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

**ABSTRACT**

*In 21th century Nigeria, business come with a lot of things one which is profit or loss, brand name, trademarks and so on. Sometimes the competitors want to use the same name for their business, or even sign, and marks due to the efficiency of that name or mark. In such cases, the tort of passing off may occur. This paper will look at the meaning of passing off, the elements of passing off, and possible damages and remedies of passing off.*

**Keywords:** MEANING OF PASSING OFF, ELEMEMTS OF PASSING OFF, DEFENCES OF PASSING OFF AND REMEDIES OF PASSING OFF.

**Introduction.**

The tort of passing off 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 the tort in respect of any losses which he has incurred. Although, this tort has been recognized for a number of years now, commenter’s continue to disagree on its classification. There is a link between passing off and the tort of malicious or injurious falsehood and some have argued that passing off is part of malicious falsehood. There is also a link between passing off and the tort of deceit as the person who passes off his goods as belonging to another deceives the public. Despite this confusion as to the tort of passing off, it is included in a textbook on tort because it has been consistently recognized as part of the law of tort and because it differs from other types of intellectual property on the ground that the basis of the law lays in the common law and not in statute law.

**Definition of passing off**

The selling of goods or carrying on of business under a name, description or mark in such a way as to mislead the public or consumers into believing that the goods or business is that of another person is passing off.[[1]](#footnote-2) Where a party (defendant) makes false representation in order to sell his goods and services with the intention to deceive a purchaser (an innocent man) into thinking that the goods and services he is selling are those of another party (the plaintiff), that is Passing Off.Passing off could be classified as part of the economic torts because the subject matter of the tort of passing off is the protection of the plaintiff’s financial interest in his property.

 The element of passing off can be found in the judgment of **Lord Diplock** in ***Erven Warnink BV v Townend & Sons (Hull) Ltd[[2]](#footnote-3).*** The case is also known as the advocaat case.Lord Diplock identified the five essential elements of the tort when he said that it is: “. Possible to identify characteristics which must be present in order to create a valid cause of action for passing off.

**Elements of passing off**

1. A misrepresentation
2. Made by a trader in the course of trade

(3) To prospective customers of his or ultimate consumers of goods or services supplied by him,

(4) Which is calculated to injure the business or goodwill of another trader and

(5) Caused actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

 **The relevance of the tort of passing off**

The following are what the tort of passing off seeks to achieve in every common law legal system;

1. To enable businesses continue to earn profit
2. To protect the right of property that exists in goodwill (i.e. business value).[[3]](#footnote-4)

**Ways of Passing off**

The passing off of the plaintiff goods as if they were the defendant’s goods can take place in number of different ways. The principal ways in which goods may be passed off are:

1. **Trading under a name which is closely related to that of the claimant/ plaintiff such name being likely to mislead the public:**

The well-established case on this is ***Hendriks v Montagu***[[4]](#footnote-5)where the Universal Life Assurance Society were granted an injunction by the court in order to restrain the company of the defendant which was incorporated later on from carrying on business under the name “Universe Life Assurance Association”. In Nigeria, the court has decided a similar situation in ***Niger Chemists ltd. v. Nigeria Chemists* [1961] 1 All NLR 171** where Palmer J. granted an injunction restraining the defendants from using the name “Nigeria Chemists” as it was calculated to deceive those who had the intention to deal with Niger Chemists. It is important to note that both parties in the suit were engaged in a similar business. Thus, where a name is made to deceive a consumer or the public due to its similarity with that of a plaintiff then that is a form of passing off and there exists a tort.

1. **Trading under a name already given for goods of that kind by the plaintiff or trading under a name so similar to that of the plaintiff’s as to be mistaken for it: -**

Where a trade name is already in use by the plaintiff for his goods and services, it will be actionable passing off for a defendant to trade under the name of the plaintiff.[[5]](#footnote-6) A trade name is a name under which goods and services are sold by a certain individual and which by established usage has become known to the public to the effect that the goods and services are that of the individual.[[6]](#footnote-7) Descriptive names such as ‘water’, ‘beer’ ‘stout’ are not protected unless the plaintiff can prove that the descriptive name has acquired a secondary name exclusively associated with the plaintiff’s own product.

1. **A direct statement by the defendant that the goods and services are that of the plaintiff:**

Actionable passing off occurs where the defendant markets his products as that of the plaintiff. This was seen in ***Byron (Lord) v. Johnston***[[7]](#footnote-8)*.* The defendant, who was a publisher, advertised some poems which he had published as being written by Lord Byron when, in fact, they were written by someone else. It was held that the defendant had committed the tort of passing off.

1. **Where the defendant trades under the trademark of the plaintiff or any deceptive imitation of the plaintiff’s mark:[[8]](#footnote-9)**

 A trademark refers to a mark used by a trader in order to indicate a connection between the marked goods and the trader and also to show that the marked goods are the trader’s merchandise[[9]](#footnote-10).

1. **Imitating the Get Up or Appearance of the Plaintiff’s Goods**:

 Where there are characteristics in the Get Up or appearance of the plaintiff’s goods which identifies the goods as those of the plaintiff, any adoption or imitation of the appearance or get up of the plaintiff’s goods by another in a manner likely to deceive will give rise to the tort of passing off.[[10]](#footnote-11) Thus, where the defendant imitates the get up or appearance of the plaintiff’s goods, the defendant is liable for passing off. In the case of ***Trebor Nigeria ltd v. Associated Industries ltd* (1972) NNLR 60 Suit no K/127/71 May 29 1972**[[11]](#footnote-12).**.** Where the plaintiffs claimed that the defendants were guilty of passing off their products as that of the plaintiffs. The court per J. R. Jones (Senior Puisine Judge) held that the defendants had in every aspect from carton to tablet to manufacturing marketed a product as similar as possible to that of the plaintiffs.

**Remedies in Passing Off**

Passing Off injures the property rights of the plaintiff especially in business. The following remedies can be claimed by the plaintiff in a Passing Off action;

1. Damages: - A successful plaintiff in a suit for passing off is entitled to damages. The court can award general damages, special damages or punitive damages. This is because it is presumed that the plaintiff must have suffered losses especially in the course of business.
2. Injunction: - A plaintiff can ask the court to restrain or prohibit the use of a mark subject matter of the passing off suit in court. Further, a perpetual injunction can be granted by the court when the suit has been concluded i.e. the defendant will never use the mark again[[12]](#footnote-13).
3. A plaintiff can also approach the court to grant him/her the delivery of the goods of the defendant which breach the trademark to be destroyed.

**Defences for passing off**

The following are available defences for a defendant faced with a claim of Passing Off;

1. Dissimilarities in the mark between that of the defendant and that of the plaintiff
2. Consent of the plaintiff was sought before using the name or mark or slogan as the case may be.
3. The defendant can also plead innocent usage of the plaintiff’s name.
4. The plaintiff’s name or mark has become common/ generic.
5. The mark of the plaintiff is not distinctive.

**Conclusion**

It is therefore appropriate to say that Passing off is a common law concept which prevents the unlawful usage of a man’s mark, sign or goods and services. Passing off protects the property rights of individuals. Passing off could be classified as part of the economic torts because the subject matter of the tort of passing off is the protection of the plaintiff’s financial interest in his property. There are various ways the tort of passing off can be done. Also this paper tries to talk about the remedies available for passing off and also the defences to passing off.

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12. ibid [↑](#footnote-ref-13)