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**LECTURER’S NAME: MRS APARA.**

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**ASSIGNMENT.**

Discuss the relevance of Passing off as a form of economic torts in the 21st Century Nigeria.

**ABSTRACT.**

As can be inferred from scholar's works, passing off being the false representation of one's business as another's. This paper seeks further inquiries into the relevance of passing off in 21st century Nigeria as an economic torture. For the purpose of this work, a working description of the torture (passing off) and interpretations by different scholars will be given, then a discussion will be held. The object of the passing law shall be listed as well as the examples and instances of passing off, the elements, the remedies and the defenses. Then a summary discussion on the relevance of Passing off in 21st century Nigeria as an economic torture.

**INTRODUCTION.**

Throughout the years, the torture of passing off has grown into a branch of intellectual property law, now this torture (passing off) has gone through a cycle of evolution, stretching its conventional limits and successfully being introduced by traders in many circumstances to provide remedies.

**DEFINTION OF ECONOMIC TORTS.**

Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another and therefore to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.

Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life.

**THE CONCEPT OF PASSING OFF.**

The nature of the transfer is the selling of products or the carrying on of a business in such a way as to deceive the public into thinking that the product or business of the defendant is that of the plaintiff, and the law on this matter is intended to protect traders against that form of unfair competition which consists in acquiring the advantage for themselves, by means of false or misleading devices the benefit of the reputation already achieved by rival traders.

Passing off is in correspondence with the fundamental maxim of ***‘ubi jus ubiremedium’*** – when there is a wrong, there is a remedy. In the sense that an unregistered owner of certain goods and services is not without remedy when there is an infringement on his products, trademark, trade name etc.

Under **Section 579(1) (d) CAMA**, a name is prohibited and restricted where it is identical with or similar to a name by which any firm, company or individual is registered under the Act. Additionally, **Section 30(1)(a) (d) CAMA**, a name is prohibited and restricted where it is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive… or in the opinion of the commission would violate any existing trade mark or business name registered in Nigeria…  
Passing off is described as an unfair competition by misrepresentation or literally speaking "the cause of confusion or deception". Generally, an action for Passing off arises where the deception is made in the course of trade, which could lead to confusion amongst customers. This applies to both ecommerce businesses and businesses with physical addresses.

It was defined in **MYADVO,** an online legal platform, as;

*“Passing off is the selling of goods or the carrying on 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”[[1]](#footnote-2)*

​The House of Lords in the case of ***​IRC V. MULLER MARGARINE[[2]](#footnote-3)*** ​described goodwill in relation to the tort of passing off as ‘the benefits and advantage of the good name, the reputation and connection of a business. It is the attractive force which brings in custom.’

It was held in the case of ***BRYON V. JOHNSTON*** that it is an actionable tort of passing off for a book publisher to advertise and sell books of poems with the name of Lord Bryon at the title page when in fact, the famous poet had nothing to do with the authorship.

**ELEMENTS OF PASSING OFF.**

The elements of passing off are the requirements that a person must prove in order to succeed in a claim of passing off. In the case of ***NIGER CHEMISTS LTD V NIGERIA CHEMISTS***, it was stated by the court, per ***Palmer J****;*

“*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”[[3]](#footnote-4)*

The passing off elements are the criteria a person has to prove in order to succeed in passing off claims. There are three components known as the 'classic trinity' to hand off. ***Lord Oliver*** reduced these three elements from the five elements of ***Lord Diplock*** as laid down in the case of ***ERVEN WARNINK V. TOWNEND & SONS LTD***.[[4]](#footnote-5) These elements are:

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(i) Goodwill owned by the trader,  
(ii) Misrepresentation,  
(iii) Damage to goodwill.

(i) Goodwill owned by the trader: The plaintiff must have gained some kind of goodwill from the company which he feels needed to protect. In each particular case the court would then have to decide on the existence or otherwise of a course of action in passing off and the existence of proven goodwill.

(ii) Misrepresentation: The complainant has the burden of showing that there was a misrepresentation capable of misleading the public, whether intentional or otherwise. The public needs to have a chance, real fraud or uncertainty. This is the responsibility of the court to determine the similitude or identification of the products or services. Typically the parameters used to measure this are; visual, aural, and conceptual similarities.

(iii) Damage to goodwill: The responsibility of demonstrating harm to the reputation in question rests with the complainant, that the resulting harm was directly caused by the false portrayal. This is not enough to show that goodwill or misrepresentation exists; it is important to show that harm has occurred in relation to the misrepresentation. He must prove that he has suffered or is susceptible to loss from that miss representation.

**REMEDIES.**

The remedies for passing off include:

1. Damages: Via determined cases it was established that a good litigant is entitled to damages in a Passing off suit. Here harm may be common, special or punitive. These typically emanate from injuries that a Plaintiff supposedly sustained in a Passing off case.

2. Account (For profit or loss): The Defendant here is entitled to benefit on the infringer's unlawfully sold goods.

3. Injunction: That is a court order preventing or restricting the use of a trademark. It is typically the first remedy requested to postpone the use of the mark pending the outcome of the lawsuit and a permanent injunction until the lawsuit is finished to avoid the use of the mark entirely.

4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth: This is an order for inspection and delivery up of infringing materials in the possession or control of an infringer. ***FERODO LIMITED & ANOR. V. IBETO INDUSTRIES LIMITED13.***

**DEFENCES OF PASSING OFF.**

In a claim for the tort of passing off, a defendant may plead a number of defenses 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 license given to him by the plaintiff to produce and or market the product.

4. Innocent passing off, and so forth.

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

There are certainly some circumstances in the 21st century in which passing off becomes important, this torment of passing off has greatly affected the commercial sector of Nigerian society as a whole. The false statement made on one's company has caused some businesses to lose goodwill and credibility of some companies.

To secure the intellectual interests of a plaintiff. Economic abuse that is interwoven with Passing Off goes a long way to ensuring that the plaintiff's property rights are not infringed. If there is no right in effect, the defendant would have complete access to trample on the plaintiff's rights and thus cause financial harm to the plaintiff.

The object of a Passing off action is to prevent one trade from destroying or abusing the goodwill and credibility that another has built up. The principle is that no person is entitled to represent his or her products or company as another's. Therefore it is our advice to improve the appropriate structure for Handing off acts to protect the goodwill and credibility of corporations.

Passing off prevents any form of similarity or unlawful imitation or adoption of the same business name. In the case of ***BEECHAM GROUP LTD V. ESDEE FOOD PRODUCT NIGERIA LTD[[5]](#footnote-6)***; it was held that the trademark ‘glucose-aid’ is calculated to deceive the public in sound in consideration of the trademark ‘Lucozade’.

**CONCLUSION.**

In conclusion, the past government has attempted to minimize the transfer of marks by way of the ***Trademark Act 1999*** and, among other things, competition is not only unavoidable, but it is required in an ever-developing and steady-growing economy, however this does not apply in situations of unhealthy competition where immoral means such as imitation are used in the free market economy. This writer assumes that further legislation and penalties under which Passing Off's tort can be mitigated should not only be implemented, but also applied when dealing with defaulting parties.

**BIBLOGRAPHY.**

1. Olarinde S and Clement C and Ikeze N The Modern Law of Torts, 2018.

2. Winfield P H & Jolowicz Tort, 12th ed. By W.V.H. Rogers, Sweet & Maxwell, London 2002.

1. <https://www.myadvo.in>, Sunday,2nd May, 2020. [↑](#footnote-ref-2)
2. 1901 AC 217. [↑](#footnote-ref-3)
3. (1961) All NLR 180 at 182. [↑](#footnote-ref-4)
4. (1979) AC 731, (1980) RPC 31. [↑](#footnote-ref-5)
5. (1985) 3 NWLR (Pt. 11) 112 [↑](#footnote-ref-6)