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**COURSE TITLE: LAW OF TORT**

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**QUESTION**

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

**THE** **CONCEPT OF PASSING OFF**

What is passing off?

Passing off is a wrong 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 and is known as the tort of passing off.

Passing off is also defined as the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one’s business as if it were that of another person whose reputation and goodwill one enjoys. In the tort of passing off, a person carries on his business or sells his goods under a name, trademark, description, or imitation of another person’s product in order to deceive the public to patronize it. Passing off is a deceit of the public to patronize one’s business, product or services. It is an unfair and unconscionable competition. As held in the famous case of **N. R. Dongre V. Whirlpool** **corporation**:

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

Whenever a person sells his good, or carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and takes advantage of that person’s reputation and goodwill, he commits the tort of passing off.[[1]](#footnote-2)

**THE PURPOSE OF THE LAW OF** **PASSING OFF.**

The law aims to protect traders from this form of unfair competition. The tort of passing off is common in a competitive business community or economy. People resort to different strategy to market their products in order to expand their business. The tort of passing off is designed to protect a person’s business interest from the unfair trade practices and sharp practices of other persons. Its objective is to protect the reputation a business has built up for itself. It protects the benefits and good name, quality, reputation, patronage and customers of the business. It also protects that attractive force of the business which brings customers to it. The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business. **SIR JOHN SALMOND** in his book **Law of Tort** stated the reason for the tort of passing off:

*“The law is designed to protect traders against unfair competition which consists in acquiring for oneself, by the means of false or misleading devices, the benefit of the reputation already achieved by* *rival traders”.[[2]](#footnote-3)*

**LORD KINGSDOWN** in **Leather Cloth Co v** **American** **Leather Cloth co** said:

*“The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”.[[3]](#footnote-4)*

In the law of passing off, the basis of the legal action is that the passing off by the defendant of his goods and business as that of the plaintiff is injuring the right of property, product, services and business of the plaintiff.

In the case of **Warnick BV v Townsend** **& Sons, LORD** DIPLOCK[[4]](#footnote-5) in the house of Lord stated the five characteristics or guidelines, for determining when an action lies in passing off. The characteristics are:

1. A misrepresentation
2. Made by a defendant in the course of trade
3. To prospective customers
4. Which is calculated to injure the business and goodwill of another person
5. Which cause damage to that person’s business and goodwill.

The tort of passing is actionable per se on its occurrence. A plaintiff does not have to prove damages in order to succeed[[5]](#footnote-6) the right of action lies even though no damage has been suffered. The probability of damage occurring is enough for a plaintiff to succeed. When passing off has been committed, the plaintiff has right to sue and is entitled to remedy.[[6]](#footnote-7)

The common forms of passing off usually noticed in the market are:[[7]](#footnote-8)

* **Trading with a name resembling** **that of a plaintiff:** The defendant is usually into the same type of business as the plaintiff, and he uses the plaintiff’s name or a name that closely resembles that of the plaintiff and as a result the public is confused and misled into thinking that they are one and the same business or one is an extension of the other. The customers will begin to patronize either of them thinking they are patronizing their usual business organization. The bona fide honesty of the defendant in his choice of the name without notice is usually not a defense. In the case of **Hendricks v Montague**[[8]](#footnote-9), the plaintiff who were insurers trading as “Universal Life Assurance Society”, obtained an injunction to restrain the defendants which was subsequently incorporated as insurers from trading as “Universe Life Assurance Association.” In this case **JAMES LJ** said:

*“Now, is there such a similarity between those names that the one is in the ordinary course of human affairs likely to be confounded with the other? Are persons who have heard of the universal likely to be misled into going to the universe? I should think, speaking for myself very likely* indeed. *Many people do not care to bear in mind exactly, the very letters of everything they have heard of”.[[9]](#footnote-10)*

* **Marketing a** **product as that of the plaintiff**: this is done when a defendant sells his goods off to people by stating that the goods are produced by the plaintiff, whereas they are not. The defendant by advertising and selling his goods by falsely stating that they are manufactured by the plaintiff, directly but wrongfully benefits and products from the good will and reputation already built b the plaintiff’s business. In the case of **Lord Bryon v Johnson[[10]](#footnote-11):**

The defendant publishers were restrained from advertising and selling a book of poems with the name lord Bryon written on the cover and title page, when in fact the famous poet was not its author.

* **Imitating** **the plaintiff’s advertisement**: an advertisement b a defendant which imitates that of the plaintiff’s product may amount to passing off. This type of passing off may occur where parties resort to radio and television campaigns to boost up their sales and customer base. A plaintiff will succeed where he is able to prove that a defendant has been making a representation that will confuse the public and pass of his products like that of the plaintiff.
* **Imitating** **the appearance of** **the plaintiff’s product:** it is passing off for the defendant to do anything, which makes his products appear like the plaintiff’s products. This passing off includes any copying of the likeness or appearance of the plaintiff product, in a manner to confuse the public. Generally, it includes the general appearance, package, label, or design of the product. In the case of U**.K. Tobacco Co. Ltd v Carreras**:[[11]](#footnote-12)

The defendants who were marketing cigarettes called “ Barrister”, on which packet was a white man wearing a barrister’s wig and gown were restrained from imitating the appearance of the plaintiff’s cigarettes called “ Band Master” on which packet was a man in a band master’s uniform.

* **Selling inferior or expired goods** **of the plaintiff** **as a current stock**: It is a passing off for a defendant to sell inferior or expired products of the plaintiff as current stock, where such has been discarded by the plaintiff. In this passing off, the defendant who has managed to lay hands on the goods, which are unfit for human consumption sells them off as a current stock of the plaintiff. Instances of where defendants have been stopped by an injunction, from selling inferior, or expired goods of a plaintiff as a current stock

There is no passing off when old products or second hand goods are sold off as such, without falsely representing that they are new ones.

**ELEMENTS** **OF PASSING OFF**

For a plaintiff to succeed in a claim for passing off, all he needs to do is to prove that the activity of the defendant is aimed to deceive the public. The defendant’s activity is likely to deceive the public. The liability in the tort of passing off is strict, therefore, innocent passing off is not a defense[[12]](#footnote-13), 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, his claim succeeds and he may collect nominal damage and an order of injunction. The plaintiff does not have to prove intention on the defendant’s part**. PALMER** **J** said in the case of **Niger Chemists Ltd v Nigeria** **Chemist**s:

*“It is not necessary to prove, that there was any intention to deceive: this has been held in a long series of cases, and is not* *disputed”*[[13]](#footnote-14)

**REMEDIES FOR PASSING OFF**

1. Damage
2. Account for profit or loss of sales
3. Injunction
4. Intervention by relevant regulatory agencies such as NAFDAC.

**DEFENSES FOR PASS**I**NG OFF**

1. Functional design
2. The mere descriptive name of the product
3. Consent such as license given to him by the plaintiff to produce or market the product
4. Innocent passing off.

**The relevance of passing off** **as a form of economic tort** **in the 21st century?**

It is an established fact that if one deliberately interferes with the trade or business of another, and does so unlawfully, it means that he is acting unlawfully. The legal system provides a wide-range of protection against unfair competition and unlawful interference with trade in the market system. The economic tort of passing off is employed by the common law courts not to only ensure fair competition in market system, but also to maintain and safeguard the individual’s interest in fair and sound competitions. Liability in the tort of passing off boils down to misrepresentation. It all started in the 17th century, in the case **Dean v Steel[[14]](#footnote-15)**. Usually judges categorized such torts under deceit and defamation. Later in the 18th century, all cases of passing off were classified as cases of deceit, where action was usually brought not by the deceived, by the one whose mark was used to deceive. In the case of Blanchard v Hill, limiting tort to cases where there was a proof of bad faith. Later in the 19th century, in the case of **Millington v** **Fox[[15]](#footnote-16)**, it was decided that fraud was not necessary in such a wrong and in the 20th century, the law of passing off began building its own meaning. The concept of equity was largely used to realize the scope of passing off. The view was that equity intervened to restrain what would be a fraud if allowed to go ahead. This viewpoint led o the equity courts awarding compensation instead of injunction.

It has been concluded that the purpose of an action in 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. It is also suggested that the Supreme Court should also resolve the jurisdiction of the federal high court in line with the constitution to prevent unnecessary objections and delay of justice at court. Trademark Act can also be amended to reflect the times, happenings and changes in Nigeria.

In conclusion, passing off is relevant because it protects the traders from unfair competition and we have seen that the judicial system is supportive of this tort through precedent such as the Trademark Acts and CPC (Customer Protection Council).

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2. Salmond op cit. Para 149 [↑](#footnote-ref-3)
3. (1865) 11 HL Cas 523 at 538 [↑](#footnote-ref-4)
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15. (1838) 40 ER 956. [↑](#footnote-ref-16)