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Discuss the tort of passing off as a form of Economic Torts in the 21st century Nigeria

***ABSTRACT***

*Passing off is a type of economic tort that seeks to protect businesses from any unlawful activity that includes misrepresentation that may lead to financial injury. The aim of this paper is to examine the tort of passing off, the requirements a claimant will have to establish in court in order to be successful in court, the forms in which passing off may occur and also its importance in contemporary Nigeria. Material for this paper was derived from case laws, judicial authorities, various textbooks and articles.*

**INTRODUCTION**

Economic tort is the name given to the group of torts that regulate economic activity. It provides protection for a person’s business from unlawful acts which may lead to financial injury. This type of tort protects business interests and covers unlawful interference with a person’s business. Types of economic tort include:

1. Passing off
2. Conspiracy
3. Malicious falsehood
4. Unlawful interference with contracts
5. Breach of Intellectual property rights

This writer will proceed to discuss only passing off as a form of economic tort

**PASSING OFF**

Passing off as an action rose in the 19th century in common law and “depended upon the simple principle that a person is not to sell his goods or his services under the pretence that they are those of another[[1]](#footnote-2). In Nigeria, an action for passing off forms part of the several aspects of the Common Law and the doctrines of Equity that were received fron England into the colony of Lagos[[2]](#footnote-3)

Passing off is a type of economic torts. It is committed when a competitor in a business negatively affects another’s business by marketing the plaintiff’s business as his own and by doing so, misleading the public to believe the business or products belong to him, the defendant. The tort of passing off protects an individual any unlawful act which may infringe on his right to own and engage in any business he wishes to, it protects the names of business, the names of products, trademarks, patents etc.

The **fundamental elements/ingredients** for passing off given by the House of Lords in ***RECKITT AND COLEMAN PRODUCTS v BORDEN[[3]](#footnote-4)*** is that:

1. The claimant must establish the goodwill or reputation attached to his goods or services.
2. The claimant must prove that the defendant made a misrepresentation to the public leading or likely leading to the belief that the good were offered by him.
3. The claimant must also show that he has suffered a loss due to that misrepresentation.

The House of Lords developed the tort of passing off and extended it in ***ERVEN WARNICK v TOWNEND & SONS[[4]](#footnote-5)*** and included that elements of passing off are:

1. Misrepresentation
2. Made by a person in the course of trade
3. To prospective customers of his or ultimate consumers of goods or services supplied by him
4. Which is calculated to injure the business or goodwill of another trader
5. Which causes actual damage to a business or to the goodwill of the trader by whom the action is brought.[[5]](#footnote-6)

The claimant in an action for malicious prosecution will have to prove the elements above to be successful.

**COMMON FORMS IN WHICH PASSING OFF MAY OCCUR**

1. Trading with a name resembling that of the plaintiff
2. Marketing a product as that of the plaintiff
3. Imitating the appearance or the “get up”[[6]](#footnote-7) of the plaintiff’s goods
4. Selling inferior or expired goods of the plaintiff as current stock

**Trading with a name resembling that of the Plaintiff**

Where the defendant trades with a name that bears a resemblance to the name of the plaintiff’s product so closely that it is likely to mislead the public into believing that the defendants business and the plaintiff’s business are the same. In ***NIGER CHEMISTS LIMITED v NIGERIA CHEMISTS[[7]](#footnote-8),*** in this case the plaintiff was well known and had a reputation as ‘Niger Chemists’ and had carried on business with that name, the defendants, his partners founded a firm with the same business in the same state under the name ‘Nigeria Chemists’ and their business was on the same street as the plaintiff and both companies were registered. The plaintiff sued and the court granted an injunction againt the defendant on grounds that the name they used was intended to deceive the public. “it seems to me as 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 Chemists’ and the other ‘Nigeria Chemists’, there must be a grave risk of confusion and deception”[[8]](#footnote-9). Similarly, in ***TREBOR NIGERIA LIMITED v ASSOCIATED INDUSTRIES LIMITED[[9]](#footnote-10)*** the plaintiff brought an action against the defendant claiming that the wrappers the defendants used was closely associated with that of the plaintiff and was passing off, the defendants pointed out dissimilarities in the two products but the court held the defendants liable for passing off.

**Marketing a product as that of the plaintiff**

Where the defendant advertises or sells his products as that of the plaintiff, it is passing off, for example, selling your toothpaste as the popular toothpaste “Close Up”. If the defendant pretends that the product is manufactured by him when they are not, he has committed passing off.

**Imitating the appearance or the “get up” of the plaintiff’s goods**

This is quite common in Nigeria and all over the world, it is the most common form of passing off. This form of passing off occurs where the defendant makes his product appear like that of the plaintiff. It is not passing off if the shape of the product is generic but if the shape of the product is significant to the plaintiff’s brand, it is passing off if the defendant imitates it. In ***DE FACTO WORKS LTD v ODUMOTUN TRADING CO LTD. [[10]](#footnote-11)*** the plaintiff were bakers and distributors of wrapped bread and the defendants were also in the same business. The plaintiff’s wrapper was yellow and chocolate coloured wrapper and the defendant changed to a chocolate wrapper with “Odus” boldly written on it similar to that of the plaintiff, the plaintiff sought an injunction restraining the defendant’s for passing off their goods.

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

If the defendant trades goods of the plaintiff which has expired or is unfit for consumption to other people it is considered passing off but it is not passing off when old products or second hand goods are sold off as such without pretending that they are new ones.

**Relevance of the tort of passing off in 21st century Nigeria**

Passing off in Nigeria is a tort actionable under unfair competition and it is also trademark infringement. Passing off is important as it gives the owner the exclusive right and the power to prevent other people from exploiting their products without their consent and permission. In Nigeria, only owners of registered trademarks can sue for infringement[[11]](#footnote-12)but owners of products that have not registered their trademark can still sue for passing off. The Federal High Court is the court in Nigeria that has competent jurisdiction to hear all cases pertaining to intellectual property rights. Also, the remedies for the tort include

* Damages: the court may award damages to the plaintiff for the loss of sales
* Injunction: the court may grant an injunction in favour of the plaintiff restraining the defendant from continuing to trade. ***DE FACTO WORKS LTD v ODUMOTUN TRADING CO LTD.( SUPRA)***

The tort of pasing off seeks tp protect traders and businesses from unfair competition that may exist where other rival traders lead the public to believe another person’s goods belong to them. “passing off is an action against the deceit on the imitation of a mark adopted by a person/company in relation to goods and services which has acquired a distinctive reputation in the market and is known as belonging to or produced by that person/company only”[[12]](#footnote-13)

In conclusion, passing off in contemporary Nigeria is of great importance as it protects proprietors of businesses from unlawful acts which may lead to financial loss. Passing off occurs a lot and the tort of passing off is necessary to prevent deceit and misrepresentation of goods not just for the owner of the goods but also for the buyers.

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1. ***PERRY v TRUEFIT*** (18420 6 Beav. 66 at 73 per Lord Langdale MR [↑](#footnote-ref-2)
2. Statutes of General Application (1900) [↑](#footnote-ref-3)
3. (1990) 1 AER 873. [↑](#footnote-ref-4)
4. (1979) AC 731 [↑](#footnote-ref-5)
5. Per Lord Diplock. [↑](#footnote-ref-6)
6. The get up of a product is the form in which the brand owner presents its product to the market ie the colour combinations, the packaging, the labeling, graphics. It is the form a product is offered the public. [↑](#footnote-ref-7)
7. (1961) ALL N.L.R 171. [↑](#footnote-ref-8)
8. Per Palmer, J. [↑](#footnote-ref-9)
9. (1972) NNLR 60 [↑](#footnote-ref-10)
10. (1959) LLR 33 [↑](#footnote-ref-11)
11. Section 3 of the Nigerian Trademarks Act Cap. T13 [↑](#footnote-ref-12)
12. T & A legal. (2018) An Appraisal Of Passing Off Actions Under Nigerian Law. [↑](#footnote-ref-13)