**NAME: SUSAN ABAH**

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**COURSE TITLE: LAW OF TORTS**

**QUESTION:** Discuss the relevance of passing off as a form of economic torts in the 21st Century Nigeria.

INTRODUCTION

Economic torts are torts which protect a person’s trade or business from acts that could cause economic or financial injury or loss to a person’s trade or business. They aim to protect trade and business conduct. Economic torts involve the legal structure for liability which arises from commercial transaction and business relationships. An indispensable feature of business is the presence of competition, it is expected and encouraged in a free market, economic tort is put in place to protect businesses from wrongful and unlawful interference. In the case of ***Mogul Steamship Co Ltd v McGregor, Gow & Co[[1]](#footnote-1)***, BOWEN LJ stated “The right to trade freely is a right that the law recognises and encourages but it is one which places him at no special advantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by [fraud](https://en.wikipedia.org/wiki/Fraud) or [misrepresentation](https://en.wikipedia.org/wiki/Misrepresentation). Intimidation, obstruction and molestation are forbidden; so is the intentional procurement or violation of individual rights, [contractual](https://en.wikipedia.org/wiki/English_contract_law) or other, assuming always that there is no just cause for it... but the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of [competition](https://en.wikipedia.org/wiki/Competition) waged in the interest of their own trade”. This goes to show that as competition is at the core of business, the law still checks for any unlawful acts in the conduct of one’s business so as to avoid economic injury or harm.

 Breach of an economic tort results in economic loss causing financial injury to a person’s trade or business. Examples of economic torts are passing off, malicious falsehood, conspiracy to interfere, breach of intellectual property, interference with contracts etc. for the purpose of this article I would be focusing on passing off in relation to its relevance as a form of economic tort in Nigeria.

PASSING OFF is an equitable tort in which the defendant imitates the appearance of a rival trader’s product in the presentation of their own (for example, by use of similar colours, text font, language, and packaging) in order to ‘pass off’ their own product as the ‘real thing’, unjustly capitalising on the brand strength of a better-known product. Another definition of Passing off is the act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers[[2]](#footnote-2). The tort protects the goodwill of a trader from misrepresentation. Passing off is actionable if the defendant’s conduct is likely to mislead the public.

In addition to the straight passing off there could be extended passing off and reverse passing off. Extended passing off is where a misrepresentation as to the particular quality of a product or service causes harm to another's goodwill. Reverse passing off is where a producer misrepresents someone else's goods or services as his own."

The tort of passing off is both a common law and statutory remedy in Nigeria as it is supported by section 3 of the Trademark Act[[3]](#footnote-3) which provides "*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 as the goods of another person or the remedies in respect thereof".*

In ***Reckitt and Coleman Products v. Borden[[4]](#footnote-4)***, the House of Lords adopted the ‘Trinity Test’ in establishing the ingredients of ‘passing-off. He listed the ingredients as

1. [Goodwill](https://en.wikipedia.org/wiki/Goodwill_%28accounting%29) owned by a trader
2. Misrepresentation
3. Damage to goodwill

Lord Oliver in explaining these elements stated “*First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Second, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Third, he must demonstrate that he suffers or ... that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”*

Remedies available in a passing off action include

1. Injunction: This is an order of the Court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of the mark pending the outcome of the case and a perpetual injunction when the case has been concluded to totally stop the use of the mark.
2. Damages: It has been established through decided cases that a successful litigant in a Passing off action is entitled to damages. Damages here could be general, special or punitive. These usually emanate from losses which are presumed to have been suffered by a Plaintiff in a Passing off action.
3. Delivery up for destruction of infringing goods: This is usually claimed where physical goods are involved. This occurs where goods are produced in breach of the trademark of another identical product. Thus, the Plaintiff usually claim for the goods to be delivered up especially so that it can be destroyed.

Defences available to a defendant in a passing off action include consent of the plaintiff, innocent usage of the plaintiff’s name, dissimilarities in the mark, indistinct name etc.

THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA

In Nigeria, there are rampant cases of unlawful and dishonest dealings of many forms in business and trade. Economic tort seeks to protect people from such unlawful and dishonest dealings. Passing off is falsely representing one's own product as that of another in an attempt to deceive potential buyers. The act of passing of shows dishonesty in business and trade as it involves deceit and confusion aimed at customers. Passing off as a form of economic tort in Nigeria encourages honesty in the conduct of business and trade in Nigeria because it is an unlawful act which has legal consequences. In the case of ***Niger Chemists Limited and Nigeria Chemists[[5]](#footnote-5)***, the Plaintiff had an established chemist business using the name "Niger Chemist" while the Defendants established the same business on the same street with the Plaintiff using the name "Nigeria Chemist". The Plaintiff sued the Defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The Court agreed with the Plaintiff and granted an injunction against the Defendant on the use of the name. In this instance Passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

With cases of passing off as an economic tort rising in Nigeria, both producers and customers are more aware of the unlawful nature of the act and therefore they are also aware of the legal consequences of indulging in the act of passing off. Companies are more careful with the presentation of their products. Customers are more careful in selecting their regular products. This awareness spread around the country also makes consumers watchdogs for the act of passing off. Victims of Passing off may make a report to the person/company manufacturing the product they intended to purchase to make them aware that another person/company is reproducing a similar product and passing it off as theirs. Victims of passing off can also report the misrepresentation to the Consumer Protection Council CPC and seek compensation as a dissatisfied consumer.

Generally, breach of economic tort causes financial loss or injury to traders. The misrepresentation in the act of passing off causes financial injury to a company or producer. With passing off as a form of economic tort, companies and producers may be compensated for the financial injury suffered. Damages in passing off are both compensatory and punitive. The punitive nature of this act discourages producers from misrepresenting products. In the case of ***Continental Pharmaceutical Ltd v Sterling Products Nigeria Plc and Smithkline Beecham Plc[[6]](#footnote-6)*** the plaintiffs who were manufacturers of a registered trademark comprising the eclipse logo with blue and white package design with the words “conphamol” brought an action against the defendants for allegedly infringing on the salient features in the packaging of conphamol substituting only the words “Panadol” and “Panadol Extra” in the same style and font. The court held the defendants guilty and N500 million against the defendants as damages for passing off. This case shows the punitive approach the court in nigeria may take for passing off and this therefore makes producers careful in their conduct of business and trade.

Economic tort aims to protect persons trade from all unlawful acts. The essence of the tort of passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. In the law of passing off, goodwill is a legal concept, not a business concept. Goodwill is the proprietary right, the right that is owned by a person which is protected by passing off. In the business world in Nigeria today, a good number of companies and producers have worked hard and long to build their goodwill and reputation. There are numerous companies which produce numerous goods that people rely on. The tort of passing of now guarantees protection of this goodwill and reputation built in the conduct of business. Misrepresentation of a product is unlawful and is now provided for in the legal structure for liability in business relationships. Imagine a situation where there is no law against the act of passing off, the country would suffer greatly in the economic sector as businesses will fall, fake products would be sold, rip offs will be out of control, businesses will suffer great financial injuries, but with passing off as an economic tort, business and trade is given protection. The constitution also provides for the tort of passing off. **Section 251(1)(f) of the Constitution[[7]](#footnote-7)** stipulates expressly that the Federal High Court shall have jurisdiction, to the exclusion of any other court, in civil causes and matters relating to 'any federal matters relating to copyright, patent, designs, trademarks and **passing off**.

In the case of ***Trebor Nigeria Ltd v Niger Shoes Manufacturing Co[[8]](#footnote-8)*** Ltd an action was held to lie in passing off where the defendant packaged and marketed its product to resemble those of the plaintiff. The court held that the fundamental rule is that one man has no right to put off his goods for sale as the goods of his rival trader. The court further observed that the defendant attempted to manufacture and market a product as similar as possible to that of the plaintiff. The courts ensure that the goodwill and reputation of a person is protected so as to avoid any form of economic loss to that person.

The tort of passing off as an economic tort in the 21st century Nigeria has proven to be of great advantage as it provides protection against the act and punishment for those who involve themselves in it, the commercial sector in Nigeria must enforce the law of the tort of passing off as it encourages sincerity in the conduct of business.

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1. [1892] AC 25 [↑](#footnote-ref-1)
2. Black's Law Dictionary Ninth Edition [↑](#footnote-ref-2)
3. CAP T13 LFN, 2004.  [↑](#footnote-ref-3)
4. [1990] 1 All ER 873 [↑](#footnote-ref-4)
5. [1961] 4 NIJPD [↑](#footnote-ref-5)
6. [1995] 38 NIJPD 460 [↑](#footnote-ref-6)
7. Section 251 (f) of the 1999 Nigerian Constitution. [↑](#footnote-ref-7)
8. [1972] 14 NIJPD 127 [↑](#footnote-ref-8)