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**COURSE TITLE: LAW OF TORTS II**

Discuss the relevance of passing off as a form of economic torts in the 21st century Nigeria

Use NALT guidelines for footnotes you should also include a bibliography at the end

**ANSWER**

Passing off is described as an unfair competition by misrepresentation or literally speaking "the cause of confusion or deception". Tort of “passing off” is simply misleading the public into believing falsely, that the brand being projected was the same as a well known brand. This was upheld in the famous case of **N. R. Dongre v Whirlpool Corporation[[1]](#footnote-2).** Passing off is the act of falsely representing one's own product as that of another in an order to deceive potential buyers and this actionable in tort. 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.

The classic definition of pasing off can be found in the judgement of Lord Diplock in Erum **Warnink BV V J Townend & Sons (Hull) Ltd[[2]](#footnote-3)**, where Lord Diplock identified the five elements of the tort when he said that it is “ ***possible to identify characteristics which must be present in order to create a valid case of action for passing off: (i) misrepresentation (ii) made by atrader in the course of trade (iii) to prosepective customers of his or ulitimate consumers of goods supplied by him (iv) which is calculated to injure the business of another trader and (v) which causes actual damae to a businessor good will of a trader…”***

This tort aims to protect the right of property that exists in goodwill. 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.

Goodwill is defined as the part of business value over and above the value of identifiable business assets. Passing off could be classified as an economic tort as a part of economic torts because the subject matter the tort of passing off is the protection of the plaintiff’s financial interest in his property. It could also be classified as part of the law relating to intellectual property.

**ELEMENTS OF PASSING OFF**

There are three elements, often referred to as the Classic Trinity, in the tort which must be fulfilled. In **Reckitt & Colman Products Ltd V Borden Inc[[3]](#footnote-4)**Lord Oliver reduced the five guidelines laid out by Lord Diplock in **Erven Warnink V. Townend & Sons Ltd[[4]](#footnote-5)** to three elements:

1. [**Goodwill**](https://en.wikipedia.org/wiki/Goodwill_(accounting))**owned by a trader**

The plaintiff has the burden of proving goodwill in its goods or services, get-up of goods, brand, mark or the thing standing for itself.

1. **Misrepresentation**

The plaintiff also has the burden of proof to show false representation (intentional or otherwise) to the public to have them believe that goods/services of the defendant are that of the Plaintiff. There must be some connection between the plaintiff's and defendant's goods, services or trade and must show likelihood or actual deception or confusion by the public. It is the Court's duty to decide similarity or identity of the marks, goods or services. The criteria are often: aural, visual and conceptual similarity.

1. **Damage to goodwill**

For the element of damage to goodwill, there may be a loss or diversion of trade or dilution of goodwill. The plaintiff need not prove [actual or special damage](https://en.wikipedia.org/wiki/Damages); real and tangible probability of damage is sufficient. This damage should however be reasonably foreseeable.

In summary the elements of passing off includes:

**Misrepresentation made by a trader in the course of trade o prospective customers of his or ultimate consumers of goods and services supplied by him which is likely to injure the business or goodwill of another trader and causes actual damage to a business of the trader by whom the action is brought.**

**METHODS OF PASSING OFF**

1. **A DIRECT STATEMENT THAT THE GOODS BELONGING TO THE PLAINTIFF IN FACT BELONG TO THE DEFENDANT**

In **Lord Byron V Johnson[[5]](#footnote-6)** 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. **IMITATING THE APPERANCE OF THE PLAINTIFFS GOODS**

In **White Hudson & Co Ltd V Asian Organization Ltd[[6]](#footnote-7) ,**the plaintiffs manufactured ‘Hacks’ cough sweets in Singapore, which they sold in red cellophone wrappers and which came to be known as ‘red paper cough sweets. The plaintiffs were, at that time, the only persons who sold cough sweets in such form in Singapore

1. **USING THE PLAINTIFF’S NAME**

Where the defendant uses the plaintiff’s name as opposed to the name of the plaintiff’s products, the tort may be committed. This can be seen in the case of **Maxims Ltd V Dye[[7]](#footnote-8)**. The plaintiff was the owner of a famous restaurant in Paris and he sought an injunction to restrain the defendant from opening a French restaurant in Norwich with the same name. Even though the restaurant in Norwich did not have the same standard as that of Paris and was not in the same country, the court granted him the injunction because the conduct of the defendant was injuring the plaintiff’s goodwill of his restaurant in Paris.

Also, the case of **J Bollinger V Costa Brava Wine Co. Ltd[[8]](#footnote-9)**, Popularly known as the Spanish Champagne case, this particular case saw an action being brought by twelve biggest champagne manufacturers of France, on behalf of every champagne manufacturer in their country, seeking injunctions on use of the word “champagne” while describing Spanish wine, and passing it off as champagne. An injunction was granted.

1. **Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same**

**Just like the case of Ogunlende V. Babayemi[[9]](#footnote-10),** the plaintiffs carried on business as civil engineering contractors and plumbers under the name ‘Mercury Builders,’ Taylor, C.J. granted an injunction restraining the defendant from conducting a similar business under the name ‘Mercury Builders (Nigeria) Ltd.’ since “there can be no doubt at all that the name of the defendant company is calculated to deceive due to its similarity with the name of the plaintiff association”

**THE REMEDIES OF PASSING OFF**

1. **INJUNCTION**

This is an order from the court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of a mark.

1. **ACOUNT OF PROFIT**

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

1. **DAMAGES**
2. **DELIVERY UP FOR DESTRUCTION OR INFRINGING OF GOODS**

**CONCLUSION**

The relevance of this tort is to prevent one’s trade from damaging another’s goodwill or reputation. The principle behind this is that no man is entitled to represent his goods as that of another. Passing off just like economic tort is not a criminal offence but any victim of passing off may first make a report to the person or company manufacturing to inform them that another is making similar product.

Furthermore, small and medium business should be enlightened and educated to explore the possibilities of seeking legal action. Also the trademark should be amended to reflect the times.

# Bibliography

1. T &A Legal, Nigeria: An Appraisal of Passing Off Actions Under Nigerian Law (2018) <https://www.mondaq.com//>
2. Prof E.S Olarinde and Others, The Modern Law of Torts: A Kaleidoscopic Perspective
3. Tort of passing off –law essays <https://www.lawteacher.net/free-law-essays/business-law/>
4. Gilbert Kodilinye: Nigeria law of torts

1. 1996 N.R [↑](#footnote-ref-2)
2. 1979 AC 711 [↑](#footnote-ref-3)
3. 1990 1 ALL ER 873 [↑](#footnote-ref-4)
4. 1979 AC 711, 1980 R.P.C 31 [↑](#footnote-ref-5)
5. 1974 SYDLAWRW 5 [↑](#footnote-ref-6)
6. 1964 WLR 1466 45 {NO 2} [↑](#footnote-ref-7)
7. 1977 FSR 364 [↑](#footnote-ref-8)
8. 1961 1 WLR 271 [↑](#footnote-ref-9)
9. **(1971) 1 U.I.L.R 417** [↑](#footnote-ref-10)