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

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***INTRODUCTION***

The tort of passing off is common in a competitive economy as people resort to every strategy to expand their business. The tort of passing off is a common law concept which prevents the unlawful usage of a man’s mark or goods or services. It protects the property rights of individuals. In this essay, the writer discusses passing off as a tort and its relevance in the 21st Century Nigeria.

***DEFINITION OF THE TERM ‘PASSING OFF’***

The Black’s Law Dictionary defines the term ‘passing off’ as the act or an instance of falsely representing one’s product as that of another in an attempt to deceive potential buyers. It is actionable in torts under the law of unfair competition. It may also be actionable as trademark infringement.[[1]](#footnote-1) According to Ese Malemi, it is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronise it. It is the presentation to customers of one’s products, services , or business as that of another person whose reputation and goodwill one thereby enjoys. It is a pretence by one person, that his goods and business are those of another person in other to capture the patronage of the customers of a rival trader and enjoy his goodwill.[[2]](#footnote-2)

According to Winfield & Jolowicz, passing off is an act in which the representation must be such as to cause confusion in the public mind between the claimant’s goods or business and the defendant’s goods or business.[[3]](#footnote-3) Kodilinye and Aluko also defines it as the selling of goods of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff, and the ‘law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved bya rival traders.[[4]](#footnote-4)

The writer of this work sees the term ‘passing off’ as an act of deceit in which one falsely represents his product as that of another thereby enticing buyers to patronise him while they think they are purchasing the work of another.

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

The tort of passing off is designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons. Its purpose is to protect the reputation and goodwill a business has built up for itself. This tort is common in a competitive business community or economy because people resort to every strategy to market their products and services, to survive and to expand their business.

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.[[5]](#footnote-5) In the words of **LORD KINGSDOWN** in ***Leather Cloth Co v American Leather Cloth Co:***

*‘The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader’.[[6]](#footnote-6)*

**SIRs JOHN SALMOND** in his book ***Law of Tort*** stated the reason for the tort of passing thus:

‘*The law… is designed to protect traders against…unfair competition which consists in acquiring for oneself, by means of false, or misleading devices, the benefit of the reputation already achieved by rival traders’.[[7]](#footnote-7)*

In the law of passing off, the basis of the legal action is that the basis of the legal action is that the passing off by the defendant of his goods and or business as that of the plaintiff is injuring the right of property, product, services and business of the plaintiff.[[8]](#footnote-8)

***ELEMENTS OF PASSING OFF***

There are certain things a plaintiff must prove to succeed in an action for passing off. This was established in the **Jif Lemon case,** which is actually the case of ***Reckitt & Colman Products Ltd v Borden Inc[[9]](#footnote-9)***, where **Lord Oliver,** brought about three principles now known as the classical trinity which I would briefly discuss;

1. ***There is an existing goodwill in the plaintiff’s goods and services complained off:***

As a natural law, one cannot place something on nothing and expect same to stand, therefore, a plaintiff in an action for passing off, cannot succeed, where he cannot show that he has an existing goodwill known to the public. Thus, where a plaintiff has no distinct goodwill, he cannot *prima facie* be heard of, to say that the defendant has infringed upon his trade-mark or name or converting his goodwill. As to what constitute goodwill, it is a reputation and trust that the public has built over a long period of time or given the trader.

1. ***That there was a misrepresentation against that very goodwill:***

The plaintiff is also to establish that the conduct of the defendant is calculated to deceive the public into believing that, the defendant’s goods are those of the plaintiff. Thus, where X puts forward a name capable of misleading the public to accept his products as though they were that of Y, the former, would not be heard to say that nobody has, in fact, been misled. In the case of ***Niger Chemists Ltd. V. Nigeria Chemist[[10]](#footnote-10),*** the court held, *inter alia*, that the question was ‘whether the words are calculated to deceive, not whether they have in fact been deceived’. Also, in considering the question above, some factors will be put in mind: the nature of the society (customers) and the level of literacy of the public. Thus, what may seem to deceive an illiterate public may not as such, seem to deceive a literate public.[[11]](#footnote-11) This was also noted in the unreported case of ***Continental Pharmaceutical Ltd. V. Sterling Products Plc. & Anor.,[[12]](#footnote-12)*** that, it is not necessary that deception had occurred; it is sufficient to show the deception that is likely to occur in the future.

1. ***That he suffered Consequential Damages:***

As in all torts, except those that are actionable *per se,*the last element to succeed in the tort of passing off, in which the plaintiff must prove , is that he suffered or is likely to suffer consequential damage from the misrepresentation. Where he merely establishes the foregoing two elements, but fails in this last element, he may have no or at least nominal damages. Thus, the plaintiff may establish that he has suffered or is likely to suffer loss or profit; damage to reputation in certain circumstances; and loss of an opportunity to expand.[[13]](#footnote-13)

***FORMS OF PASSING OFF***

There are various forms of passing off. However, in order to maximise space, we would only list the few common forms we have. They include:

1. Trading with a name resembling that of the plaintiff.
2. Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design.
3. Marketing a product with a name resembling that of the plaintiff’s goods
4. Marketing Products with the plaintiff’s trademark or its imitation
5. Imitating the appearance of the plaintiff’s product.
6. Selling inferior or expired goods of the plaintiff as current stock; and
7. False advertisement by copying the plaintiff’s advertisement.[[14]](#footnote-14)

***RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21st CENTURY NIGERIA***

The tort of passing off is very important as it has helped a lot in the commercial sector. There are lots of benefits that can be derived from the tort of passing off. They include:

1. ***To enable business to be able to make and enjoy profits:*** when people’s customers are not deceived into buying the products of another by misrepresentation, the actual business owners would be able to make their deserved product which would go a long way in preserving as well as growing the business.
2. ***To reduce the sale of fake products in the market:*** the tort of passing off helps to reduce the sale of fake products in the market because it makes sure that any manufacturer who produces low quality goods with the label of another is brought to book and is made to pay damages.
3. ***It protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business:***  the tort is designed to protect traders against unfair competition which consists in acquiring for oneself, by means of false, or misleading devices,the benefit of the reputation already achieved by rival traders.[[15]](#footnote-15)
4. ***The tort of passing Off is designed to protect a person’s business interests from the unfair trade practices and sharp practices of others.***
5. ***It also exists to protect the right of property that exists in goodwill (i.e business value)[[16]](#footnote-16)***

***DEFENCES FOR 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. Functional design, or package
2. The mere descriptive name of the product
3. Consent, such as licence given to him by the plaintiff to produce, and or market the product.
4. Innocent passing off, and so forth.

***REMEDIES FOR PASSING OFF***

They include;

1. Damages
2. Account for Profit or for loss of sales.
3. Injunction
4. Intervention from the appropriate relevant regulatory agencies like NAFDAC, SON.

***CONCLUSION***

It is important to note that. Passing off differs from Trademark infringement though one can claim both in court. In the latter, the mark has been registered in accordance with the ***Trademarks Act***, while in the former; the mark is not registered in accordance with the Trademark Act. Passing off as a tort is extremely relevant in the 21st Century and has improved the commercial sector greatly

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2. Ese Malemi, *Law of Tort,.*2nd Ed.pg 631 [↑](#footnote-ref-2)
3. Winfield & Jolowicz, Tort, 19th Ed.pg.611 [↑](#footnote-ref-3)
4. Kodilinye and Aluko. *Nigerian Law of Torts.pg.*221 [↑](#footnote-ref-4)
5. Ese Malemi, *Law of Tort,2nd Ed.pg.632* [↑](#footnote-ref-5)
6. (1865)|11 HL Cas 523 at 538; (1865) 11 ER 1435 [↑](#footnote-ref-6)
7. Salmond op cit. para 149 [↑](#footnote-ref-7)
8. Ese Malemi, *Law of Tort, 2nd Ed.pg.632* [↑](#footnote-ref-8)
9. (1990) 1 All ER 873 [↑](#footnote-ref-9)
10. (1961) 1 All N.L.R.171 [↑](#footnote-ref-10)
11. U.K Tobacco Ltd v Carreras Ltd (1931) 16 N.L.R.11 [↑](#footnote-ref-11)
12. Suit No: FHC/L/CS/460/95 [↑](#footnote-ref-12)
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16. Francis Ibekwe-Allagoa BL, *The Tort of Passing Off in Nigeria* [↑](#footnote-ref-16)