**OGHENOVO OGHENERUKEVWE PELUMI**

**17/LAW01/205**

**LAW OF TORT ASSIGNMENT**

**TOPIC: PASSING OFF**

**LECTURER: MRS APARA OYEBANKE TAIWO**

**ECONOMIC TORT**

This is also called business tort. This are torts that provide 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. This are torts that inflict economic losses.

**THE TORT OF PASSING OFF**

The classic definition of the tort of passing off can be found in the judgement of **LORD DIPLOCK in ERUEN WARNINK BV V. J TOWNEND AND SONS (HULL) LTD.[[1]](#footnote-1)**

**LORD DIPLOCK** identified five essential elements of the tort of passing off. They include

* 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 business or goodwill of another trader.
* Which causes actual damage to a business.

This is committed where the plaintiff’s goods are passed off by the defendant as being his own goods. The person whose goods have been passed off in this manner may have an action in tort in respect of any losses which he has incurred. This tort is very important to the society, it protects business names of products, trademark among others. This tort protects the individual in whatever economic activity one is engaged in.

**THE RELEVANCE OF THE** **TORT OF PASSING OFF IN THE 21ST CENTURY**

Liability in the tort of passing off ultimately boils down to misrepresentation. It all started in the 17th century, in the cases ***Southern v. How[[2]](#footnote-2)*** and ***Dean V. Steel[[3]](#footnote-3)*** Usually, the judges categorized such torts under deceit or defamation.

Later in the eighteenth century, all cases of passing off were classified as cases of deceit, where the action was usually brought not by the deceived, but by the one whose mark was used to deceive***. Blanchard v. Hill[[4]](#footnote-4)*** limiting the tort to cases where there was a proof of bad faith

Later, in the nineteenth century, in the case ***Millington v. Fox[[5]](#footnote-5)*** it was decided that proof of fraud was not necessary in such a wrong and it was from here that the actual tort of passing off began building its own definition.

The concept of equity was largely used to realize the scope of passing off. The predominant view was that equity intervened to restrain what would be a fraud if allowed to go ahead and that it protected proprietary rights. This particular viewpoint led to the equity courts to awarding compensations instead of injunctions. This idea was based on the theory that, in such a tort, constructively, the defendant was an agent of the plaintiff.

**RELEVANCE OF PASSING OF IN NIGERIA**

Passing off is a common law remedy and it is described as an unfair competition by misrepresentation or literally speaking the cause of confusion or deception. The tort of 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.

* ***TREBOR NIGERIA LIMITED V. ASSOCIATED INDUSTRIES LIMITED.[[6]](#footnote-6)***

Trebor Nigeria limited the makers of trebors peppermint brought an action against associated industries limited the makers of minta super mint 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 two products as a defense to the action, the judge however found the defendant 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.

**ELEMENTS OF PASSING OFF**

There are three elements required to prove passing off. They are known as ***‘the classical trinity’***

The plaintiff must be able to prove the following:

* **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 easy for the court to award punitive damage.

* **WHETHER THE PUBLIC IS LIKELY TO BE CONFUSED**

In order to determine whether the public is to be confused and mislead by activities of the defendant, the court usually looks at the characteristics of buyers of the goods in question.

* **THE LIKELIHOOD OF DECEPTION**

To succeed in a claim of passing off, all that a plaintiff has to prove is that activity of the defendant is calculated to deceive the public.

**METHODS OF PASSING OFF**

There are various methods and ways in which goods can be passed off. They include

* **MARKETING A PRODUCT AS THAT OF A PLAINTIFF**

This is seen as actionable, passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff whereas they are not.

* ***BYRON V JOHNSTON [[7]](#footnote-7)***

It was held actionable for a book publisher to advertise or sell a book of poems with the name of lord Bryon on the title page when in fact the famous poet had nothing to do with the authorship.

* **TRADING WITH A NAME RESEMBLING THAT OF THE PLAINTIFF**

This is when the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public in believing that the defendants product or business and the business of the plaintiff are the same.

* ***NIGER CHEMIST LIMITED V NIGERIA CHEMIST* [[8]](#footnote-8)**

It was held that as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger chemist’ the other ‘Nigerian chemist’ there must be a grave risk of confusion and deception.

* **IMITATING THE APPEARANCE OF THE PLAINTIFFS GOODS**

It is passing off for the defendant to do anything, which makes his product appear like the plaintiff’s product.

* ***CADBURY SCHWEPPES LIMITED V PUB SQUASH [[9]](#footnote-9)***

The privy council held that a cause of action could lie, not only in respect of the physical appearance of the goods but also in respect of the physical appearance of the goods, but also in respect of the way in which they are advertised. It was held that the plaintiffs were not entitled to an injunction because they had not established that a virile sporting image was associated by the public exclusively with their product.

* **SELLING INFERIOR OR EXPIRED GOODS OF THE PLAINTIFF AS ORIGINAL OR CURRENT STOCK**

It is seen as passing off when the defendant sells inferior and expired goods or products of the plaintiff as a current stock, where such has been discarded by the plaintiff.

* ***WILTS LIMITED V THOMAS ROBINSON SONS AND CO LTD* [[10]](#footnote-10)**

This is a case of condensed milk which was similar to the product that his honor remembered consuming when he was in preparatory school. He noted that he understands that the law is if you publish a defamatory statement about a man’s good which is injurious to him honestly believing that it is true your object being your own advantage and no detriment to him you obviously are not liable.

**REMEDIES FOR PASSING OFF**

* **INJUNCTION**

The plaintiff can seek injunction to restrain the defendant from continuing to pass off his goods as if they were the plaintiffs. Injunction may be granted on certain terms, like whether the defendant is permitted to manufacture goods as long as he distinguishes it from that of the plaintiff.

* **DAMAGES**

The plaintiff may also seek a remedy in damages for the loss which he has suffered as a result of the defendant’s activities or he may seek from the defendant an account of the profits which he has made as a result of the passing off

* **INTERVENTION OF RELEVANT REGULATORY AGENCIES**

The intervention of a relevant regulatory agency such as NAFDAC, SON, intellectual property commission and so forth can serve as a remedy of passing off.

* **ACCOUNT OF PROFIT**

The plaintiff is entitled to profit on goods wrongly sold by the infringer.

**DEFENCES TO PASSING OFF**

A defendant can plead this number of defenses. They include:

* **THE MERE DESCRIPTIVE NAME OF THE PRODUCT**

The case of ***BRITISH VACUUM CLEANER CO V NEW VACUUM CLEANER CO[[11]](#footnote-11)*** 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 which are not exclusive name of product of any particular person.

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* <https://www.mondaq.com>
* <https://www.lawteacher.net>

1. {1979} AC 731 [↑](#footnote-ref-1)
2. {1617} [↑](#footnote-ref-2)
3. {1963} ND Tex. [↑](#footnote-ref-3)
4. {2003} [↑](#footnote-ref-4)
5. {1838} 40 ER 956 [↑](#footnote-ref-5)
6. {1972} N.N.L.R.60 [↑](#footnote-ref-6)
7. {1816} 35 ER 851 [↑](#footnote-ref-7)
8. {1961} 1 ALL NLR 171 [↑](#footnote-ref-8)
9. {1980} 2 NSLWR 851 [↑](#footnote-ref-9)
10. {1957} RPC 220 [↑](#footnote-ref-10)
11. {1907} 2 CH 312 [↑](#footnote-ref-11)