

COLLEGE OF LAW

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**QUESTION:**

Discuss the relevance of passing off as a form of Economic Tort in the 21st century Nigeria

**Introduction**

A fundamental element of the business environment is the competition amongst the markets. To this extent, the gain/profit of one business is likely to be at the detriment or disadvantage of another. Economic torts in its essence protects some of a person’s intangible interests—his business interests—from unlawful interference. Economic torts may arise from actions which may have caused loss in the plaintiff’s commercial transactions. Economic torts essentially arise from some form of economic loss. In the case of *Keeble v. Hickeringill[[1]](#footnote-1)* **Holt, CJ**, made a broad statement on the question of economic interest when he stated thus: “He that hinders another in his trade or livelihood is liable to an action for so hindering him.” The purpose of 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, that, civil conspiracy and so forth. For the purpose of this paper, the writer will be discussing distinctly, the economic tort of passing off and its relevance in modern day Nigeria.

**Definition of Passing off**

Passing off occurs when a person intentionally or unintentionally passes off their goods or services as those belonging to another party. This act of misrepresentation often damages the goodwill of the other party or his business, resulting in financial or reputational damage. The essence to the conception of passing off is that the goods are in effect telling a falsehood about themselves, are saying something about themselves which is calculated to mislead. The foundation of all liability in the tort of passing off is deceit and misrepresentation. Unlike the closely related tort of injurious falsehood, however, under the tort of passing off it is required that the misrepresentation be a relevant one. In respect of this tort, it is ideal to say that it is part of a much wider canvas of legal remedies controlling unfair competitive practices[[2]](#footnote-2) In the case of *Perry v. Truefitt[[3]](#footnote-3)* **Lord Langdale,** in explaining the tort of passing off stated that: “A man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end” Passing off essentially protects the goodwill of a trader from misrepresentation. It protects traders from the unfair form of competition that stems from misleading the market to claiming benefits for oneself on the reputation of another trader. In the famous case of *N. R. Dongre v. Whirlpool Corporation[[4]](#footnote-4)* it was held that a man may not sell his own goods under the pretence that they are the goods of another man.

This tort aims to protect the right of property that exists in goodwill. Goodwill can be defined essentially as the part of business value over and above the value of identifiable business assets. 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 value of goodwill of a brand can be calculated by a number of methods, like subtracting the value of all tangible assets from the total value to establish the value of the intangible assets. Goodwill can be classified into two zones, viz. institutional goodwill and professional practice goodwill. While institutional goodwill associates itself with business houses, their market position, professional practice goodwill associates itself with professional practices like law, medicine, architecture, engineering and many others.[[5]](#footnote-5)

**Forms of Passing off**

The most common form of passing off are as follows:

1. **Trading with a name resembling that of the plaintiff.**

This is where the defendant is engaged in the same type of business as the plaintiff and uses a name bearing close resemblance to that of the plaintiff in order to mislead the public into believing that his product/business and that of the plaintiff are the same. In *Niger Chemists ltd v. Nigeria Chemist[[6]](#footnote-6)* the court held that; “it is a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger Chemist’ and the other ‘Nigeria Chemists,’ there must be a grave risk of confusion and deception.” A similar decision was reached in Hendricks v. Montague[[7]](#footnote-7) and Ogunlende v. Babayemi[[8]](#footnote-8)

1. **Marketing a fake product as that of the plaintiff by using the plaintiff’s label.**

This is where the defendant sells his goods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not. In the case of Byron v. Johnston[[9]](#footnote-9) was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

1. **Marketing products with the plaintiff trademark or its imitation.**

This occurs where the defendant markets his goods using the plaintiff’s trademark or an imitation of it. Thus leading to a confusion of the buyers, who then purchase his product thinking that they are the product of the plaintiff. A trade mark is any design, picture, mark, name or other arrangement fixed to goods in order to identify them as belonging to the manufacturer or seller. Trademarks are usually registered and protected under the ***Merchandise Marks Act 2004***. In *Perry v. Truefitt[[10]](#footnote-10)* the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of ‘Medicated Mexican Balm’ or other similar designations.[[11]](#footnote-11)

1. **Imitating the appearance of the plaintiff’s product.**

This is where defendant tries to make his product appear like that of the plaintiff. This includes copying the likeness or appearance of the plaintiff’s product, in a manner so as to confuse the public into patronizing his product believing it to be that of the plaintiff e.g. general appearance, package, label, or design of the product. In *De facto Works Ltd v. Odumotun Trading Co Ltd,****[[12]](#footnote-12)***  because of the semblance of the defendant’s product to that of the plaintiff, the court held that the defendant should cease production in Lagos unless he was able to distinguish his product from that of the plaintiff, regardless of the fact that they did not have similar names. This can also be done through advertisements with the same purpose.[[13]](#footnote-13)

1. **Selling inferior or expired goods of the plaintiff as current stock.**

This is where a defendant sells inferior or expired goods/products of the plaintiff as if they were a current stock, where such products have been discarded by the plaintiff.[[14]](#footnote-14) It should be noted however that where second hand or inferior goods are sold without the misrepresentation that they are new, there will be no action under passing off.

1. **False advertisement by copying the plaintiff’s advertisement.**[[15]](#footnote-15)

**Elements of Passing off**

In order to succeed under a claim for passing off, the plaintiff must be able to prove that;

* There was fraud by the defendant
* The public is likely to be confused
* There was a likelihood of deception

**Remedies**

The remedies for the tort of passing off include; Damages, Account for profit or loss of sales, An Injunction[[16]](#footnote-16) or an Intervention by the relevant regulatory agencies (NAFDAC, SON, etc.)

**Defences**

Under a claim for passing off, a defendant may plead a number of defences by saying that the passing off complained of is a; Functional design or package or the mere descriptive name of the product or was consented or was Innocent passing off[[17]](#footnote-17)

**Relevance of Passing off as an Economic Tort in modern day Nigeria**

The concept of passing off is not at all new to Nigeria. In fact it is a wide spread phenomenon deeply rooted in the Nigerian market sector. Let’s take this scenario for example – where A, hoping to buy a birthday present for his son, goes to Balogun market with the intention of buying a pair of Nike sneakers which his son has always wanted. On arriving at the store, A, who only has little knowledge about the brand picks up and buys a pair of “Nika” sneakers instead. It is not until he gets home that he is made aware that the both brands are not the same. Such situations are not only largely disappointing to customers but can also be harmful, especially where the products are to be consumed or used externally, for instance, Creams, makeup, oils, etc. Unfortunately, such scenarios are so common in Nigeria, they are almost normalized. Counterfeit and fake products are labeled ‘second-hand’ or ‘aba’ and are sometimes even promoted as being entrepreneurial.

The purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. To this extent it is imperial that there be in place a legal framework guiding such acts. Especially in a nation like Nigeria where the phenomenon of passing off is rampant and largely unchecked.

**Conclusion/Recommendation.**

Although the tort of Passing off is not a criminal offence, a victim of Passing off may make a report to the person/company manufacturing the product one intended to purchase to make them aware that another person/company is reproducing a similar product and passing it off as theirs. The victim may also go further to report the misrepresentation by the manufacturers of counterfeit brand to the Consumer Protection Council ("CPC") and seek compensation as a dissatisfied consumer. A passing off claim as well as a case for trade mark infringement could be sustained concurrently and claim for trade mark infringement could fail but a passing off claim succeeds. Businesses, medium and small scale should also be enlightened to acquire trademarks for their products in order to offer an even greater source protection to them. Strict legal frameworks should also be put in place in order to protect manufacturers/traders from this tort.

**Bibliography.**

* Ese Malemi (2008), *Law of Tort*, Ikeja, Lagos: Princeton Publishing Co.
* Kodilinye and Aluko (2005), *The Nigerian Law of Torts*, Revised Edition: Spectrum.
* Winfield & Jolowicz on Torts (2006), 17th ed. London: Sweet & Maxwell.
* <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php> Last accessed 29/04/2020

1. [1706] 103 Eng. Rep. KB [↑](#footnote-ref-1)
2. Winifield & Jolowicz on Torts (2006): 17th ed. [London: Sweet & Maxwell] p. 535. [↑](#footnote-ref-2)
3. [1842] 49 ER 749 at 725. [↑](#footnote-ref-3)
4. [1996] 2 ARBLR 488 SC [↑](#footnote-ref-4)
5. <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php>. [↑](#footnote-ref-5)
6. [1961 ALL NLR 180 at 182 [↑](#footnote-ref-6)
7. [1881] 50 LJ Ch 456 [↑](#footnote-ref-7)
8. [1971] 1 UILR 417 [↑](#footnote-ref-8)
9. [1816] 35 ER 851 [↑](#footnote-ref-9)
10. [1842] 49 ET 749 [↑](#footnote-ref-10)
11. See also *Reckitt & Colman Ltd v. Borden* [1990] I WLR 491 HL. [↑](#footnote-ref-11)
12. [1959] LLR 33 [↑](#footnote-ref-12)
13. This principle was shown in *Cadbury Schweppes pty Ltd v. Pub Squash Co. pty Ltd* [1981] I ALL ER 213 PC. [↑](#footnote-ref-13)
14. *Wilts Ltd v. Thomas Robinson Sons & Co Ltd* [1958] RPC 94 CA [↑](#footnote-ref-14)
15. *Cadbury Schweppes pty Ltd v. Pub Squash Co. pty Ltd SUPRA* [↑](#footnote-ref-15)
16. *John Walker & Son Ltd v. Henry Ost & Co. Ltd* [1970] 2 ALL ER 106. [↑](#footnote-ref-16)
17. This defence will however only affect the amount of damages to be awarded [↑](#footnote-ref-17)