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ASSIGNMENT

***Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria.***

First of all, economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life and passing off is a form of it.

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well known brand is a wrong and is known as the tort of “passing off”.

 As held in the famous case of N. R. Dongre vs. Whirlpool Corporation[[1]](#footnote-1)

*“A man may not sell his own goods under the pretence that they are the goods of another man.”*

The law aims to protect traders from this form of unfair competition. Legally, classifying acts under this tort aims to protect the right of property that exists in 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. It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favourable location, reputation of the brand in the community, or the quality of its employer and employees.

The Erven Warnink BV v J Townend & Sons (Hull) Ltd[[2]](#footnote-2) (Dutch Advocaat) case was the first case where the basic elements of the wrong of passing off were put forth by Lord Fraser. They were as follows;

A 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 (in the sense that this is a reasonably foreseeable consequence) and which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.

Later in Reckitt & Colman Ltd v Borden Inc[[3]](#footnote-3) also known as the Jif Lemon case, Lord Oliver reduced these principles to three basic features (now known as the classical trinity) which included

* Reputation
* Misrepresentation
* Damage to goodwill

To sum it up, the tort of passing off covers those cases where one trader falsely misrepresents his goods as those of another trader/brand, which has a good reputation/goodwill in the market and thus leads to damaging his goodwill.

In a passing off action, 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. Remedies could include injunction or damages or both. Damage or likelihood of damage form the core all passing off actions.

An example of passing off can be seen in the case of Calvin Klein Inc. USA v. International Apparel Syndicate[[4]](#footnote-4). In this case, the plaintiff, an internationally reputed US company with a tremendous goodwill for designer clothing brought an action for passing off and trademark infringement against International Apparel Syndicate, an Indian company to stop them from using the trade name Calvin Klein and the mark CK.

The defendants’ contention that the plaintiffs could not bring an action because they did not sell their goods in India was disallowed. The court said that the marks were used with an intention to deceive the customers and to trade riding on the international reputation of Calvin Klein.

Another example of passing off can be seen in the case of Honda Motors Co. Ltd. v. Mr. Charanjit Singh and Ors[[5]](#footnote-5), where the defendants manufactured pressure cookers under the name “Honda”, in India. Their application for registration had already been rejected once before and they had applied for registration again, while continuing to sell their products.

In the judgment, it was held that with an established business and sale of quality products, the name “Honda” had become associated with the plaintiffs’ reputation and its goods. It was said that it is very easy for the public to associate the plaintiffs with any product that carries the name of “Honda”.

Further, the honourable judges also held that by using the name “Honda” the defendants were creating confusion in the consumers’ minds, which was indirectly affecting the business of the plaintiffs in an adverse way. An injunction was ordered to stop the defendants from using the name “Honda”.

From the above cases, it can be seen that the tort of passing off which is a form of economic tort is relevant for businesses that their trademarks have been stolen and it’s being used without permission. The tort of passing off is relevant in Nigeria as it is in other countries especially in the 21st century where things have changed and become advanced. Nowadays, there are many businesses in Nigeria and many people come up with their various ideas and trademarks to succeed in the business world but there are others that steal trademarks or business names from others. There are even some who assume the trademarks of businesses abroad in Nigeria to make people believe they are the actual business.

This tort is relevant because if it is not enforced or checked it will bring about unfair competition in the business world. This is a challenge in Nigeria because there are so many businesses that infringe this tort and go scot-free. It can be seen in the markets especially with products of businesses whose trademarks are abroad and also with businesses that try to lure customers away from the original product to the fake product mainly because it comes cheap compared to the original product.

It is also an issue for large companies to find all these small time businesses (in the market especially) that pass off their products or trademarks because there are so many and even though they find one or two, there may be more around they wouldn’t be able to locate. Moreover if they are lucky to find one or two of these companies passing off, there should be efficient ways to deal with the issue.

The most common form of passing off you can see in Nigeria is trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same. This can be seen in the case of Hendriks v. Montagu[[6]](#footnote-6) where, the plaintiffs, the “Universal Life Assurance Society” brought an action against the defendants to stop them from carrying on business with the trade name “Universal Life Assurance Association”. The injunction sought was granted and it was mentioned that since the names were too similar for differentiation, the tort of passing off was indeed committed.

This principle was applied in the case of Niger Chemists Ltd v. Nigeria Chemists[[7]](#footnote-7). In this case the plaintiffs had carried on business as chemists and druggists for several years, and had several branches in Onitsha and other towns in what was then eastern Nigeria. The defendants later founded a firm carrying on exactly the same type of business in Onitsha under the name “Nigeria Chemists.” The plaintiffs contended that the defendants’ use of 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 use of the name “Nigeria Chemists” was calculated to deceive persons who know of and intend to deal with Niger Chemists.

This was similar in the case of Ogunlede v. Babayemi[[8]](#footnote-8) where the plaintiffs carried on business as civil engineering contractors and plumbers under the name “Mercury Builders,” Taylor C.J. granted an injunction restraining the defendant from conducting a similar business under the name “Mercury Builders (Nigeria) Ltd.” since “there can be no doubt at all that the name of the defendant company is calculated to deceive due to its similarity with the name of the plaintiff association.”

**Conclusion**

In a country where a considerable percentage of the population lives in rural areas, it is very easy to pass off goods. Thousands of instances of passing off can be found out throughout Nigeria. Right from clothes to shoes to beverages to phones to laptops, you name it, you find it. The Trademarks Act, 1990 has provided protection against passing off and situation will surely improve if monitored. Passing off has come a long way through the common law system and now has some well-defined principles and ambit. Perhaps the time is ripe to bring in legislation and enact a statute concerning passing off.

**Bibliography**

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1. (1996) 5 SCC 714 [↑](#footnote-ref-1)
2. [1979] AC 731 [↑](#footnote-ref-2)
3. [1990] 1 All E.R. 873 [↑](#footnote-ref-3)
4. [1996] PTC (16) [↑](#footnote-ref-4)
5. 2003 (26) PTC 1 Del [↑](#footnote-ref-5)
6. (1881) 50 L.J. Ch. 456 [↑](#footnote-ref-6)
7. [1961] All N.L.R. 171 [↑](#footnote-ref-7)
8. (1971) 1 U.I L.R 417 [↑](#footnote-ref-8)