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**ABSTRACT:**

This paper goes in detail to answer the question which burdens on the relevance of Passing Off as a form of Economic Tort in the 21st Century Nigeria. Passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff. Further, analysis will be carried out in the subsequent pages.

**INTRODUCTION:**

The tort of Passing Off has developed into a powerful branch of intellectual property law, expanding to be of application far from its original use in the nineteenth century. In the ever growing and competitive business environment of the present day 21st Century, it now matters more than ever to traders that the can protect various aspects of their intellectual property rights. In the past thirty years, passing off has gone through a process of growth, extending its traditional boundaries, and being successfully applied by traders to provide remedies in many novel situations.

**WHAT IS PASSING OFF?**

Like every legal terminology, there is no concise meaning of Passing Off due to the fact that Torts law and Law in its entirety is kadeiscopic in nature. That brings us to the meaning of Passing Off, different legal scholars and legal entities in their various ways have posited the meaning of Passing Off which we shall take into cognizance.

**Ese Malemi,** in his book **Law of Torts:**

*“Passing off is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one’s products, or the carrying on of one’s business as if it were that of another whose reputation and goodwill one thereby enjoys….”*

**MYADVO,** an online legal platform in one of their paper on Passing off, states thus:

*“ Passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff”*

**THE PURPOSE OF THE LAW OF PASSING OFF:**

The tort of passing off is common in a competitive business community or economy. The tort of passing off is designed to protect a person’s business interest from the unfair trade practices and sharp practices of other persons. Its object is to protect the reputation and goodwill a business has built up for itself**. SIR JOHN SALMOND** in his book **Law of Tort** stated the reason for the tort of passing off thus:

“The law… is designed to protect traders against… unfair competition which consists in acquiring for oneself, by means of false, or misleading devices, the benefit of the reputation already achieved by rival traders”

In the words of **LORD KINGSDOWN** in **Leather Cloth Co v American Leather Cloth Co:**

“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 law of passing off, the basis of the legal action is that passing off by the defendant off his goods and or business as that of the plaintiff, is injuring the right of property, product, services and business of the plaintiff.

**WHEN DOES ACTON FOR PASSING OFF LIE?**

[[1]](#footnote-2)The House of Lords in the case of **Warnink BV v Townsend & Sons,** **LORD DIPLOCK** stated the five characteristics or guidelines, for determining when an action lies in passing off. These five characteristics are whether there is:

1. A Misrepresentation

2. Made by a defendant in the course of trade

3. To prospective customers

4. Which is calculated to injure the business and goodwill of another person; and

5. Which causes damage to that persons business and goodwill or will likely to do so.

**PASSING OFF IS ACTIONABLE PER SE:**

The tort of passing off is actionable per se on its occurrence. A plaintiff does not have to prove damages in order to succeed. The right of action lies even though no damage has been suffered nor proven. The probability of damage occurring is enough for a plaintiff to succeed. Therefore, once passing off has been committed, the plaintiff has right to sue and it entitled to remedy.

**COMMON FORMS OF PASSING OFF:**

The tort of passing off is committed in various forms, as business resort to different strategies in imitating the products and businesses of their rivals. The common forms of passing off which are easily noticed in the market are:

1. **Trading with a name resembling that of the plaintiff**: In this form of passing off, the defendant is usually engaged in the same type of business as the plaintiff, and he uses the plaintiff’s name or a name closely resembling that of the plaintiff, as a result the public is confused and misled into thinking that they are one and the same business, or that one is an extension of the other. The innocence or bona fide honesty of the defendant in his choice of the name, without notice is a defense. In ***Hendrick V Montague***: The plaintiff who were insurers trading as “Universal Life Assurance Society” obtained an injunction to restrain the defendants which was subsequently incorporated as insurers from trading as “Universe Life Assurance Association”. In this case **James LJ** said:

*“Now is there such a similarity between those names that the one is the ordinary course of human affairs likely to be confounded with**the other? Are persons who have heard of the Universal likely to be misled into going to the Universe? I should think, speaking for myself very likely indeed. Many people do not care to bear in mind exactly, the very letters of everything they have heard of”*

2**. Marketing a product as that of the plaintiff**: The tort of passing off is committed when a defendant sells his goods off to people by stating falsely that the goods are produced by the plaintiff, whereas they are not. The defendant by advertising and selling his goods by falsely stating that they are manufactured by the plaintiff, directly but wrongfully benefits from the goodwill and reputation already built by the plaintiff business. ***Lord Byron v Johnston***:[[2]](#footnote-3) The defendant publishers were restrained from advertising and selling a book of poems with the name of Lord Byron written on the cover and title page, when in fact the famous poet was not its author.

3. **Marketing goods with a name resembling that of the plaintiff’s goods**: It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendants goods are mistaken as made by the plaintiff and are bought as the product of the plaintiff. A trade name as defined by **SIR JOHN SALMOND** is one:

“under which goods are sold, or made by a certain person and which by established usage, has become known to the public as indicating that those goods are the goods of that person”5

The protection of trade name does not only protect products, but also protects the trade name of all kinds of businesses, professionals, and persons who have goods, or services to offer, such as artists, writers, and so forth.

**ELEMENTS OF PASSING OFF**:

To succeed in a claim for passing off, all that a plaintiff has to prove is that the activity of the defendant is “calculated” to deceive the public. In other words, that the defendant’s activity is likely to deceive the public. 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 defendants, or the act alleged to be passing is likely to deceive the public, his claim succeeds, and he may obtain nominal damages, and an order of injunction. The plaintiff does not have to prove intention to deceive on the part of the defendant. In the words of **PALMER J** in the case of **Niger Chemists Ltd V Nigeria Chemists:**

“*It is not necessary to prove, that there was any intention to deceive: this has been held in a long series of cases, and is not disputed”*

In view of the face that liability is strict in the tort of passing off, liability may therefore attach without the necessity of fault in the defendant. Thus, a defendant maybe liable for passing off, even though his conduct is totally honest; or innocent because he never intended to deceive; and also it is not necessary to establish fraud on the part of the defendant. [[3]](#footnote-4)

**REMEDIES FOR PASSING OFF:**

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

1. Damages

2. Account

3. Injunction, and

4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

**DEFENCES FOR PASSING OFF:**

In a claim for the tort of passing off, a defendant may plead a number of defenses by saying that the passing off complained of is a:

1. Functional design or package

2. The mere descriptive name of the product

3. Consent, such as license given to him by the plaintiff to produce and or market the product;

4. Innocent passing off, and so forth.

Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off, but he will most likely get off with a nominal or a reduced award of damages. This is so because the plea, in the absence of aggravating circumstances has a mitigating effect on the amount of damages that may be awarded by the court.

With the above given brief discussion of Passing Off, it will lead this writer into discussing the most crucial bedrock for this discussion, which is the relevance of passing off as a form of economic tort in the 21st century Nigeria:

**RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY NIGERIA:**

Economic torts are torts which inflict mainly economic losses. In other words economic torts are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life.

One cannot over look the relevance of passing off as a form of economic tort in 21st century Nigeria. This tort of passing off have greatly affected the commercial sector of the Nigerian society as a whole. The false representation made on one’s business has led to the loss of goodwill and reputation of some companies.

To protect a plaintiff’s property rights, this is a relevance to the 21st century Nigeria which cannot be over emphasized. Economic tort which is interwoven with Passing Off goes a long way to ensure that the property rights of the plaintiff are not tampered with. If there is no right in place the defendant will have all full access to trample on the rights of the plaintiff thereby causing the plaintiff financial loss.

It is relevant because without it, a lot of people would be stealing other people’s ideas and getting money from it. This brings us to the concept of copyrights and trademarks which are birthed from the tort of passing off as a whole. Ideas are birthed by a person in order to make use of it, if there is no protection of these ideas then all is lost. Trademarks and Copyrights are vital necessaries for a business to prevent the stealing of one’s idea, goodwill, and reputation. Nigeria as a whole is a country which is saddled with the issue of piracy, majors approaches have been put in place in order to address this issue, and thus the relevance of passing off as a form of economic tort in 21st century Nigeria.

**CONCLUSION:**

This writer is of the view that legislations through which the tort of Passing Off can be mitigated should be enacted. Nigeria as a nation has had its own fair share of passing off and we’ve had decisions to such effect, passing off cannot be separated from passing off.

Economic tort has affected Nigerian in a lot of ways. Financial losses and injury have been inflicted on the basis of this tort. Passing off is in consonance with the fundamental maxim of “ubi jus ubi remediu”- when there is wrong, there is remedy. Economic tort and passing off are interwoven.

Nigeria as a nation through passing off has enacted the Trademark act which is spelt out in the **Laws of the Federation 2004,** intellectual property has been birthed in Nigeria to address these ever growing challenges and has addressed the issue of passing off.

The 21st century Nigeria has seen the effects of the tort of Passing Off, in this sense the level of false representation has been mitigated.

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1. 1. Salmond op cit.

   2. (1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435

   3. (1842) 49 ER 749 at 725. [↑](#footnote-ref-2)
2. 4. (1816) 35 ER 851

   5. Salmond op cit para 401 [↑](#footnote-ref-3)
3. 6. Niger Chemists V Nigerian Chemists, Supra

   7. Niger Chemist v Nigerian Chemists Ltd, Supra

   8. Cadbury Schweppes Ltd v Pub Squash Co Ltd (1981) 1 ALL ER 213 PC. [↑](#footnote-ref-4)