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**Question;**

**Discuss the relevance of passing off as a form of Economic Torts in the 21st century Nigeria.**

## Introduction

Passing off is the false representation of one's product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is a pretense by one person, that his goods or business are those of another person in order to capture the patronage of the customers of arrival trader and enjoy his good will. In the tort of passing off, a person carries on his business or sell his goods under a name, trademark, description, or imitation of another person's product in order to deceive the public to patronize it. Passing off is a deceit of the public to patronize one's business, product or services. Passing off is an unfair and unconscionable competition. The essence of passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant's product or business is that of the plaintiff, and the law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders.

In the words of **LORD KINGSDOWN** in *Leather Cloth Co v. American Leather Cloth Co*; "*The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.*"<sup>1</sup> Also, **LORD LANGDALE MR** explaining the law in *Perry v. Truefitt* stated that; "*A man is not to sell his own goods under the pretense 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*".<sup>2</sup>

The tort of passing off is common in a competitive business community or economy. People resort to every strategy to market their products and services, to survive and to expand their business: the tort of passing off is designed to protect a person's business interests from the unfair trade practices and sharp practices of other persons. Its objective is to protect the reputation and goodwill a business has built up for itself. It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business. The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business.<sup>3</sup>

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<sup>1</sup> (1865) 11 HL Cas. 523 at p.538; (1865) 11 ER 1435

<sup>2</sup> (1842) 49 ER 749 at 725; *Draper v Trist* (1939) 3All ER 513 at 526

<sup>3</sup> Ese Malemi, *Law of Tort* ( 1st edn,Princeton publishing co. 2008)

In the case of *Warnink BV v. Townsend & Sons*, LORD DIPLOCK<sup>4</sup> in the House of Lord stated that five characteristics or guidelines, for determining when an action lies in passing off. These five characteristics are whether there is:

1. A misrepresentation
2. Made by a defendant in the course of trade
3. To prospective customers
4. Which is calculated to injure the business and goodwill of another person; and
5. Which causes damage to that person's business and goodwill or will likely do so.

The tort of passing off is actionable per se on its occurrence. A plaintiff does not have to prove damages in order to succeed. The right of action lies even though no damage has been suffered nor proved. The probability of damage occurring is enough for a plaintiff to succeed. Therefore, once passing off has been committed, the plaintiff has right to sue and is entitled to remedy.<sup>5</sup>

The tort of passing off is committed in various forms, the most common forms easily noticed in the market are:

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

It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff, when in fact they are not. The defendant by advertising and selling his goods by falsely stating that they are manufactured by the plaintiff, directly but wrongfully benefits and profits from the goodwill and reputation already built by the plaintiff's business. In *Byron v. Johnston*,<sup>6</sup> it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Byron on the title-page, when in fact that famous poet had nothing to do with its authorship.

- **Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so familiar to the plaintiff's trade name as to be mistaken for it.**

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<sup>4</sup> (1979) All ER 927 at 932 (1979) AC 731 at 472 HL

<sup>5</sup> *McCulloch v May Produce Distributors Ltd* (1947) 2All ER 845

<sup>6</sup> (1816) 35 ER 851

A trade name as defined by **SIR JOHN SALMOND** 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 the goods of that person.*”<sup>7</sup>

It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendant’s goods are mistaken as made by the plaintiff and are bought as the products of the plaintiff. The protection of trade names applies not only to traders and manufacturers.

Generally, a plaintiff cannot sue in respect of the use of such a name by another person, unless the plaintiff can prove that the particular descriptive name has a secondary meaning exclusively associated with his product.<sup>8</sup>In the case of *Hines v. Winnick*,<sup>9</sup> the plaintiff musician and band leader who used to broadcast his radio programme under the name “Dr Crock and his Crack pots”, obtained an injunction to restrain the defendant from featuring another band on the programme using the same name.

- **Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark**

A trade mark is any design, picture, mark, name, or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller.

It is 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 then patronize his products thinking that they are the products of the plaintiff. In the case of *Perry v. Truefitt*,<sup>10</sup> 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.

- **Imitating the appearance of the plaintiff’s product**

It is passing off for the defendant to do anything, which makes his product appear like the plaintiff’s products. The passing off includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public. Generally, it includes the general appearance, package, label, or design of the product. In the case of *U.K Tobacco Co. Ltd v.*

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<sup>7</sup> Salmond op cit para 401.

<sup>8</sup> Ese Malemi, *Law of Tort* ( 1st edn,Princeton publishing co. 2008)

<sup>9</sup> (1947) Ch 708 at p. 713 per Vaisey J.

<sup>10</sup> (1842) 6 Beav 66, 49 ER 749

*Carreras Ltd*,<sup>11</sup> where the defendant marketed cigarettes called “Barrister” in packets on which appeared a white man in a barrister’s wig and gown. This was held to be an actionable imitation of the get-up and appearance of the plaintiff’s cigarettes called “Bandmaster”, whose packets featured a white man in bandmaster’s uniform.

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

It is passing off for a defendant to sell inferior or expired products of the plaintiff as a current stock, where such has been discarded by the plaintiff. In this passing off, the defendant who has managed to lay hands on the goods, which are unfit for human consumption sells them off as current stock of the plaintiff.

To succeed in a claim for passing off, all that a plaintiff has to prove is that the activity of the defendant is “calculated” to deceive the public.

**Remedies for passing off may include:**

1. Damages
2. Account for profit; or for loss of sales
3. Injunction, and
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth

In a claim for the tort off passing off, a defendant may plead a number of defences that the passing off complained of is a:

1. Functional design or package
2. Mere descriptive name of the product
3. Consent, such as licence given to him by the plaintiff to produce and or market the product
4. Innocent passing off.<sup>12</sup>

Economic torts on the other hand are torts which inflict economic losses, they are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life. Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another and therefore to this extent, one

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<sup>11</sup> (1931) 16 NLR 1

<sup>12</sup> Eise Malemi, *Law of Tort* ( 1st edn,Princeton publishing co. 2008)

business may succeed to the disadvantage of another, the economic torts seek to ensure that business are protected from acts of unacceptable interference such as passing off.

### **Relevance of passing off as a form of economic torts in the 21st century Nigeria**

Economic torts inflict economic losses or financial injury and these damage can be gotten from passing off. Passing off is a very common tort which is rapidly increasing especially nowadays in the 21st century Nigerian marketing and production sectors. A lot of individuals in this sector are victims to the injuries and losses accompanied with this tort. These days, it is very common for people to buy a trusted product and then realize it is an identical brand made to look exactly like what they originally wanted. This problem affects both the buyer/ consumer and the seller/manufacturer. In the instance of the buyer, he or she might mistake the fake product for the original because it uses the same packaging, trade name, trade mark and he or she must have consumed it before noticing. In the instance of the seller/ manufacturer which is the main person the tort of passing off seek to protect because they are the ones on the losing side. They might realize a setback in their course of business and may inquire financial loss.

The tort of passing off is very important in Nigeria due to the fact that because of the greed to make easy and fast money people do not acknowledge the hard work of others. What this means is that Nigeria is populated with a lot of entrepreneurs many of whose brand have become really popular because of the authenticity of their product or the effectiveness of their product hence, a lot of individuals in a bid to make quick money, adulterate these products and market them as their own with the sole aim that it would be mistaken for that of the original seller thereby deceiving consumers to purchase the product.

In conclusion, the laws guiding economic torts are put in place in order to protect the reputation and goodwill of business owners and manufactures who may fall victim from being exploited also to prevent their businesses from being damaged. Although competition is a very healthy aspect of the marketing sector, it does not give room for acts which the law considers to be unacceptable. Business owners should also be enlightened in order to know the rights which protects their business so as to avoid being at loss. Therefore, it can be seen due to the current state of the marketing and production sector in Nigeria that passing off is very relevant as a form of economic tort in 21st century Nigeria.

## **Bibliography**

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