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**COURSE TITLE: LAW OF TORTS II**

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**LECTURER: MRS APARA**

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

**WHAT IS AN ECONOMIC TORT?**

An economic tort offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Despite the fact that competition amongst businesses is a fundamental element of business 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 and financial losses. Economic torts occur mainly in the economic, commercial or business sector of life. They are various forms of Economic torts, one of which is Passing off.

**WHAT IS PASSING OFF?**

Passing off is an act of misrepresentation. This is when a business/company misleads the public to falsely believe that their product/brand is the same as a well-known brand/product, this is known as the tort of passing off. Anyone who attempts to illegally imitate, mislead or cause fraud in economic activities to the detriment of another trader is liable for the tort of passing off. The concept was established in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation[[1]](#footnote-1)*** which held that a man may not sell his own goods under the pretense that they are the goods of another man.

Although, competition is an essential part of business, law aims to protect traders from unfair and illegal competition.

The torts of passing off can be committed in various forms namely:

1) Trading with a name resembling that of the plaintiff.

2) Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design.

3) Marketing a product with a name resembling that of the plaintiff’s goods.

4) Marketing products with the plaintiff trademark or its imitation.

5) Imitating the appearance of the plaintiff’s product.

6) Selling inferior or expired goods of the plaintiff as current stock.

7) False advertisement by copying the plaintiff’s advertisement.

1. **Trading with a name resembling that of the plaintiff**: This is a situation whereby the defendant and plaintiff are in similar business and the defendant uses a name almost the same with that of the plaintiff to trick the public into believing the products produced by the defendant is the same as the plaintiff’s. A case that explains this is that of ***Hendricks v. Montague[[2]](#footnote-2)***, it was held that 'Universal Life Assurance Society’ and ‘Universe Life Assurance Association’ are very likely. The similarities in the name of business is enough to mistake one for the other especially when that is the intent of the defendant.

2. **Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design:** The defendant would be held liable in the tort of passing off if he claims the plaintiff manufactured or produced a product when in-fact the plaintiff had nothing to do with it. This act is misleading and destroys the goodwill of the plaintiff. In ***Byron v. Johnston*** (1816) 35 ER 851 – it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

3. **Marketing products with the plaintiff’s trademark or its imitation:** It is actionable in passing off for a defendant to market his goods using the plaintiff’s trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff.

Trademarks are usually registered and also protected under the Merchandise Marks Act 2004.

Also, in ***Perry v. Truefitt[[3]](#footnote-3)*** (1842) 49 ET 749 – the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of ‘Medicated Mexican Balm’ or other similar designations. ***Reckitt & Colman Ltd v. Borden[[4]](#footnote-4)***

ELEMENTS OF PASSING OFF

These are the things a plaintiff needs to prove to succeed in a claim for passing off. 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 those of the plaintiff’s. According to Lord Oliver in the Jef Lemon case, there are three basic elements of passing off which is also known as the classic trinity namely:

1. **Misrepresentation**: The is entirely up to the court to decide, factors such as the literacy of the customers or their level of awareness are considered, the factors of the case are also considered, if at one instance a layman could mistake one product for another due to the similarities of the product, the court is likely to grant damages to the plaintiff. It also has to be proven beyond reasonable doubt that those products can be mistaken for each other and the mistake was not to die to the negligence of the buyer. The plaintiff also has to prove that the defendant made a statement or provided services that mislead the public to think those act or services were that of the plaintiff. ***UK Tobacco Co Ltd v. Carreras.[[5]](#footnote-5)***

2. **Reputation/Goodwill**: Goodwill is defined as the part of business value over and above the value of identifiable business assets. So basically, it is an intangible asset. The plaintiff has to prove that his products and services are well known to the public and that the defendants misleading activities was targeted to deceive the public and to benefit the defendant. Liability in the tort of passing off is strict. Therefore, innocent passing off is not a defense, and once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction.

3. **The effect of the fraud by the defendant**: To succeed in a claim of passing of, the plaintiff must have suffered or is likely to suffer loss due to the fraudulent acts of the defendant.

REMEDIES FOR PASSING OFF

The remedies for the tort of passing off include the following:

1) Damages(compensation)

2) Account for profit or loss of sales;

3) Injunction (a court order forbidding the infringer to continue selling the infringing goods)

4) Intervention by the relevant regulatory agencies such as NAFDAC, Intellectual Property Commission etc.

DEFENCES OF PASSING OFF

1. Consent

2. Innocent passing off

3. Functional design or damage

RELEVANCE OF PASSING OFF IN THE 21st CENTURY.

The world of business is ever expanding, there’s no limit as to how far or wide the economics world is today. As established earlier, the fundamental element of business is competition but what happens when traders begin to play dirty? What happens when the competition is unfair?

Passing off is concerned with the right of a trader to bring a legal action for protecting business goodwill. This is based on common law.

In the case ***Cartier v. Carlile[[6]](#footnote-6)***, it was decided that a “man must be taken to intend” the natural consequences of his act and mere proof of likelihood of deception was sufficient to prove the wrong.

The 21st is more modernized and advanced than previous centuries i.e the way we do business is more developed. In countries such as Nigeria where unemployment is the order of the day, it is no surprise that brands will have similar names, products, logos etc nonetheless the law must protect the citizens and their business, that is why the tort of passing off is more relevant than ever as it provides balance in the business world ensuring that those who tend to defraud the public, mislead them into believing one product is the same with that of another trader are held liable and that traders who have suffered loss due to the unfair competition of other traders are awarded with damages.

CONCLUSION

The tort of passing off appears to be a simple concept but a deeper look into it would bring to the realization that it is a complex, dynamic and an ever-increasing concept. As the society develops each day so does the tort of passing off.

It is important that the law adjusts to the changes in the economic world.

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1. (1996) PTC (16) 583 (SC) [↑](#footnote-ref-1)
2. (1881) 17 Ch.D 638 [↑](#footnote-ref-2)
3. (1842) 49 ET 749 [↑](#footnote-ref-3)
4. (1990) 1 ALL E.R 873 [↑](#footnote-ref-4)
5. (1931) 16 NLR 11 [↑](#footnote-ref-5)
6. (1861 C123) [↑](#footnote-ref-6)