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ASSIGNMENT: ECONOMIC TORT

**ASSIGNMENT**

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

**ECONOMIC TORTS**

When the kind of behaviour on which tort liability can be predicted, such as carelessness, causes a physical or emotional injury, or even a loss of reputation, it is natural to suppose that more than “economic” is involved and that economic analysis is merely one candidate for guiding the formulation of doctrine. But when the behaviour causes only an “economic” harm in the narrowest sense, that is, a financial loss unrelated to any physical contact with the victim or even his property, there is no ground is provided, however, that the inquiry is understood to comprehend all relevant costs and benefits, including costs of using the legal system to redress harms, costs of insuring, and the possible disutility from having to bear a risk that cannot be shifted through insurance or otherwise. But given these qualifications, which amount merely to an insistence that economic analysis be done correctly, it should be uncontroversial to claim that the best rule of law for the “economic torts “will be most efficient rule of law. Economic torts are defined to mean tort claims that do not allege physical contact with the victim or his property or harm to such nonfinancial or at least non-commercial, goods as business reputation and personal privacy.

Economic torts occur mainly in the economic, commercial or business sector of life. 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.

These groups of torts protect some of a person’s intangible interests – those which may loosely be called his business interests – from unlawful interference.

**PASSING OFF**

1. Passing off on the other hand, is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronise it. Passing off is the selling of one’s [[1]](#footnote-1)products, or the carrying on of one’s business as if it were that of another person whose reputation and goodwill one thereby enjoys. In other words, it is the passing off or representation to customers of one’s products, services, or business as that of another person whose reputation and goodwill one thereby enjoys. Passing off is a pretence by one person, that his goods or business are those of another person in other to capture the patronage of the customers of a rival trader and enjoy his goodwill. Whenever a person sells his goods, or carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill. Passing off is the act or instance of falsely representing one’s own product as that of another in an attempt to deceive potential buyers.

This is a big issue especially in Nigeria where goods on the store shelves are not properly labelled. Take for instance john went to supermarket to purchase biscuits, he was distracted and in a rush and merely picked his favourite kind of biscuits, after settling down at home he realizes after taking a bite of the biscuit that it is in fact another biscuit with the same colours and package, the only difference was the substitution of a letter in the name. So, let say he intended to buy **‘canto’** biscuit but what he held in his hand was **‘canfo’** biscuit. His thoughts chased after each other from the disappointment on the waste of money and time, the self-reprimand to inspect products more carefully, what could have happened to him if the product contained hazardous substances and a wondering thought, if the canfo biscuit should have been in the supermarket in the first place. One must think that once the makers of canto have established a biscuit brand in the market with thousands of Naira spent on non-stop radio jingles that become popular sung-along-songs with children together with adverts on the BRT buses, they would have secured a presence in the market and begin to reap the fruit of their labour. Sadly, this is not the case as a sharp fella will produce a similar product but rather than spend thousands of Naira to create his own brand, will seek to coast on another’s success by passing off his product as canto.

* The Duhaime’s dictionary, defines passing off as making some false representation likely to induce a person to believe that the goods or services are those of another. This can be further explained in the case of **Niger Chemists Ltd. v. Nigeria Chemists** “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”

**Passing off and Trademark Infringement;** it is necessary to state that passing off and trademarks infringement go hand in hand and very similar in nature. Whilst, passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark. This means that a mark, brand, design, name must be registered before one can make a claim on trade mark infringement. Another distinction is, whilst an action for infringement of trade mark is a statutory remedy conferred on the owner of a registered trademark, for the enforcement of a right to use the trade mark in relation to the goods/services for which the mark has been registered; and action for passing off is an action against the deceit on the colourable limitation of a mark adopted by a person/company in relation to goods/services which has acquired a distinctive reputation in the market and is known as belonging to or produced by the person/company only.

An action for Passing off is a common law remedy and the claimant need not establish title for same but must show that the goods/services have distinctive features. Section 3 of the trademark Act provides that: “No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods of another person or the remedies in respect thereof”. The above connotes that a passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim “there is no law without a remedy”.

[[2]](#footnote-2)

In the case of **Trebor Nigeria Limited v. Associated Industries Limited** Trebor Nigeria Limited the makers of Trebor Peppermint brought and action against Associated Industries Limited the makers of Minta Supermint claiming that the wrapper used to package the product by the Defendant was similar to that of the plaintiff and that they were guilty of passing off their products like that of the defendant. The defendant raised the dissimilarities in the two products as a defence to the action, the judge however found the Defendants liable for passing off their product as that of the plaintiffs.in this case passing off occurred by the use of the a package strongly similar with that of another product such as to deceive the public that they are one and the same.[[3]](#footnote-3) An action for infringement of registered trademarks should always be instituted in the federal High Court only because the action arises in relation to a Federal enactment which is the Trade Mark Act. However, the courts have variant decisions on the jurisdiction of the courts on passing off actions. In **Patkun Industries Ltd v. Niger Shoes Ltd,** a 1988 decision, the supreme court held that the federal High Court has jurisdiction in trademarks infringement of trademarks, whether registered or unregistered. The constitution specifically makes provisions for passing off actions as follows: “ Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters on any federal enactment relating to copyright, patent, designs, trademarks and passing off, industrial designs and merchandise marks, business, names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards”. The constitution also provides that, -if there is any other law that is inconsistent with its provisions, the constitution will prevail, and that other law shall, to the extent of the inconsistency, be void.

**Components to prove passing off:** aside from the key components of deception, Justice Nnaemeka Agu, in the 1977 case of **The Boots Company Limited v United Niger Imports Limited** carefully listed what he considered to be ingredients of a successful passing off action as follows:

1. Proof of the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of the public or persons involved in a trade in the relevant market as coming from a particular source;
2. That the defendant who are engaged in a common field have used a name, mark, sign so resembling to the plaintiff’s that it is likely to deceive the minds of the common customers
3. That the use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiff’s business.

**The relevance of passing off to Economic Tort [[4]](#footnote-4)**

The relevance of passing off to economic Tort is to protect the registered owner of the mark, design or patent and the registration to the extent of the economic right that he/she has to market such product to the exclusion of any other person. Any illegal use of a person’s trademark or design of his / her product by any other party/ company for their own product is forbidden under the law under the trademark Acts as well as the Patents and Designs Acts. It is a Tort that creates the protection for the registered owner of the patent or design and such that if there is an infringement of that right registered, the original registered owner can approach the court for protection and an order of court for damages for infringement by the other party. It simply means that un-authorization to pass off someone else’s product is prohibited by the law. The registered owner of the product has an action to;

Restrain any person from further use of that mark/design or patent.

The protection of the court to forbid you from the use of their trademark

And also to make and order that such a person should pay him certain sums in damages (compensatory and monetary damages) because of the use of his/her designs. If such a person was making 200 million in a month through the sale of his product, their sale will have diminished within that period. So generally speaking, passing off as a tort protects the registered interest of the registered owner of either the trademark, patent or design. The protection here is the Economic right that such a person has as a registered owner of his product, it is a tort that protects the Economic rights of the registered owner of the Trademark against the one(defendant) passing off his product as that of the registered owner. So the registered owner will always be protected by the law and is entitled to damages for the tort of passing off from the one who has infringed on his registered right. In the decided case of **Omnia(Nig.) v Dyktrade Ltd7,** it was held by the trail judge and upheld by Belgore J.S.C that a party is not entitled to sue for infringement of a trademark which had not been registered and that the mere issuance of acceptance by the Registrar of Trade Marks of the applicant’s application does not amount registration until the issuance of the certificate of registration.

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2. T & A Legal, ‘ An Appraisal of Passing Off Actions Under Nigerian Law’ (2018) <[http://www.lawteacher.net/Free law essays/business law/ tort of passing off project assignment-law-essays](http://www.lawteacher.net/Free%20law%20essays/business%20law/%20tort%20of%20passing%20off%20project%20assignment-law-essays)> accessed May 6 2020 [↑](#footnote-ref-2)
3. *Niger Chemists Ltd v Nigeria Chemists (*1961) ALL NLR 171. *Patkun Industries Ltd v Niger Shoes Ltd* (1988) 5 NWLR 138. *The Boots v United Niger Imports Limited Co Limited* (1977) 1 ANSLR 144. *Omnia(Nig.) v Dyktrade Ltd* (2007) 15 NWLR 576. *Trebor Nigeria Limited v Associated Industries Limited* (1972) NNLR 60. [↑](#footnote-ref-3)
4. Black’s Law Dictionary Ninth Edition; CAP T13 LFN 2004; (1972) NNLR 60;

   (1988) 5 NWLR (Pt 93) 138; (2007) 15 NWLR (Pt.1058) 576; s251 (f) CFRN 1999; s1 (3) CFRN 1999; Supra @7 above; (1977) 1 A.N.S.L.R 144. [↑](#footnote-ref-4)