

**NAME: ONABANJO RERELOLUWA IYANUOLUWA**

**MATRIC NO: 17/LAW01/237**

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**COURSE TITLE: LAW OF TORTS II**

**LECTURER: MRS. APARA OYEBANKE**

**QUESTION: DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA.**

**USE NALT GUIDELINES FOR FOOTNOTES, YOU SHOULD ALSO INCLUDE A BIBLIOGRAPHY AT THE END.**

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## ABSTRACT

The law of tort is a product of the common law, such law was birthed to provide a framework for dealing with negligent and intentional acts done against a person's livelihood. That being said, as time went on, a branch of tort was created, that branch is tagged economic tort. This was specifically crafted to address issues civil issues that may arise from economic (trading relationship). The Tort of Passing off falls under this ambit. The thrust of this work shall among other things, be geared towards ascertaining the relevance of passing off to economic tort.

## INTRODUCTION

The concept of Economic Tort<sup>1</sup> is not new as it is a common law principle designed to provide business relationships. As the Law of Tort was made to alleviate the pains of a plaintiff and impose liability on the tortfeasor (where he is held liable), for any claim under this heading to succeed, economic loss must have occasioned. The economic tort can be split into two primary categories; viz:

- a. Procuring a breach of contract
- b. Causing loss by unlawful means.

Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage. It was established long before trademarks became registerable. It was originally intended to protect traders by allowing them to bring action against a trader attempting to ride off the back of their established reputation (goodwill) by using a similar mark or get-up as their own. However for an action of passing off to succeed three requirements must be established; goodwill, a misrepresentation and resulting damage.

### Elements of passing off

To establish a claim for passing off, you must meet three key requirements:

- goodwill - you must prove that you own a 'reputation' in the mark that the public

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<sup>1</sup> Also referred to as Business Torts

associates with your specific product or service

- misrepresentation- you must show that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours
- damage - you must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss

Rights relating to passing off are established gradually with use. Goodwill in a mark can be particularly difficult to define. Reputation and goodwill of a business is generally considered as something that provides an identity to a business and its goods or services, and distinguishes them from those of their competitors

In 1875, a statutory system of registering Trademarks was introduced<sup>2</sup> and it gave a broad definition of what constitutes a registerable mark. This has greatly limited the role of passing off as everything which is capable of being a distinguishing indicium for the purposes of a claim for passing off.<sup>3</sup>

Due to the recent extended scope of trade mark law by virtue of the NIGERIAN TRADEMARK ACT, which increased what is registerable as a trade mark, the importance of passing off has been diminished. However, there are still certain things, which are unregistrable as trademarks, and therefore the common law tort of passing off is by no means redundant.

**Passing off: a fall back for potentially registerable marks that were not registered or failed to renew a registration.**

Where a trader has built up goodwill but failed to register a potentially registerable mark for whatever reason it is still necessary to offer some sort of protection to prevent other trader's from benefitting from that goodwill. As in the case where someone has failed to renew an already registered trade mark. By virtue of the NIGERIAN TRADEMARK ACT trade mark registration lasts for a period of 10 years, after which registration must be renewed [44] . Although a trader should always endeavour to register a registerable mark as the outcome of a passing off action carries much more uncertainty than when there is a clear trade mark infringement.

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### **Passing off: the only remedy for damaging products with different uses but the same name**

The law of copyrights only protects identical sign on similar goods or services or a similar sign on identical good or services however, there must exist a 'likelihood of confusion'. Before an infringement can occur. Without a likelihood of confusion the law will therefore not protect against any possible damage to the goodwill of a trade mark which may have been caused.

The problem lies in that the former position, which is likely to cause more damage to the proprietor of the trade mark than the latter, is afforded less protection. In such circumstances the common law of passing off plays an important role in protecting goodwill. It is therefore clear that until the NIGERIAN TRADEMARK ACT is reformed to include such extension, which may or may not happen, applicants are left with having to rely on claiming a successful action of passing off to protect against damaging but non-confusing uses on similar goods or services. An example of where this was the case is in *Taittinger v Allbev*. This involved a non-alcoholic drink being sold as "Elderflower Champagne" but it did not come from the Champagne region. The claim of passing off was allowed here because the court found that although there was no likelihood of confusion there was damage to the goodwill associated with "Champagne" because it led to:

'[A] blurring or erosion of the uniqueness that now attends the word champagne, so that the exclusive reputation of the champagne houses would be debased'.

In cases such as this where there is a risk of the tarnishing of the goodwill of a business it is essential to be able to rely on passing off for protection because as per Lord Macnaghten in *IRC V Muller* [1901] goodwill is the 'attractive force which brings in custom'. Passing off therefore retains its importance in the protection of goodwill in such circumstances.

In the case of *Trebor Nigeria Limited v. Associated Industries Limited*,<sup>i</sup> Trebor Nigeria Limited the producers of Trebor Peppermint instituted an action against Associated Industries Limited the producers of Minta Supermint claiming that the wrapper used to package the product by the Defendant was similar to that of the Plaintiff and that they were guilty of Passing off their products as that of the Defendant.

The Defendants raised variations in the two products as a defense to the action, the Judge, however, pronounced the Defendants liable for Passing off their products as that of the Plaintiff. In this instance Passing off occurred by the use of a package heavily similar to that of another

product such as to deceive the public that they are the same.

Related decisions were made in *Niger Chemists Limited v. Nigeria Chemists and D.K. Brown*<sup>ii</sup>.

*Ayman Enterprises Ltd. v. Akuma Industries Ltd and Omnia Nigeria Limited v. Dyketrade Limited*.<sup>iii</sup>

It's relevant because it protects business initiatives from experiencing financial loss as a result of the misrepresentation of their products. It's significant primarily in Nigeria because Nigeria has a privatized economy as such there is a tendency to be competition and rival traders will do all it takes to make a profit and outsell other competitors

## BIBLIOGRAPHY

- Emily Finch and Stefan Fafinski, (2015), Tort Law, Law Express
- "Tort of Passing- Off Project Assignment for Law of Torts.." LawTeacher.net. 11 2013. All Answers Ltd. 05 2020 <<https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php?vref=1>>.

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<sup>i</sup> (1972) NNLR 60

<sup>ii</sup> [\(\[node:field-casenumbe\]\) \[1961\] 8 \(16 March 1961\)](#);

<sup>iii</sup> (SC 116/1999) [2003]