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## ABSTRACT

As can be inferred from works of scholars, passing off being the false representation of one's business as that of another. This paper seeks further enquiries as to the pertinence of passing off as an Economic Tort in 21<sup>st</sup> century Nigeria. A working definition of the tort (passing off) and definitions by various scholars shall be offered for the purpose of this work, then there shall be a discuss the purpose of the law of passing off, also examples and instances of passing off shall be mentioned, the elements, the remedies and defenses as well. Then a summary discuss on the relevance of Passing off as an Economic Tort in the 21<sup>st</sup> Century Nigeria.

## INTRODUCTION

Over the years, the tort of passing off has evolved into a branch of intellectual property law, now this tort (passing off) has gone through a process of growth, extending its traditional boundaries, and being successfully applied by traders to provide remedies in many circumstances.

## THE CONCEPT OF "PASSING OFF"

At this point, the question "What is Passing Off?" arises. Just like every other concept, the tort of Passing Off has been defined severally, by various authors and scholars based on caprices, teachings and sub-conscious bias, regardless, there are features peculiar to all the definitions as will be seen below. Passing Off has been defined thus;

According to **Ese Malemi**;

*"Passing off is the false representation of one's product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one's products, or the carrying on of one's business as if it were that of another whose reputation and goodwill one thereby enjoys...."*<sup>1</sup>

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"*<sup>2</sup>

To my understanding, passing off is a branch under the law of tort that focuses on a representation of a person's business or product by another in such a way that it deceives the society as to the relationship between the products.

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<sup>1</sup> Ese Malemi, Law of Torts (Princeton Publishers 2017).

<sup>2</sup> <https://www.myadvo.in>, Sunday, 2<sup>nd</sup> May, 2020.

The House of Lords in the case of *IRC v. Muller Margarine*<sup>3</sup> 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.’

In *Ogunlende v. Babayemi (1971) 1 U.I.L.R 417*<sup>4</sup> where the plaintiffs carried on business as civil engineering contractors and plumbers under the name of ‘Mercury builders’, **Taylor, C.J.** granted an injunction restraining the defendant from conducting a similar business under the name ‘Mercury Builders (Nigeria) Ltd’, Stating that;

*“...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 PURPOSE OF PASSING OFF

The tort of passing off is common in a competitive business community or economy. The tort of passing off is designed to protect a person’s business interest from the unfair trade practices and sharp practices of other persons. Its object is to protect the reputation and goodwill a business has built up for itself. **Sir John Salmond** in his book **Law of Tort** stated the reason for the tort of passing off 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”*.<sup>5</sup>

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”*<sup>6</sup>

In the law of passing off, the basis of the legal action is that passing off by the defendant off his goods and or business as that of the plaintiff, is injuring the right of property, product, services and business of the plaintiff.

## 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**;

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<sup>3</sup>IRC v Muller & Co’s Margarine 1901 AC 217.

<sup>4</sup>*Ogunlende v. Babayemi* (1971) 1 UILR 417.

<sup>5</sup>Salmond op cit Para 401.

<sup>6</sup>(1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435.

*“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”*<sup>7</sup>

There are three elements of passing off known as the ‘classic trinity’<sup>8</sup>. These three elements were reduced by **Lord Oliver** from Lord Diplock’s five elements as laid down in the case of *Erven Warnink v. Townend & Sons Ltd.*<sup>9</sup> These elements are:

1. That there was goodwill owned by the trader.
2. That there was a misrepresentation.
3. That there was damage to goodwill.

#### GOODWILL OWNED BY THE TRADER

The plaintiff must have acquired some kind of goodwill from the product that he feels necessary to protect. The existence or otherwise of a course of action in passing off and the existence of established goodwill will then have to be decided by the court in each particular case.

#### MISREPRESENTATION

The plaintiff has the burden to prove that there had been a misrepresentation, whether intentional or otherwise, capable of misleading the public. There must be a likelihood, actual deception or confusion by the public. It is the court’s duty to decide the similarity or identity of the goods or services. The criteria used in measuring this are usually; visual, aural and conceptual similarities.

#### DAMAGE TO GOODWILL

The burden to prove that the goodwill in question was damaged lies with the plaintiff and that the resultant damage was actually caused by the false representation. It is not enough to prove that there is an existence of goodwill or misrepresentation; it is necessary to show that damage had occurred as regards to that misrepresentation. He must show that he had suffered or is likely to suffer loss from that misrepresentation. The plaintiff does not need to prove actual or special damage; real or tangible probability of such damage will suffice. However, the damage must be reasonably foreseeable. In such instances, the court must use common sense in determining the case based on the evidence provided and judicial discretion in opposition to witnesses. Disclaimers may not be enough to avoid liability in cases of passing off.

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<sup>7</sup> (1961) All NLR 180 at 182.

<sup>8</sup> The modern law of Torts: A Kaleidoscopic Perspective.

<sup>9</sup> (1979) AC 731, (1980) RPC 31.

REMEDIES: The remedies for passing off include:

1. Damages.
2. Account (For profit or loss).
3. Injunction.
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

DEFENCES: 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 21<sup>st</sup> century, there is without a doubt certain situations in which passing off becomes relevant, this tort of passing off have greatly affected the commercial sector of the Nigerian society as a whole. The false representation made on one's business has led to the loss of goodwill and reputation of some companies. Below are some of the importance of the tort;

1. To protect a plaintiff's property rights. Economic tort which is interwoven with Passing Off goes a long way to ensure that the property rights of the plaintiff are not tampered with. If there is no right in place the defendant will have all full access to trample on the rights of the plaintiff thereby causing the plaintiff financial loss.
2. The law of passing off is designed to prevent misrepresentation in the course of trade in a business which is likely to confuse the public. Passing off does not confer monopoly rights to any names, get up, marks etc., it does not recognize them as a property in its own right unlike under trademark.
3. It 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*<sup>10</sup>; it was held that the trademark 'glucose-aid' is calculated to deceive the public in sound in consideration of the trademark 'Lucozade'.

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<sup>10</sup> (1985) 3 NWLR (Pt. 11) 112

4. Trademarks and Copyrights are important for a business to prevent the copying of one's idea, goodwill, and reputation. Various methods have been adopted in order to address this issue, and thus the relevance of passing off as a form of economic tort in 21<sup>st</sup> century Nigeria.

#### CONCLUSION/RECOMMENDATION

Competition is not only inevitable, but it is necessary in an ever developing and steady growing economy, However, that is not applicable to situations of unhealthy competitions whereby unethical means such as imitation are used in the free market economy

There has been an attempt by the past government to mitigate passing off by virtue of the *Trademark Act 1999* and among others, regardless, this writer is of the opinion that more legislations and sanctions through which the tort of Passing Off can be mitigated should not only be enacted but also seen to be enforced by dealing with defaulters.

As much as possible there should also be sensitization of traders and business owners about such laws which are protecting them and their ideas in order to engage in all the requirements to be favored by these existing laws, such as registering a trademark among other requirements.

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