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

**INTRODUCTION.**

Passing off is a cause of action is historically rooted in common law and is primarily found in tort law under economic tort alongside. It arose in the 19th century and relied upon the simple principle that a person is not to sell his goods or his services under the pretence that they are those of another.

The tort of passing off is the act of falsely representing one’s own product as that of another in an attempt to deceive potential buyers. Usually, the basis for this representation is the fact that the other’s trade has built up goodwill and reputation over the years which is associated with either his trade name or trademark and the defendant sees it as a basis to make profit for himself by misleading the public and causing confusion.

Passing off is quite similar to the law of intellectual property and it is ranked alongside copyright, patents and trademarks, though, the similarity lies more between passing off and trademarks infringement which the *Trademarks Act[[1]](#footnote-1)* provides for, it differs from these other types of intellectual property rights because the law lays in common law and not in statute law. When a person starts a trade, he has a name, signs, marks, slogans, and others which collectively form his trademark. The owner of the trademark thus has exclusive rights over the trademark and can exclude others from using his trademark under the various trademark laws unless with a license. However, other than the protection granted by trademark laws, the owner can also sue the infringer for the tort of passing off. This then brings about where a person with an unregistered trademark has a remedy with passing off.

In order to succeed in an action under the tort of passing off, a plaintiff would have to establish the following elements:

* Goodwill: the plaintiff must show the court that there is a business value. i.e. the attractive force that brings customers, which is attached to the goods and services he produces in a suit for passing off.
* Misrepresentation: The plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully, whether intentionally or not, are actually the goods and services of the plaintiff.
* Damage: The plaintiff also needs to show that a loss has been suffered due to the belief that the goods and services of the defendant are those of the plaintiff.

These three elements known as the classic Trinity were stated in the House of Lords case of *Reckitt & Colman Products Ltd v Broden Inc.****[[2]](#footnote-2)*** by Lord Oliver.

**PASSING OFF AND ITS RELEVANCE IN NIGERIA.**

The tort of passing off seems to be adaptable to changing trading practices and conditions and has had some notable extensions.In Nigeria, a cause of action in the tort of passing off forms part of the several aspects of the common law and the doctrines of equity that were received from England into the Colony of Lagos. As elsewhere, the ‘informal’ protection of rights by the tort of passing off, which centres on unregistered trademarks, closely resembles the formal rights created by trademark law. The relevant law in an action for passing off is the *Trademarks Ac 1990, s3[[3]](#footnote-3)* 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 of another person or remedies in respect thereof.”

The action although a common law action, has been encoded in our Constitution. In *Patkun Industries Ltd v Niger Shoes Manufacturers Co Ltd****[[4]](#footnote-4),*** the supreme court held among other things that section 3 of the Trademarks Act gives a right of action in passing off and that the right is derived from the trademarks act and not from common law. The Constitution[[5]](#footnote-5) also provides that: “the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters on any Federal enactment relating to copyright, patent, designs, trademarks and passing off…”

In the case of *Omnia Nigeria Ltd v Dykrade Ltd[[6]](#footnote-6),* the court held that the Federal High Court has elusive jurisdiction to hear and determine a claim arises from the infringement of a registered or unregistered trade mark.

The study of the law of passing off and its application in Nigeria is relevant or important because protecting one’s business is the best thing to do in a country like Nigeria where the rate of passing off and copyright infringement are high. An owner of unregistered goods or services is not without legal remedy upon infringement of his marks by the defendant and so he may need to bring an action in order to prevent others from selling or marketing his products or mislead the public by proving the extent to which his goods are being sold.

Also, the economic tort of passing off is important because, although, the *Trademark Act*[[7]](#footnote-7) grants remedies for registered trademarks infringed upon, the tort of passing off sets a stand or an opportunity for a person without registered or who has an unregistered trademark to also have an action in passing off where he can protect the ownership of his goodwill or reputation, which may be damaged by the defendant’s misrepresentation.

Furthermore, the owners of small and medium businesses have the opportunities to seek legal actions on passing off and take advantage to protect their goodwill, trade names and profits. In a country as that of Nigeria where there are so many small and medium scale businesses, it is possible for a person to find another who trades under a name that resembles that of his, misleading the public into believing that his business and that of the other person are the same. *The Companies and Allied Matters Act[[8]](#footnote-8)* requires that every individual, firm or corporation having a place of business in Nigeria, whether such a person is carried on in the individual’s name or in a corporate name must be registered at the Corporate Affairs Commission within a period of 28 days of the commencement of such a business in order to ensure that no trade name can be used to deceive or cause confusions as to the distinctiveness of two different businesses in Nigeria.

In the case of *Niger Chemists Ltd v Nigeria Chemists[[9]](#footnote-9)* where the plaintiffs had carried on business as chemists and druggists for several years and had several branches in Onitsha and other towns. The defendants later founded a firm carrying on exactly the same type of business in Onitsha under the name “Nigeria Chemists”. The plaintiffs contented that the defendants’ use of a name similar to their own was actionable passing off and they sought an injunction to restrain its further use. Palmer J granted the injunction holding that the name “Nigeria chemists” was calculated to deceive persons who know of and intend a to deal with Niger Chemists.

Another area or circumstance of the common law tort of passing off which is still important in Nigeria, regardless of the Trademark Act limitations, is where the general get-up of a product is concerned. An action will be successful in the tort of passing off, where there is anything in the appearance or get-up of the plaintiff’s goods which particularly identifies those goods as the merchandise of the plaintiff, if the defendant in marketing his goods imitates or copies such appearance or get-up in a manner likely to confuse the public.

In the most recent case of *De Facto Works Ltd v Odumotun Trading Co. Ltd.[[10]](#footnote-10),*the defendants, who sold bread wrapped in yellow and brown paper with the name ‘Odus’ written in large scroll letters in chocolate colour, were held liable in passing off as this was an imitation of the get-up of the plaintiff’s bread, which had been wrapped for some time previously in yellow and brown paper with the name ‘De Facto’ written in large chocolate coloured scroll letters.

Other than the use of a person’s trade name by another, an action can also arise where the use of a person’s own name for his business clashes with that of another who bears same name with him. As a general rule, a person can freely use his own name, or ne which he has acquired by reputation, although the use of it inflicts damage on someone else who has the same name. This, however, is qualified by the law of passing off to an extent that the defendant cannot do so where it would be to mislead the public. The question of fact in each case would therefore be whether the name or description given by the defendant to his goods is such as to create a livelihood that a substantial section of the purchasing public will be misled into believing that his goods are the goods of the claimant.

In the case of *Parker-knoll Ltd v Parker-knoll International Ltd[[11]](#footnote-11)*,both parties were manufacturers of furniture, the claimants being a well-known company in the United Kingdom and the defendant an American company which had only recently begun to trade in England. The House of Lords granted an injunction to restrain it from continuing to do so without distinguishing its goods from those of the claimant.

The setting of passing off is normally trade and it is possible for a relatively small trade to result in sufficient goodwill for a passing off case so long as it is more than trivial. However, trade in the narrow sense is not essential, even if it is difficult to say precisely how far the law goes. An author may sue for a false representation or false attribution of authorship that a book is his work and a professional person or professional association may have a cause of action in respect of unauthorised use of their names in a manner likely to cause harm to their professional activities. In respect to all passing off claims, the claimant would need to demonstrate misrepresentation and damage as well as the existence of goodwill.

In conclusion, the importance of the law of passing off was reduced by the *Trademarks Act[[12]](#footnote-12)* 1994, particularly as to how far the Act allowed a trademark to be registered in respect of a container or the get-up of the goods. The tort of passing off doesn’t have a statute of law of its own but is being provided for in the Trademarks Act, which brings about the similarity between trademarks infringement and the tort. This is also functional in Nigeria as the form of economic tort is derived from common law. Nevertheless, even where there appears to be a strong case of trademark infringement, it remains common to run a parallel claim for passing off and it will be the only remedy where the law of trademarks is inapplicable or the registration is invalid or where there has been no attempt at registration.

The economic tort of passing off aims at granting remedies to a plaintiff who has suffered loss or damage as a result of the defendant’s activities. It could be an injunction restraining the defendant from disposing of his goods without sufficiently distinguishing them form the claimant’s, or damages may be granted in respect of losses to the claimant or he may seek, in some cases, an account of the profits which the defendant has made as a result of the passing off.

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1. TMA 1994 [↑](#footnote-ref-1)
2. (1990) 1 WLR 491. [↑](#footnote-ref-2)
3. TMA 1990 s3 [↑](#footnote-ref-3)
4. (1988) 5 NWLR PT 93 138 [↑](#footnote-ref-4)
5. The 1999 Constitution, which is the Supreme Law of the Federal Republic of Nigeria, hereafter refers to as the “Constitution” [↑](#footnote-ref-5)
6. (2007) 15 NWLR PT 1058 576 [↑](#footnote-ref-6)
7. TMA 1990 [↑](#footnote-ref-7)
8. CAMA 2004, s30(a), s579(d)(e) [↑](#footnote-ref-8)
9. (1961) ALL NLR 171 [↑](#footnote-ref-9)
10. (1959) LLR 33 [↑](#footnote-ref-10)
11. (1962) RPC 265 [↑](#footnote-ref-11)
12. TMA 1990 [↑](#footnote-ref-12)