

***Name:*** *Abere Miebi Priscilla*

***Matric Number:*** *17/law01/003*

***College:*** *Law*

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***Lecturer’s Name:*** *Mrs. Apara Oyebanke*

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**PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY NIGERIA**

**M. P. ABERE**

**1.1. ABSTRACT**

*The aim of this paper is to explain passing off in the 21st century Nigeria. This paper throws some light on what economic tort is all about as a fragment of the law of tort. It examines closely the tort of passing off. this paper examines passing off as a form of economic tort. In this paper, we see the different forms of passing off that are committed in society. Furthermore, this paper examines succinctly the relevance of passing off in the 21st century Nigeria. This paper explains whether the law of passing off is relevant in Nigeria. Also, this paper offers some recommendations that could lead to a possible end to the tort of passing off. The significance of this study is that it informs the readers theoretical understanding of the tort of passing off in the 21st century Nigeria.*

Key words: *passing off*, *economic tort*, *Law of Torts*, *21st century Nigeria*.

**1.2. INTRODUCTION**

The court held in the renowned case of *N.R. Dongre v Whirlpool Corporation*,[[1]](#footnote-1) that ‘A man may not sell his own goods under the pretence that they are the goods of another man’. The law governing this rule is called the law of passing off. The subject of the tort of passing off is a critical one. This is so because it deals with business interests of private individuals. In fact, it is a form of economic tort. The law of passing off is now becoming very popular. It has now matured into a branch of intellectual property. Passing off is very important in the Nigerian economy as new businesses spring up everyday as many people are looking for a source of income. Unfortunately, some people want to get money at all cost, even at the cost of another’s business. This goes to show that passing off is very important. It is more important now more than ever before.

**1.3. ECONOMIC TORT**

Economic torts are torts which arise out of business agreements that interfere with economic or business relationships that cause economic loss. Economic tort is also known as business tort. Economic torts are torts which inflict financial losses or financial injury.[[2]](#footnote-2) Economic torts occur primarily in the business, economic or commercial sector of life.[[3]](#footnote-3) There are several forms of economic tort; however, this writer would be focusing on Passing Off. Passing off is a form of economic tort.

**1.4. THE PURPOSE OF ECONOMIC TORT**

The primary aim of economic tort is to offer provision of relief to an injured party because of the harm caused to the injured party by the defendant. It also aims to impose liability on the defendant responsible for the harm. More so, it deters potential defendants from acting in such a way as to cause harm to a potential claimant or plaintiff. Economic tort protects some of a person’s intangible interests, that is, a person’s business interests from illegal interference. Customarily, a situation whereby a person suffers economic loss, redress has been in contract law. The justification for this is in the doctrine of consideration. The damages awarded for a breach of contract are to put the claimant in the position they would have been in if the contract had been performed. This is the objective of tort. However, economic torts protects the status quo interest.

**1.5. PASSING OFF**

Passing off is an economic tort. Passing off is the intentional or unintentional selling of goods and services or carrying one’s business as though it were anothers, by misleading others to purchase its goods and services. **BLACK’S LAW DICTIONARY** states that ‘The tort of passing off applies where there is a representation that a person’s goods or services are those of someone else.’ Passing off is the false representation of ones product or business as that of another person, by that deceiving buyers to patronize it.[[4]](#footnote-4) It is the selling of one’s products, or carrying on of of one’s business as if it were that of another person whose reputation and good will one thereby enjoys.[[5]](#footnote-5)

**1.6. PURPOSE OF THE LAW OF PASSING OFF**

The purpose of the tort of passing off is to protect a person’s business interests from arbitrary trade practices. It aims to protect the right of property that exists in philanthropy or altruism. According to Sir John Salmond in his book *Law of Tort*, stated that the tort of passing off ‘Is designed to protect traders against that form of unfair completion which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders’.[[6]](#footnote-6) In the words of Lord Kingsdown, ‘The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader’.[[7]](#footnote-7) In the words of Lord Langdale MRanalyzing the law in *Perry v Truefitt*said that, ‘A man is not to sell his own goods under the pretence that they are the good of another person; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end’.[[8]](#footnote-8)

**1.7. FORMS OF THE TORT OF PASSING OFF**

Passing off comes in many forms. Such forms could be:[[9]](#footnote-9) selling a product as that of the plaintiff or imitating the characteristics of the plaintiff’s goods.

**1.8. ELEMENTS OF PASSING OFF**

To succeed in action for passing off, the plaintiff must prove that the action of the defendant is ‘calculated’ to mislead the public. This means that the only element the plaintiff has to prove to the court is that the defendant is likely to mislead the public. It is worthy of note that liability for the tort of passing off is strict. Strict liability offences arises for a defendant when he does certain acts. It arises despite the fact that the defendant intended no harm and he took every necessary measure to prevent injury to the plaintiff. This means that innocent passing off is not a defence.[[10]](#footnote-10)

In *Niger Chemists Ltd v Nigeria Chemists*, Palmer Jstated that ‘It is not necessary to prove, that there was any intention to deceive: this has been held in a long series of cases, and is not disputed’.[[11]](#footnote-11) However, where there is no possibility of the public being deceived, there is no case of passing off.[[12]](#footnote-12)

**1.9. THE RELEVANCE OF PASSING OFF IN THE 21ST CENTURY NIGERIA**

The law of passing off is still very applicable in Nigeria. Nowadays, new businesses are springing up here and there. The competition is very high. More so, Nigeria runs a mixed economy which gives private individuals freedom to own the means of production, but gives little control to the government. This gives individuals the freedom to make profit. If the freedom giving to these individuals is misused, arbitrary means of making profit are adopted. This is the case in 21st century.

The law of passing off is relevant in the 21st century Nigeria because of the following reasons;

1. Passing off preserves the reputation and good will of companies. This is the primary aim of the tort of passing off.
2. Passing off protects intellectual property rights. This is in line with **Article 27(2) Universal Declaration of Human Rights 1948** which states: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”[[13]](#footnote-13) Passing off prevents the production of sub-standard goods. Without the knowledge of the original franchise holder, other companies would produce sub-standard goods for customers. The tort of passing off seeks to protect two classes of persons: the innocent public and an existing legitimate person or business, from being misled.[[14]](#footnote-14)
3. It hinders companies from passing off. The laws of passing off does not only protect intellectual property rights; it also deters companies from using the trademark or patent of another company. When business owners are aware that using another business’ trademark is illegal or that there are enforced laws against the illegal use of intellectual property rights, there would be a reduction in the amount of goods that are being produced illegally.
4. It preserves the authenticity of products of companies. The knowledge of the tort of passing off helps companies produce their goods and services in such a way that it cannot be duplicated by another company. More so, consumers who aware of the law of passing off would be more vigilant and pay close attention to the products they buy.
5. It promotes healthy business environment amongst companies. The presence of the law of passing off creates a peaceful and healthy relationship among companies. Having knowledge of the law of passing off, companies are less likely to commit the tort of passing off. Therefore, there would be healthy business competition amongst companies as companies would not want to conduct their businesses as if it where another’s business. In such environment, companies would aim at improving the quality of their goods and services.

**1.1.0. RECOMMENDATIONS**

To help reduce the illegal act of passing off, the following measures are proposed;

1. Sensitizing the masses of the law of passing off;
2. Introducing the subject of the tort of passing off into the academic syllables of the secondary and tertiary institutions.

**1.1.1. CONCLUSION**

Passing off as a form of economic tort is relevant in the 21st century Nigeria. This is because it protects a person’s business interest. This in fact, is the main purpose of passing off. In an ever changing society with new ideas and innovation, there would be no safety, no protection of intellectual property without the law of passing off.

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1. (1996) 5 SCC 714 [↑](#footnote-ref-1)
2. Ese Malemi, Law of Torts (Princeton Publishing Co. 2013) [↑](#footnote-ref-2)
3. ibid 646 [↑](#footnote-ref-3)
4. ibid 631 [↑](#footnote-ref-4)
5. ibid [↑](#footnote-ref-5)
6. Salmond op. cit. para 149 [↑](#footnote-ref-6)
7. Leather Cloth Co. v American Leather Cloth Co. (1865) 11 HL Cas. 523 at p. 538; De Facto Works Ltd v Odumotun Trading Co. (1959) LLR 33 at p.39; Trebor (Nigeria) Ltd v Associated Industries Ltd (1972) NNLR 60 at p.63 [↑](#footnote-ref-7)
8. (1842) 49 E.R. 749 at p. 725; Draper v Twist (1939) 3 All ER [↑](#footnote-ref-8)
9. Gilbert Kodilinye and Oluwole Aluko, Nigerian Law of Torts (2nd edn, Spectrum Law Publishing 1999) [↑](#footnote-ref-9)
10. ibid 640 [↑](#footnote-ref-10)
11. (1961) All NLR 171 at p. 173 [↑](#footnote-ref-11)
12. Cadbury Schweppes Ltd v Pub Squash Co. Ltd (1981) 1 All ER 213 PC [↑](#footnote-ref-12)
13. Article 27(2) UDHR 1948 [↑](#footnote-ref-13)
14. Triumph Atteh, The Tort of Passing Off: An Overview [↑](#footnote-ref-14)