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What are economic torts?

Economic Torts are tortious interference actions designed to protect trade or business. Economic torts offer protection for a person’s trade or business from acts which the law consider to be unacceptable. The tort seeks to protect a person’s trade from unlawful interference. Although it is a fundamental element of business that businesses compete with one another 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 include:

* Passing off
* Breach of intellectual property rights such as breach of copyright, patents, trademarks and other merchandise marks
* Injurious falsehood/ malicious falsehood
* Interference with contracts
* Conspiracy to interfere, civil conspiracy

These groups pf tort generally protect a person’s intangible, financial and economic interests but for the purpose of the question, emphasis will be laid on the tort of passing off.

**Passing off**

The tort of passing off is a common law tort that prevents one person from misrepresenting his goods or services as that of another. The tort is committed where the plaintiff’s goods are passed off by the defendant as being his own (that is, the defendant’s) goods. The person whose goods may have been passed off in this manner may have an action in tort in respect of any losses that he has incurred. In the words of Lord Kingsdown,[[1]](#footnote-1) “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.

Elements of the tort of passing off

For a claim of passing off to be successful, the plaintiff must show:

* That there was a misrepresentation
* That the misrepresentation was made by a trader in the course of his trade, usually the same trade.
* That the misrepresentation was made to prospective customers or ultimate consumers of goods or services supplied by the plaintiff
* That it was calculated to injure the goodwill or business of the plaintiff
* Which causes or is likely to cause damage to the business or goodwill of the plaintiff

Passing off takes different forms, the most common which are:

1. Marketing a product as that of the plaintiff
2. Trading under a name so closely resembling that of the plaintiff
3. Marketing goods with the trademark of the plaintiff or with any deceptive imitation of such mark
4. Imitating the appearance of the plaintiff’s goods
5. Marketing goods under a tradename already appropriated.
6. MARKETING THE PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell goods with a direct statement that the goods are manufactured by the plaintiff, when in fact they are not. In **Lord Byron v. Johnson[[2]](#footnote-2)** the defendant who was a publisher, advertised some poems which he had published as being written by Lord Byron when, in fact, they were written by someone else. It was held that the defendant had committed the tort of passing off. Thus, it would be passing off for X the manufacturer of tyres to advertise his tyres as manufactured by ‘Dunlop” since this would be an obvious attempt to profit from the goodwill and reputation of the rival business.

1. TRADING UNDER A NAME SO CLOSELY RESEMBLING THAT OF THE PLAINTIFF

This is where the defendant produces or markets 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 products are mistaken as made by the plaintiff and are bought as the product of the plaintiff. A well-known example of this type of passing off is **Hendriks v. Montagu[[3]](#footnote-3)** where the Universal Life Assurance Society were granted an injunction restraining the defendants company, which was incorporated subsequently, from carrying on business under the name “*Universe Life Assurance Association*” where it was held that where there is a similarity between the names such that in an ordinary course of human affairs the names will be confused for each other then it may amount to passing off. This principal was used in the case of **Niger Chemist Ltd. V Nigeria Chemists[[4]](#footnote-4)** where the plaintiff who had different branches and had acquired goodwill sought an injunction to restrain the defendant from carrying on with business with a name that was so similar to theirs, which constituted passing off. Their claim was successful.

1. MARKETING GOODS WITH THE TRADEMARK OF THE PLAINTIFF OR WITH ANY DECEPTIVE IMITATION OF SUCH MARK

A trademark is any design, picture, mark, name or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. [[5]](#footnote-5)It is actionable 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 patronize his product thinking that they are the product of the plaintiff.

1. IMITATING THE APPEARANCE OF THE PLAINTIFF’S GOODS

It is passing off for the defendant to do anything, which makes his product appear like the plaintiff’s product. This passing off includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public e.g. Labels, packaging or design of the product. In **De Facto Works Ltd, v. Odumotun Trading Co. Ltd[[6]](#footnote-6)**, the defendants were held liable in passing off where they sold bread wrapped in yellow and brown paper with their name written in brown in scroll letters which was an imitation of the plaintiff’s bread with the name De Facto.

1. MARKETING GOODS UNDER A TRADE NAME ALREADY APPROPRIATED

A trade name 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 goods of that person. Thus for example, where the plaintiff bandleader broadcast under a radio name “Dr. Crock and his Crackpots” the defendant was restrained by an injunction from putting another band on the product with the same name.

**Defendant’s conduct must be “calculated as likely to deceive”**

It is well settled that a defendant may be liable for passing off although his conduct was entirely honest and innocent in the sense that he had no intention to deceive. Liability is strict, and all the plaintiff needs to show is that the defendant’s activities are “calculated” that is likely to deceive the public. In **Niger Chemists Ltd. V. Nigeria Chemists[[7]](#footnote-7)** Palmer J. said that the question was whether the words are calculated to deceive, not whether they have in fact deceived.

Remedies for passing off

* Damages
* Account for profit or loss of sales
* Injunction

Defenses to passing off

* Functional design or package
* The mere descriptive name of the product e.g. bread, radio, fan etc. Consent, such as license given to him by the plaintiff to produce or market their product.
* The mark of the plaintiff is not distinctive.

 **What is the relevance of the tort of passing off in 21st century Nigeria?**

The tort of passing is a dynamic tort that seeks to accommodate new cases or situations. As the society develops with new technologies, the tort of passing off is becoming dynamic and posing new challenges. In a country like Nigeria most people or citizens are involved in some sort of business or investment or the other. Ranging from really small businesses to larger businesses. These businesses however do not have watertight legal regulation. In this kind of environment, complexities will arise with passing off.

In Nigeria today, many brands are being passed off in different forms. As those who pass of these products do so to benefit from the goodwill of the businesses or products they are passing off. This is very commonly called “*Aba products or Aba goods*” to refer to counterfeit products that have been created with the trademark or name of a well-known brand, and sold at cheaper prices. For instance, The “*Nike*” brand that is known for its tick as its trademark has been passed off a lot of times for instance with the name “*Nika*” with that same tick. Variation of the same product by different companies and marketing and advertising agencies has brought the incidence of passing off to a higher level. In the health sector of the Nigerian economy, the problem of adulterated drugs is the bane of that sector either in the estimation of individuals or the estimation of experts in the government hospitals and even experts in the medical sector

Therefore due to the watertight regulation of production of goods in Nigeria, the tort of passing off is very relevant to prevent the misrepresentation of businesses and protect a person’s trade or business from unacceptable acts which may result in financial harm of the business.

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1. Leather Cloth Co. *v* American Leather Cloth Co. (1865) 11 H.L Cas 523 at p. 538 [↑](#footnote-ref-1)
2. [1816] 35 ER 851 [↑](#footnote-ref-2)
3. [1881] 50 LJ Ch 456 [↑](#footnote-ref-3)
4. [1961] ALL NLR 171 [↑](#footnote-ref-4)
5. TMA 2004 s67(1) [↑](#footnote-ref-5)
6. [1959] LLR 33 [↑](#footnote-ref-6)
7. ibid [↑](#footnote-ref-7)