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COURSE TITLE: LAW OF TORTS

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

**INTRODUCTION**

Often times, individuals are deceived into purchasing trusted goods or products which are similar or identical to the desired product without knowledge. To this end, this has caused financial loss, for which their grievances are not compensated for or addressed. This deceptive plot of the competitive business market has caused many to lose economically. In a bid to protect one’s financial interest under such circumstances, the tort of passing off was introduced. Taking into cognizance the purpose of economic tort to protect one’s financial interest, passing off is one of the economic torts.

Passing off is an act or instance of falsely representing one’s own product as that of another in an attempt to deceive potential buyers[[1]](#footnote-2). According to **Dulhaime’s Legal Dictionary**, it is making some false representation likely to induce a person to believe that the goods or services are those of another. It is no secret to say that the business world is highly competitive and products and manufacturers strive to outsell one another. While others develop better marketing strategies and schemes, some persons try to manipulate the buyers into buying their products by projecting other people’s goods as theirs or a brand similar. The purpose of the tort of passing off is to protect the goodwill of a trader from misrepresentation. Chiefly recognized in the case of **N.R. Donge v. Whirlpool Corporation[[2]](#footnote-3)**, it was established that “*a man may not sell his own goods under the pretence that they are the goods of another man*”. The tort of passing off protects traders from this form of unfair competition.

**ELEMENTS OF THE TORT OF PASSING OFF**

The **Erven Warnink B.V. v J. Townend & Sons**[[3]](#footnote-4), popularly termed the Dutch Advocaat case was the first case where the basic elements of the tort of passing off were put forth by Lord Fraser as follows:

1. A misrepresentation,
2. Made by a trader in the course of trading,
3. To prospective customers of his or ultimate consumers of goods or services supplied by him,
4. Which is calculated to injure the business or goodwill of another trader,
5. Which causes actual damage to a business or goodwill of the trader by ehom the action is brought or is likely to do so

Consequently, in **Reckitt & Colman products Ltd v. Borden Inc,[[4]](#footnote-5)** known widely as the Jif Lemon case, Lord Oliver reduced the principles to three basic features (now known as the classical trinity) which included:

1. Reputation
2. Misrepresentation
3. Damage to goodwill

It is pertinent to note that for an action in passing off to succeed, the plaintiff must prove that there is a similarity in the trade names or marks and that the defendant is passing off his goods as that of the plaintiff.

**RELEVANCE OF PASSING OFF IN CONTEMPORARY NIGERIA**

Though the tort of passing off and trademark infringement are strongly similar, they go hand in hand and are not considered the same due to their distinctive features. However contended, it is safe to say, in this regard that the Nigerian law recognizes both passing off and trademark infringement. **Section 3 of the Trademark Act[[5]](#footnote-6)** connotes that “*no person shall be entitled to institute any proceeding to prevent, or 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*”. This goes a long way to protect companies and businesses even those with an unregistered trademark. Notably, this is not covered by trademark infringement, as the lw presupposes that one cannot recover damages when dealing with an unregistered trademark, however an action for passing off is permissible with an unregistered trademark, with the condition that the goods were sold as goods of another person and both trademarks are similar or branded to be similar.

In the same vein, the Nigerian law has accommodated the tort of passing off into practice to protect businesses from commercialists who thrive to use dubious schemes such as creating similar features of another’s goods for profit maximization. In the case of **Trebor Nigeria Ltd v. Associated industries Ltd[[6]](#footnote-7)**, the makers of Trebor peppermint brought an action for passing off against the defendants, claiming that the wrapper used to package the defendant’s product was similar to that of the plaintiff. The defendants raised dissimilarities between the products as a defense, which was dismissed by the Judge who ruled in favour of the plaintiff.

The law has been branded to make subsequent actions for passing off admissible in court, such that they are not void. **Section 251(f) of the Constitution[[7]](#footnote-8)** of the undeniably provides that the Federal High Court exercises exclusive jurisdiction in civil cause and matters on any Federal enactment relating to copyright, patent, designs, trademarks and passing off, inter alia.

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Constitution of the Federal Republic of Nigeria (1999) as amended

Black’s Law Dictionary (ix)

1. Black’s Law Dictionary (ix) [↑](#footnote-ref-2)
2. (1996) 5 SCC 714 [↑](#footnote-ref-3)
3. (1979) AC 731 [↑](#footnote-ref-4)
4. (1990) 1 All ER 873 [↑](#footnote-ref-5)
5. Cap T13 Laws of the Federation of Nigeria, 2004 [↑](#footnote-ref-6)
6. (1972) NNLR 60 [↑](#footnote-ref-7)
7. Constitution of the Federal Republic of Nigeria [↑](#footnote-ref-8)