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**QUESTIONS: 1) TORT LPB 302. – ECONOMIC TORTS.**

**Discuss the relevance of passing off as a form of Economic Torts in the 21st century Nigerian. Guidelines: Use the NALT guidelines for footnotes, include a bibliography at the end. Times New Roman, font size 12, line spacing 1.5, maximum of 5 pages.**

**INTRODUCTION**

Economic tort offers protection for a person’s trade or business from acts which the law considers as being unacceptable. Although competition among varied businesses is a fundamental element in business where which one business may succeed to the disadvantage of another. Therefore economic tort seeks to ensure that businesses are protected from acts of unacceptable interference. “PASSING OFF” is an economic tort.

**THE TORT OF “PASSING OFF”**

The classic definition of the tort of passing off can be found in the judgement of **LORD DIPLOCK in ERUEN WARNINK BV V. J TOWNEND AND SONS (HULL) LTD.[[1]](#footnote-1)**

**LORD DIPLOCK** identified five essential elements of the tort of passing off. They include

* Misrepresentation.
* Made by a trader in the course of trade.
* To prospective customers of his or ultimate consumers of goods or services supplied by him.
* Which is calculated to injure the business or goodwill of another trader.
* Which causes actual damage to a business.

My understanding of the term “passing off” springs off from the statement by LORD Kingsdown, “….. The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader” in the case, LEATHER CLOTH Co. V. AMERICAN LEATHER CLOTH CO[[2]](#footnote-2). I therefore define “passing off” as the sales of goods or the carrying out of business activities by a party under the umbrella of another party without personal or legal permission, there by misleading the public to believing what is false and converting the benefits to oneself that is of the other party. “Passing off” can also be described as an unfair competition by **misrepresentation** or literally speaking **"the cause of confusion or deception".** 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 Act[[3]](#footnote-3). In the case of *Trebor Nigeria Limited v. Associated Industries Limited[[4]](#footnote-4)*, Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Supermint, the Judge however found 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 strongly similar with that of another product such as to deceive the public that they are one and the same.

Also in the case of *Niger Chemists Limited and Nigeria Chemists[[5]](#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 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.

The Constitution[[6]](#footnote-6) specifically makes provisions for Passing off actions. The Constitution[[7]](#footnote-7) also provides that, - If there is any other law that is inconsistent with its provisions, the Constitution will prevail, and that other law shall, to the extent of the inconsistency, be void. This provision gives the Federal High Court jurisdiction over matters relating to passing off.

**ELEMENTS OF PASSING OFF**

* **Marketing a product as that of the plaintiff.**

For example, when you market your tires as Dunlop or Michelin, or you market your insecticides as Mobil or Morten, or you market your detergent as Ariel or sunlight. ***BYRON V JOHNSTON [[8]](#footnote-8)***.

* **Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendants business and that of the plaintiff are one and the same.** The case of OGUNLENDE V. BABAYEMI ,NIGER CHEMISTS LTD. V. NIGERIA CHEMIST[[9]](#footnote-9)
* **Marketing under a trade name already appropriated for goods of that kind by the plaintiff, or under a name similar to the plaintiffs trade name as to be mistaken for it.** 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.
* **Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such work.** A trade mark is any design, picture, mark or other arrangements 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 Trade Marks Act 1965, under which most actions are brought.
* **Imitating the get-up or appearance of the plaintiffs goods**: A) u.k Tobacco co. Ltd V. Carrera Ltd (1931) 16 N.L.R 1 (B) DE FACTO WORKS LTD V. ODUMOTUN TRADING CO. LTD. (1959) L.L.R.33

**THE RELEVANCE OF THE** **TORT OF PASSING OFF IN THE 21ST CENTURY**

In relation to Nigeria, , a cause of action in ‘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.[[10]](#footnote-10) This was done under the reception legislation, that is, Ordinance No. 3 of 1863 effective from the 4th of March 1863. This effectively introduced the British legal system into the Colony and was a lead-up to the establishment of the first Supreme Court for the Colony in 1863 that exercised civil and criminal jurisdiction.[[11]](#footnote-11)

 In sum, ‘passing-off’ is a cause of action that is primarily founded in tort[[12]](#footnote-12) and is historically rooted in common law.[[13]](#footnote-13) It is a cause of action that has undergone dramatic changes over the years but still potent in protecting the entrenched rights in areas to which it relates The crucial point to note is that it is not easy to define what constitutes ‘goodwill’ in general for purposes of suing for ‘passing-off’. The existence or otherwise of a cause of action in ‘passing-off’ and the existence of an established ‘goodwill’ would then have to be decided by the court in each particular case. In the case of IRC v. Muller Margarine[[14]](#footnote-14) the House of Lords, in part, described ‘goodwill’ in relation to ‘passingoff’, as ‘the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom.’ While the establishment of ‘goodwill’ by the claimant is a key element in succeeding in an action for ‘passing-off’, it is important to note that the existence of that ‘goodwill’ alone, without more, does not in itself fulfil the other ingredients of the tort.

 In Reckitt and Coleman Products v. Borden,[[15]](#footnote-15) the House of Lords adopted the ‘Trinity Test’ in establishing the ingredients of ‘passing-off’, and explained same as follow:

* The claimant must establish the goodwill or reputation attached to the goods or service
* The claimant must also establish that there has been a misrepresentation by the defendant which has caused confusion to the members of the public.
* Finally, the claimant must demonstrate that he has suffered or is really likely to suffer losses by the reason of the defendant’s misrepresentation.[[16]](#footnote-16)

 It is to note that acts of infringement that could ground an action in ‘passing-off’ might relate to the misuse of trade names, trademarks or the design ‘get-up’ of the goods or business in question. For instance, in the case of Niger Chemists Limited v. Nigeria Chemists[[17]](#footnote-17), the plaintiff sold drugs as Chemists in Onitsha, Eastern Nigeria and the defendant opened shop on the same street and started the same line of business of dispensing drugs. On being sued, the court granted an injunction against the defendant on the basis that their use of the name Nigeria Chemists was intended to deceive the members of the public to believe that they had a relationship of some sort with Niger Chemists.

 It is imperative to note that in every situation, for a person to be held liable in an action for passing-off, all the enunciated ingredients of the tort must exist at the same time within the particular circumstance(s) giving rise to the alleged infringement. However, it is not necessary that the plaintiff show prove of damage, just the possibility of it happening is tangible enough.

 In the Niger Chemists Case, Palmer J, quoting Lord Cozens Hardy MR in Ewing v. Buttercup (1917) 2 Ch 1 held: ‘I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected in some way with the plaintiff or are carrying on a branch of the plaintiff’s business.

 His Lordship then concluded: ‘That is the danger which can reasonably be foreseen in the present case, namely that people will be misled into thinking that Nigeria Chemists are a branch of, or in some way connected with, Niger Chemists. It is a confusion which leads to deception. In considering whether a ‘passingoff’ infringement has occurred, the court decides subjectively on every case, making note that all the required elements are present.

The decision of the Supreme Court in Omnia v Dyktrade[[18]](#footnote-18) is not surprising. What is surprising has been the amount of time and energy already dissipated through the courts to arrive at such a decision, especially after the coming into effect of the 1999 Constitution. The 1999 Constitution effectively ended the dispute as to whether it was the Federal High Court or State High Courts that have the jurisdiction in trademarks related or ‘passing off’ issues. Section 251(1)(f) of the Constitution[[19]](#footnote-19) 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..’ Additionally, section 272[[20]](#footnote-20) of the Constitution makes it clear that the jurisdiction of State High Court is subject to the provisions of section 251…’ That is the section establishing the Federal High Court.

**THE REMEDIES FOR PASSING OFF**

* **INJUNCTION**

 The plaintiff can seek injunction to restrain the defendant from continuing to pass off his goods as if they were the plaintiffs. Injunction may be granted on certain terms, like whether the defendant is permitted to manufacture goods as long as he distinguishes it from that of the plaintiff.

* **DAMAGES**

 The plaintiff may also seek a remedy in damages for the loss which he has suffered as a result of the defendant’s activities or he may seek from the defendant an account of the profits which he has made as a result of the passing off

* **INTERVENTION OF RELEVANT REGULATORY AGENCIES**

The intervention of a relevant regulatory agency such as NAFDAC, SON, intellectual property commission and so forth can serve as a remedy of passing off.

* **ACCOUNT OF PROFIT**

The plaintiff is entitled to profit on goods wrongly sold by the infringer.

**DEFENCES TO THE TORT OF PASSING OFF**

You may encounter different defenses if you pursue a claim for passing off.

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1. {1979} AC 731 [↑](#footnote-ref-1)
2. {1865} H.L Cas. 523/538 [↑](#footnote-ref-2)
3. Trademarks Act 2004 [↑](#footnote-ref-3)
4. {1972} HC. 127 [↑](#footnote-ref-4)
5. {1961} ALL N.L.R 171 [↑](#footnote-ref-5)
6. This refers to the 1999 Constitution, which is the Supreme Law of the Federal Republic of Nigeria, hereafter refers to as the "Constitution" [↑](#footnote-ref-6)
7. Sec 1(3) cfrn 1999 [↑](#footnote-ref-7)
8. {1816} 35 ER 851 [↑](#footnote-ref-8)
9. Supra in 5 [↑](#footnote-ref-9)
10. A.O Obilade, the Nigerian Legal System (1979) 18. [↑](#footnote-ref-10)
11. The Supreme Court was established under the Supreme Court Ordinance No.11 of 1863. [↑](#footnote-ref-11)
12. See Margaret Brazier et la (eds) Clerk and Lindsell on Torts (15th Ed 1981) [↑](#footnote-ref-12)
13. See David Kitchen et al, (eds) Kerly’s Law of Trade Marks and Trade Names (14th Ed) 2005. [↑](#footnote-ref-13)
14. {1901) AC217, 223 et seq [↑](#footnote-ref-14)
15. (1990) 1AER 873. [↑](#footnote-ref-15)
16. See Kerly’s on Trademarks above at 431 [↑](#footnote-ref-16)
17. (1961) ANLR 180. [↑](#footnote-ref-17)
18. {1995} SC 57. [↑](#footnote-ref-18)
19. {1999} CFRN. [↑](#footnote-ref-19)
20. {1999} CFRN. [↑](#footnote-ref-20)