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**COURSE TITLE: LAW OF TORTS**

**COURSE CODE: LPB 302**

**QUESTION:** Discuss the relevance of passing of as a form of economic torts in the 21st century

Economic torts seek to protect a person’s business from acts which the law considers to be wrong and 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. Economic torts include:

* Passing off;
* Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
* Injurious falsehood/Malicious falsehood
* Interference with contracts
* Conspiracy to interfere, that, civil conspiracy and so forth.

The main focus of this study is passing off and how it affects economic torts in the 21st century 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.

Another definition of Passing off is the act or an instance of falsely representing one's own product as that of another in an attempt to **deceive potential buyers**.1 Passing off is actionable in tort under the law of unfair competition.

The Duhaime's Legal Dictionary, defines Passing off as making some false representation likely to **induce a person to believe** that the goods or services are those of another.

 “The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”

There are different forms in which passing off could take place, these are

1. Marketing a product as that of the plaintiff e.g marketing your insecticide as mobile or mortein .
2. Trading under a name very similar or closely resembling that of the plaintiff so 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. In the case of ***NIGER CHEMISTS LTD. V. NIGERIA CHEMISTS (1961) ALL N.L.R 171[[1]](#footnote-2)***

Judge Per Palmer, j. in his judgment held that

***“ it seems to me as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger chemists’ and the other ‘Nigerian chemists’, there must be a grave room for confusion and deception”***

1. Marketing goods under a trade (a trade name is one under which goods are sold and which by established usage has become known to the public as indicating that those goods are the goods of that person) name already appropriated for goods of that kind by the plaintiff or under a name so similar to the plaintiff’s trade name as to be mistaken for it.
2. Marketing goods with the trade mark of the plaintiff or with any deceptive information of such mark. A trade mark is any design, picture , mark or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. Trademarks receive protection not only under the law of passing off but also, if registered , under the trademarks act 1956.
3. Imitating the get-up or appearance of the plaintiff’s goods.

ELEMENTS OF PASSING OFF

1. Misrepresentation
2. Made by a trader in the course of trade
3. To prospective customers of his or ultimate consumers of goods and services supplied by him
4. If it is calculated/ likely to injure the business or goodwill of another trader.
5. If it actual damage to a business or goodwill of the trader by whom the action is brought.

REMEDIES

1. **Injunction:** This is an order of the Court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of the mark pending the outcome of the case and a perpetual injunction when the case has been concluded to totally stop the use of the mark.
2. **Damages:** It has been established through decided cases that a successful litigant in a Passing off action is entitled to damages. Damages here could be general, special or punitive. These usually emanate from losses which are presumed to have been suffered by a Plaintiff in a Passing off action.
3. **Delivery up for destruction of infringing goods:** This is usually claimed where physical goods are involved. This occurs where goods are produced in breach of the trademark of another identical product. Thus, the Plaintiff usually claim for the goods to be delivered up especially so that it can be destroyed.
4. **Anton Piller Orders:** 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.*
5. **Account of profit:** Here the Plaintiff is entitled to profit on goods wrongly sold by the infringer.

### Passing off and Trademark Infringement

It is necessary to state that Passing off and trademarks infringement go hand in hand and are very similar in nature. Whilst, Passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark. This means that a mark, brand, design, name must be registered as a trade mark before one can make a claim on trade mark infringement.

Another distinction is, whilst an action for infringement of trade mark is a statutory remedy conferred on the owner of a registered trade mark, for the enforcement of a right to use the trade mark in relation to the goods/services for which the mark has been registered; an action for Passing off is an action against the deceit on the colourable imitation of a mark adopted by a person/company in relation to goods/services which has acquired a distinctive reputation in the market and is known as belonging to or produced by that person/company only.

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 is arguable to state that Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by Section 3 of the Trademarks Act2 which provides that:

"*No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for Passing off goods as the goods of another person or the remedies in respect thereof".*

The above connotes that a Passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim *"There is no law without a remedy".*

**THE RELEVANCE OF PASSING OF ECONOMIC TORTS IN THE 21ST CENTURY**

In Nigeria there is an increasing number of dishonest dealings of many businesses and trades. Economic torts is aimed at protecting people from dealings[[2]](#footnote-3) that are harmful. Passing off in eco[[3]](#footnote-4)nomic torts refers to a misrepresentation of one’s product in order to deceive or manipulate potential customers/buyers. Passing of shows an act of disloyalty and manipulation towards customers, in Nigeria there are consequences for passing of which therefore makes people to abstain from such acts. In the case of ***Niger Chemists Limited and Nigeria Chemists[[4]](#footnote-5)***, the Plaintiff had an established chemist business using the name "Niger Chemist" while the Defendants established the same business on the same street with the Plaintiff using the name "Nigeria Chemist". The Plaintiff sued the Defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The Court agreed with the Plaintiff and granted an injunction against the Defendant on the use of the name. In this instance Passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

With cases of passing off as an economic tort rising in Nigeria, both producers andcustomers aremore aware of the unlawful nature of the act and therefore they are also aware of the legal consequences of indulging in the act of passing off. Companies are more careful with the presentation of their products. Customers are more careful in selecting their regular products. This awareness spread around the country also makes consumers watchdogs for the act of passing off. Victims of Passing off may make a report to the person/company manufacturing the product they intended to purchase to make them aware that another person/company is reproducing a similar product and passing it off as theirs. Victims of passing off can also report the misrepresentation to the Consumer Protection Council CPC and seek compensation as a dissatisfied consumer.

Generally, breach of economic tort causes financial loss or injury to traders. The misrepresentation in the act of passing off causes financial injury to a company or producer.With passing off as a form of economic tort, companies and producers may be compensated for the financial injury suffered. Damages in passing off are both compensatory and punitive. The punitive nature of this act discourages producers from misrepresenting products. In the case of ***Continental Pharmaceutical Ltd v Sterling Products Nigeria Plc and Smithkline Beecham Plc[[5]](#footnote-6)***the plaintiffs who were manufacturers of a registered trademark comprising the eclipse logo with blue and white package design with the words “conphamol” brought an action against the defendants for allegedly infringing on the salient features in the packaging of conphamol substituting only the words “Panadol” and “Panadol Extra” in the same style and font. The court held the defendants guilty and N500 million against the defendants as damages for passing off. This case shows the punitive approach the court in nigeria may take for the offense of passing off and this therefore makes producers careful in their conduct of business and trade.

Economic tort aims to protect persons trade from all unlawful acts. The essence of the tort of passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another.In the law of passing off, goodwill is a legal concept, not a business concept.Goodwill is the proprietary right, the right that is owned by a person which is protected by passing off. In the business world in Nigeria today, a good number of companies and producers have worked hard and long to build their goodwill and reputation. There are numerous companies which produce numerous goods that people rely on. The tort of passing of now guarantees protection of this goodwill and reputation built in the conduct of business. Misrepresentation of a product is unlawful and is now provided for in the legal structure for liability in business relationships. Imagine a situation where there is no law against the act of passing off, the country would suffer greatly in the economic sector as businesses will fall, fake products would be sold, rip offs will be out of control, businesses will suffer great financial injuries, but with passing off as an economic tort, business and trade is given protection. The constitution also provides for the tort of passing off. **Section 251(1)(f) of the Constitution[[6]](#footnote-7)** stipulates expressly that the Federal High Court shall have jurisdiction, to the exclusion of any other court, in civil causes and matters relating to 'any federal matters relating to copyright, patent, designs, trademarks and **passing off**.

In the case of ***Trebor Nigeria Ltd v Niger Shoes Manufacturing Co[[7]](#footnote-8)*** Ltd an action was held to lie in passing off where the defendant packaged and marketed its product to resemble those of the plaintiff. The court held that the fundamental rule is that one man has no right to put off his goods for sale as the goods of his rival trader. The court further observed that the defendant attempted to manufacture and market a product as similar as possible to that of the plaintiff. The courts ensure that the goodwill and reputation of a person is protected so as to avoid any form of economic loss to that person.

In conclusion, Nigeria as a fast growing economy where many different people are starting up businesses and entrepreneurship among the youth is becoming rampant, passing of will continue to be perpetrated by business owners so therefore the law needs to be put in place to control such acts.

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1. [1961] 4 NIJPD [↑](#footnote-ref-2)
2. Section 3 trademarks act [↑](#footnote-ref-3)
3. [↑](#footnote-ref-4)
4. [1961] 4 NIJPD [↑](#footnote-ref-5)
5. [1995] 38 NIJPD 460 [↑](#footnote-ref-6)
6. Section 251 (f) of the 1999 Nigerian Constitution. [↑](#footnote-ref-7)
7. [1972] 14 NIJPD 127 [↑](#footnote-ref-8)