages the goodwill of a person or his business which causes damage to his reputation or financial damage. Passing off can also be seen as an unfair competition by misrepresentation. Passing off is also making some false representation likely to **induce a person to believe**<sup>3</sup> that the goods or services are those of another. The law of passing off prevents one trader from misrepresenting goods or services as being the goods and services of another, and also prevents a trader from holding out his or her goods or services as having some association or connection with another when this is not true. The federal High court has the jurisdiction over cases of passing off as seen in the case of *Omnia (Nig.) v. Dyktrade Ltd*<sup>4</sup>.

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<sup>1</sup> (1932) A.C. 502

<sup>2</sup> Black Law's Dictionary

<sup>3</sup> Duhaime's Legal Dictionary

<sup>4</sup> (2007) 15 NWLR (Pt.1058) 576

It is arguable to say that Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by Section 3 of the Trademarks Act<sup>5</sup> which provides that:

*“No person shall be entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered trademark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof”.*

In the case of *Trebor Nigeria Limited v. Associated Industries Limited*<sup>6</sup>, the judge found the defendants liable for passing off their products as that of the plaintiff by using a package that was similar with that of the plaintiff’s product to deceive the public that they are the same. Likewise, in the case of *Niger Chemists Limited v. Nigeria Chemists*<sup>7</sup>, the court granted an injunction against the defendant on the use of the trade name of the plaintiff to deceive the public that there is a business relationship between them.

### **ELEMENTS OF PASSING OFF**

There are three elements of passing off that must be proved to win a case of passing off. In the case of *Ervenn Warninck v. Townend & Sons Ltd*<sup>8</sup> also known as the “**Dutch Advocaat**” case, Lord Diplock put out the first five elements of passing off and later on Lord Oliver reduced these five elements to three in the case of *Reckitt & Colman Products Ltd v Borden Inc.*<sup>9</sup> Also known as the “**Jif Lemon**” case and these three elements are:

1. **Misrepresentation:** Proof that the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of the public or persons involved in a trade in a relevant market as coming from a particular source.
2. **Goodwill owned by a trader:** 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 to deceive the minds of the customers.
3. **Damage to goodwill:** 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.

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<sup>5</sup> CAP T13 Laws of the Federation of Nigeria, 2004

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

<sup>7</sup> (1961) ANLR 180

<sup>8</sup> (1979) AC 731

<sup>9</sup> (1990) 1 ALL ER 873

These elements were clearly stated in the case of *The Boots Company Limited v. United Niger Imports Limited*<sup>10</sup> by Justice Nnaemeka Agu.

### **REMEDIES**

Remedies that apply to this particular tort are:

- i) Injunction
- ii) Damages
- iii) Delivery up for destruction of infringing goods.
- iv) Anton Piller Orders (i.e. an order for inspection and delivery up of infringing materials in the possession or control of an infringer. See the case of *Ferodo Limited & Anor. V. Ibeto Industries Limited*<sup>11</sup>)
- v) Account of profit<sup>12</sup> (Here the plaintiff is entitled to profit on goods wrongly sold by the infringer).

### **DEFENCES**

The defences available against the claim of passing off includes the following:

1. Consent of the plaintiff to the use of the name, mark, sign or slogan.
2. Indistinct name, mark, sign and slogan of the plaintiff<sup>13</sup>.
3. That the plaintiff's name, mark, sign and slogan has become generic/common place.
4. Dissimilarities in the mark of the plaintiff and defendant<sup>14</sup>
5. Innocent usage of the plaintiff's name.

### **RELEVANCE OF THE TORT OF PASSING OFF IN THE 21<sup>ST</sup> CENTURY.**

In the 21<sup>st</sup> century, we have lots of cases of passing off in the business sector, where a trader tries to represent their product as another trader's product so that the buyer will be interested in buying their product. However, thanks to the tort of passing off, it prevents people from doing such things and furthermore it has also helped in the situation of unfair competition because misrepresenting your goods as another's makes the

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<sup>10</sup> (1977) 1 A.N.S.L.R 144

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

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

<sup>13</sup> Supra in 11 above

<sup>14</sup> Supra in 6 above

competition (i.e. business competition) between the both of you unfair. A business must have competition but it becomes an unfair competition when the seller starts passing off his or her goods and that is why the tort of passing off is relevant to prevent such cases.

Another 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 of passing off is that no man is entitled to represent his goods or his business as that of another. Furthermore, another relevance of passing off is to protect the trade name and profits of the buyer.

In conclusion, the tort of passing off still remains a vital form of protection of intellectual property despite the introduction of a registered system of trade mark protection. I also recommend that there should be raised awareness for the tort of passing off as most people are not aware of it and its characteristics especially small and medium businesses who should be enlightened and educated to explore the possibility of seeking legal action on passing off and to take advantage of the remedies available to protect their goodwill, trade name, profits and rights.

#### **BIBLIOGRAPHY:**

1. Black's Law Dictionary, Tenth edition.
2. Chudi N.C, Intellectual Property and Law in Nigeria.
3. Duhaime's Legal Dictionary, Sixth edition.
4. Principles of Tort Law, Fourth edition.
5. Trade Marks Act (2004)
6. Wikipedia
7. 1999 Constitution of the Federal Republic of Nigeria.
8. <https://www.bowmanslaw.com/insights/technology-media-and-telecommunications/the-relevance-of-passing-off-principles-in-trade-mark-oppositions/>
9. <https://www.jstor.org/stable/43953397>
10. <https://www.tandfonline.com/doi/abs/10.1080/03069400.2006.9993194?needAccess=true&journalCode=ralt20>

