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Economic torts are torts which inflict mainly economic losses. In other words, economic torts are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life. Economic torts are many and include:

1. Passing off
2. Injurious falsehood
3. Interference with contracts and so forth

In this assignment, I will be discussing the economic tort – passing off. The tort of passing off is committed where the plaintiff’s goods are passed off by the defendant as being his own (that is, the defendant’s) goods. 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. It also protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business. In the law of passing off, the basis of the legal action is that the passing off by the defendant of his goods and or business as that of the plaintiff, is injuring the right of property, product, services and business of the plaintiff. In the case of **Warnink BV v Townsend and Sons, LORD DIPLOCK** in the House of Lord stated the 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.[[1]](#footnote-1)

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. Therefore, once passing off has been committed, the plaintiff has right to sue and is entitled to remedy.

**COMMON FORMS OF PASSING OFF**

The tort of passing off is committed in various forms and as a result, the tort of passing off have served to offer protection against various common forms of passing off. The common forms of passing off which are easily noticed in the market are:[[2]](#footnote-2)

1. Trading with a name resembling that of the plaintiff
2. Marketing a product with a name resembling that of the plaintiff’s goods
3. Imitating the appearance of the plaintiff’s product
4. Marketing a fake products as that of the plaintiff by using the plaintiff’s label
5. Marketing products with the plaintiff’s trademark and so forth.

I shall briefly explain some of these common forms of passing off.

* **TRADING WITH A NAME RESEMBLING THAT OF THE PLAINTIFF:** In this form of passing off, the defendant is usually engaged in the same type of business as the plaintiff, and he uses the plaintiff’s name or a name closely resembling that of the plaintiff, as a result the public is confused and misled into thinking that they are one and the same business, or that one is an extension of the other. The customers are thereby confused and misled to patronize either of them thinking that they are patronizing their usual business organization. The innocence, or bona fide honestly of the defendant in his choice of the name, without notice is not a defence. In the case of **Ogunlende v Babayemi:[[3]](#footnote-3)** The plaintiff who were building and civil engineering contractors carrying on business as “Mercury Builders” were granted an injunction to restrain the defendants, from carrying on a similar business under the name “Mercury Builders Nigeria Limited”.
* **MARKETING A PRODUCT AS THAT OF THE PLAINTIFF:** The tort of passing off is committed when a defendant sells his goods off to people by stating falsely that the goods are produced by the plaintiff, whereas 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 the case of **Lord Byron v Johnston:[[4]](#footnote-4)** The defendant publishers were restrained from advertising and selling a book of poems with the name of Lord Byron written on the cover and title page, when in fact the famous poet was not its author.
* **MARKETING PRODUCTS WITH THE PLAINTIFF’S TRADEMARK:** It is passing off for a defendant to markets 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. A trademark is any design which identifies those goods with the manufacturer or seller. The ground on which the court protects trademark, is that it is not right to permit a party to sell his own goods as the goods of another person. Therefore, a party will not be allowed to use the names, or other design by which he may pass off his own goods to purchasers as the products of another person. In the case of **Perry v Truefitt:** 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.

**ELEMENTS OF PASSING OFF**

1. That the defendant’s activity is likely to deceive the public.
2. The plaintiff does not have to prove intention to deceive on the part of the defendant.
3. It is not necessary to prove that the defendant’s conduct has actually deceived the members of the public
4. The trader in the course of trade deceived his customers in the course of the trade
5. It caused actual damage to a business or goodwill of the trader by whom the action is brought.

**REMEDIES FOR PASSING OFF**

* Damages
* Account for profit
* Injunction
* Intervention by the relevant regulatory agencies such as NAFDAC, SON and so forth.

**DEFENCES FOR PASSING OFF**

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

* Functional design
* The mere descriptive name of the product
* Consent, such as licence given to him by the plaintiff to produce and or market the product
* Innocent passing off, however, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off, but he will most likely get off with a nominal or a reduced award of damages. This is so because the plea, in the absence of aggravating circumstances has a mitigating effect on the amount of damages that may be awarded by court.

**BIBLIGORAPHY**

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* Olarinde, E.S. and Chigbo, C.C. and Ikpeze, N.G., *THE MODERN LAW OF TORTS: A Kaleidoscopic Perspective* (Afe Babalola University Press 2018).

1. Ese Malemi, *LAW OF TORT* (2nd edn, Princeton Publishing Co. 2017). [↑](#footnote-ref-1)
2. Francis Day and Hunter Ltd v Twentieth Century Fox Co Ltd (1939) 4 All ER 192 at 199 PC [↑](#footnote-ref-2)
3. (1971) 1 UILR 417 [↑](#footnote-ref-3)
4. (1816) 35 ER 851 [↑](#footnote-ref-4)