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**ASSIGNMENT TITLE: ECONOMIC TORTS**

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**QUESTION**

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

Use NALT guidelines for footnotes, you should also include a bibliography at the end.

Times New Roman Font size 12, 1.5 spacing, maximum of 5 pages.

***ABSTRACT***

*Economic torts is a broad concept in the law of torts and has become extremely relevant globally. However, this term paper would be concentrated on its importance to Nigeria. Economic torts has been subdivided into passing off, malicious falsehood, interference with contract, breach of intellectual property rights and conspiracy. Our interest in this article would be on passing off and its relevance to the 21st century Nigeria. [[1]](#footnote-1)Passing Off is an economic tort that protects one whose products and business has been falsely misrepresented as that of another person, thereby deceiving buyers to patronize that other person.*

**INTRODUCTION**

Generally speaking, economic torts covers passing off, conspiracy, malicious falsehood, breach of contract etc. It deals with protecting the financial, economic and business interest of someone. Its major purpose is the protection of one’s financial interest just like contract. Economic torts is however broader than contract. It includes:

1. Passing Off: where one does anything to mislead the public into believing that the products of another person are his and thereby takes the advantage of that other person.
2. Breach of Intellectual Property Rights: a tort that covers the protection of one’s creative work. Such as breach of copyrights, patents and even trademarks.
3. Malicious Falsehood: a false statement about one’s business and products that consequently cause damage to him.
4. Interference with contracts: inducement of a contracting party to break the contract he has with someone thereby causing damage to that person.
5. Conspiracy: it is the joint effort of more than one person to intentionally cause harm to one’s business.

The importance of economic torts as an aspect of the law of torts cannot be underestimated. It is very normal for there to be competition in the free market economy, however, some people would want to use it to their advantage and unconsciously cause harm to others. This is what economic torts is trying to restrict.

We would now take a broad look into Passing Off as a form of economic tort and juxtapose its importance.

**ECONOMIC TORTS: PASSING OFF**

DICTUM

“….the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”

Per **LORD KINGSDOWN in [[2]](#footnote-2)LEATHER CLOTH CO. v. AMERICAN LEATHER CLOTH CO.**

[[3]](#footnote-3)**Passing Off** is the tort that covers the presentation of one’s products, services, or business as that of another person whose reputation and goodwill one thereby enjoys. [[4]](#footnote-4)Usually passing off involves one form of misrepresentation, or the other to make the public patronize one’s goods or business. An action lies in **passing off** for damages, an account, for profit, and seizure of the products and an injunction to restrain the defendant from continuing the business in the future.

In a free market economy, there is high level of competition. People develop strategies and means to expand their business and make good name for themselves. This should however not be done in an unlawful way. The major purpose of the economic tort of passing off is to protect the goodwill and advantage of the real owner of a business. It aims at protecting the name one has already built for his business. **Passing off** protects one’s business interest.

TYPES/METHODS OF PASSING OFF

1. Marketing a product as that of the plaintiff:

This is when someone markets his product under a name that looks like that of the plaintiff thereby misleading the public into believing that his business and that of the plaintiff are the same. Example, marketing your sweet as pin-pop. This was seen in the case of **HENDRICKS v. MONTAGUE (1881) 50 LJ CH 456.**

1. Marketing a product with a name resembling that of the plaintiff’s goods:

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.

1. Marketing fake products as that of the plaintiff by using the plaintiff’s label or design:

This tort is committed when a defendant sells his goods off to people by stating falsely that they are produced by the plaintiff.

1. Marketing products with the plaintiff’s trademark or imitation:

It is passing off for a defendant to market his goods using the plaintiff’s trademark or its imitation, leading to a confusion of buyers, who then patronize his products thinking that they belong to the plaintiff. A trademark is any design, picture, mark, name or other mark affixed to goods, which identifies those goods with the manufacturer. **PERRY v. TRUEFITT[[5]](#footnote-5).**

1. Imitating the appearance of the plaintiff’s product.
2. Selling inferior or expired goods of the plaintiff as current stock
3. False advertisement by copying the plaintiff’s advertisement.

ELEMENTS

1. Misrepresentation
2. Made by a trader in the course of a trade
3. To prospective customers
4. Which is likely to injure the business of another person
5. Which actually causes damage to the business or goodwill of the person

Some of the remedies available to the plaintiff are; damages, injunction[[6]](#footnote-6), account for profit or for loss of sales. The defences to this tort includes; innocent passing off, consent and functional design to mention a few.

RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA

[[7]](#footnote-7)The tort of **passing off** is committed where the plaintiff’s goods are passed off by the defendant as being his own. **Passing off** could be classified as part of economic torts because the major purpose of passing off is the protection of one’s financial interest. The major relevance of **passing off** as an economic tort in the 21st Century Nigeria is the protection of one’s financial and business interest. All other importance and relevance surrounds this particular point. We operate a free market economy and it’s impossible for competition not to be a major factor. All businesses definitely would have a rival, this is to ensure good competition, prevent monopoly and in turn increase the level of productivity and efficiency. However, this rivals should not use another person’s benefit to their own advantage. Commentators continue to disagree on the classification of **passing off**. Some have placed it under malicious falsehood and even deceit. This simply means that passing off is very unlawful as some people have even viewed it as deceit and bearing falsehood against someone else. It is a very big issue especially in Nigeria where goods on the store are not properly labelled.

[[8]](#footnote-8)The tort of passing off is also relevant to intellectual property. It could be ranked alongside copyright, trademarks and patents. **Passing off** protects trademark. It is necessary to state that **passing off** and trademarks infringement go hand in hand. Whilst **passing off** is an action on unregistered marks that have become notoriously attributable to a person or company, trademark infringement usually involves a registered mark. The point here is that the relevance of **passing off** as an economic tort in Nigeria is its relationship with intellectual property. **Passing off** is not just important as a tort but also seeks to protect one’s intellectual right. **Passing off** is both a common law and a statutory remedy in Nigeria as it is statutorily supported by **Section 3 of the Trademarks Act[[9]](#footnote-9).** The law of passing off is of great importance to trademark and copyright protection in Nigeria.

It’s just very annoying when you buy a trusted product and then realize it is an identical brand made to look exactly like what you originally wanted. You would be disappointed on the waste of time and money and even reprimand yourself to inspect goods more carefully. The main purpose of an action for passing off is to prevent one trade from damaging the goodwill and reputation built by another. Awareness of **passing off** should be increased towards the association of passing off to bad business. This is to ensure fair competition in the market system.

Another importance wells in the fact that passing off has the capability of conferring a high level of exclusivity on a personal name even against the defendant with the same personal name. It is difficult to see how registered trademarks right could adequately cater for the protection when the depiction of the celebrity can take an infinity of different forms. This is to say that for cases involving false endorsement and things such as unauthorized images of a celebrity, a trademark may not be enforceable and the common law tort of passing off may be the only course of action. A **passing off** action in such circumstances lies in the fact that well known celebrities will have accrued a certain amount of goodwill. If these are then affiliated with another product because of unauthorized use by a trader, it may cause the public to assume the celebrity has given consent. The damage caused to the celebrity is financial loss. In today’s commercial market such as endorsement deals can be particularly lucrative for celebrities. It is therefore vital that they are afforded some sort of protection. In essence, the tort of passing off applies to cases of false endorsement. Manufacturers and retailers recognize the realities of the market place when they pay for known personalities to endorse the goods. The law of **passing off** should do likewise.

Another area were the law of **passing off** will remain the only form of protection is for themes, for example in advertising, which are not capable of specific representation. Conclusively, passing off remains a vital form of protection of intellectual property despite the introduction of a registered system of trademark protection.

**CONCLUSION**

In a country where a considerable percentage of the people live in rural areas, it is very easy to pass of goods. Competition is inevitable in a free market economy. However, this tort looks forward to ensuring unfair competition in the market. Thousands of instances of passing off can be found. Unfortunately, a legal solution has invaded most of these. With the Trademarks Act, 1999, providing protection against passing off, situation has improved. In Nigeria, more people should be sensitized especially those in the rural areas. They should be educated on the high competition rate and how they can be protected from unfair competition. They should also know the importance of a registered trademark, however one with an unregistered trademark can still bring an action in passing off. Perhaps, the time is ripe to bring in legislation and enact a statute concerning passing off.

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1. Ese Malemi, Law of Torts (Princeton Publishing Company 2017) [↑](#footnote-ref-1)
2. Leather Cloth Co. v. American Leather Cloth Co. (1865) 11 H.L Cas. 523/538 [↑](#footnote-ref-2)
3. Ese Malemi, Law of Torts (Princeton publishing Company 2017) [↑](#footnote-ref-3)
4. Niger Chemists Ltd v Nigeria Chemists (1961) All NLR 171 [↑](#footnote-ref-4)
5. (1842) 49 ER 749 [↑](#footnote-ref-5)
6. John Walker & Sons Ltd v. Henry Ost & Co. Ltd (1970) 2 106 [↑](#footnote-ref-6)
7. S Olarinde and C CHIGBO and N Ikpeze, The Modern Law of Torts (College of Law, ABUAD Publishers 2018) [↑](#footnote-ref-7)
8. T & A Legal, An Appraisal of Passing Off Actions Under Nigerian Law (2018) *Mondaq Connecting Knowledge and People* [↑](#footnote-ref-8)
9. TMA 1999 [↑](#footnote-ref-9)