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**ABSTRACT**:

There is an optimum frame work for this tort that the frame work has to take on board the apparent tension within the House of Lords as revealed in the recent decisions In **OBG V ALLAN AND TOTAL NETWORK V REVENUE.[[1]](#footnote-1)** These decisions and the conflict of policy that appears to lie behind them reveal different agendas for the future development of the general economic tort. The business world comes with so much; the first profit or loss, branding, trademarks, business name, consumers, competitions etc. Sometimes the competition or competitors want to use similar business name, slogan, sign, or mark because of the success of that particular name or mark, in such a scenario, where an individual businesses name or mark is being challenged by a similar business name or mark then the tort of passing off will arise. Such restrictions can be beneficial in that they can provide welcome protection for the valuable expectations of individuals, businesses and other enterprises against disruption by unfair and egregious methods.

**INTRODUCTION**

Economic tort refer to a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business. It offers protection for a person’s trade from acts which the law considers to be unacceptable. Economic torts are torts which inflicts economic losses. There are tort which inflicts financial injury. Economic torts include:

1. Passing off
2. Breach of intellectual property rights such as a reach of copyright , patents, trademark and other merchandise marks
3. Injurious falsehood/ malicious falsehood
4. Interference with contracts
5. Conspiracy to interfere, that, civil conspiracy and so forth.

These groups of torts protect some of a person’s intangible interest, those which maybe loosely be called his business interest from unlawful interference generally, where a person has suffered economic loss, redress has traditionally been in contract law. The justification for this has been in if the contract had been the doctrine of consideration.

**DEFINITION OF PASSING OFF**

Passing off happens when someone deliberately or unintentionally passes of their goods as those belongings to another party. The action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage. This is similar to trademark infringement, but applies to protect unregistered rights associated with a particular business, its goods and services the principle underlying the tort of passing of is that á man is not to sell his own goods under the pretence that they are the goods of another man.

In each case of passing off, the key issue is the danger of misrepresentation as to the origin of goods or services. If someone leads consumers to believe that their goods or services are connected with another business when they are not, they may give the other business grounds to sue for passing off.

In the case of **TREBOR NIGERIA LIMITED V ASSOCIATED INDUSTRIES LIMITED[[2]](#footnote-2)**, trebor Nigeria limited the markers of trebor peppermint brought an action against associated industries limited the markers of minta super mint claiming that the wrapper used to package the product y the defendant was similar to that of the plaintiff ad that they were guilty of passing off their products like that of the defendant .the defendant raised dissimilarities I the two products as a defense to the action , the judge however found the defendants liable for passing off their product as that of the plaintiff .

Generally, an action for passing off arises where the deception is made In the course of trade, which could lead to confusion amongst customers, passing off is actionable I tort under the law of unfair competition. Passing of is an action on unregistered marks that have become notoriously attributable to a person company.

The selling of goods or carrying on of business under a name, description or mark 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. Where a party makes false representation In order to sell his goods and services with the intention to deceive a purchaser into thinking that the goods and services he is selling are those of another party.

The tort of passing off is practiced in common law countries like Nigeria, UK, New Zealand, Australia etc. The tort of passing off is designed to protect traders, businessmen against unfair competition acquired by false or misleading information and to prevent a rival trader from benefiting from the reputation already achieved by a trader. In essence a man may not sell his own goods under the pretense that they are the goods of another man.

**Aims 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 business continue to earn profit.
2. To protect the right of property that exist in good will

**Elements of the tort of passing off**

A claimant needs to establish the following in order to succeed in an action of passing of

1. Goodwill: the claimant must show the court that there is business value which is attached to the goods and services he produces in suit for passing off.
2. Misrepresentation: the claimant needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully are actually the goods and services of the claimant.
3. Damage: the claimant needs to show the court that a loss has been suffered due to the belief that the goods and services of the defendant are those of the claimant

These three elements were stated by the House of Lords known as the classic trinity in case of **RECKITT&COLMAN PRODUCTS LTD V. BORDEN INC[[3]](#footnote-3)**

**Remedies for passing off:**

Passing off injures the property right of the plaintiff especially in business. The following remedies can be claimed by the plaintiff in a passing of 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 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.

**RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN NIGERIA**

This law aims to protect traders from this form of unfair competition. Legally, classifying acts under this tort aims to protect the right of property that exist in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit eared by other businesses of similar type.it might be due to a particularly a favorable location , reputation of the brand in the community , or the quality of its employer or employees. To sum it up, the tort of passing off covers those cases where one trader falsely misrepresent his goods as those of another trader which has a good reputation in the market and thus leads to damaging his good will.

In the case of **NIGER CHEMIST LIMITED V. NIGERIA CHEMIST AND D.K BROWNY[[4]](#footnote-4)**, the plaintiff sued and court granted any injunction against the defendant on the grounds that their use of name Nigeria chemist was intended to deceive the members of the public into believing that there was a relationship between Nigeria chemists and Niger chemist. The case establishes the principle that an action in passing off may lie in cases of misuse of trade names, trademarks or the design get up of the goods or businesses

An action for passing off is a common law remedy and the claimant need not establish title for same but must show that the goods / services have distinctive features. It arguable to state that passing of is both a common law and statutory remedy In Nigeria as it is statutorily supported section 3 of the trademark act. The purpose of an action for 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 as that of any other. It is therefore our recommendation that the necessary framework for passing off actions the strengthened to defend the goodwill and reputation of businesses

It is also suggested that the trademarks act the further amended to reflect the times, happenings and changes in Nigeria. In particular, it is observed that the trademarks registry has witnessed a serious backlog marks ad this has the resultant effect of limiting the rights of most product owners to passing off as opposed to an action on the infringement of a trade mark. Furthermore, small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on passing off and take advantage of the remedies available to protect their goodwill, trade name and profits.

In the case of **CONTINENTAL PHARMACEUTICAL LTD. V. STERLING PRODUCTS NIGERIA PLC. AND SMITH KLINE BEECHAM PLC[[5]](#footnote-5).** The tort of passing of has developed into a powerful branch of intellectual property by expanding to the application far from its original use in the nineteenth century. What is protected in an action of passing off is an economic assets. passing off action is a common law remedy for unregistered trademarks which have acquired sufficient goodwill, against the unauthorized use of mark by the third party, passing off has in essence two functions, these are the protection of the trader against the unfair competition of his rivals and the protection of consumers who would otherwise be confused as to the origin or nature of the goods or services, which are offered.

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1. [2007] UKHL 21,,1 AC1,,2 (WRL)920 [↑](#footnote-ref-1)
2. (1972) 60 (NNLR) [↑](#footnote-ref-2)
3. [1990] 1, 873 (ALL E.R). [↑](#footnote-ref-3)
4. (1961) 4 NIPJD(S.C) [↑](#footnote-ref-4)
5. 1995)38 NIPJD [FHC] 460. [↑](#footnote-ref-5)