**The relevance of passing off as a form of Economic Tort in the 21st century Nigeria**

This paper seeks to address summarily what economic tort and passing off means and then pin point the relevance of passing off a form of economic tort in the present century. This will also show when a plaintiff can sue based on economic tort when his property has been passed off.

**Summary of Economic tort**

When there is a tort (damage) caused to someone’s property, economic property, economic or business relationships, but not to the physical aspect of that individual it is safe to say an economic tort has occurred. Therefore harm like financial loss, property loss, economic losses, financial injury, conversion of property by a defendant can be termed as economic loss. These tort occur in only the various business aspects of life. Economic tort according to [[1]](#footnote-1)Wikipedia is “a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business. Economic tort also called business tort has the purpose of the protection of an individual’s business from an interference which hasn’t been consented to or accepted, it protects trade or businesses. This tort helps prevent another company or business enterprise or business from gaining or using another person’s business advantage as theirs or to use it as a ground-hold to sell their products or services due to the background or foundation the company has built. It will however be legal if a business enterprise uses the disadvantage of another business for the betterment of their own business which will help create a healthy business competition. In the case of [[2]](#footnote-2)***Mogul Steamship co ltd V. McGregor Gow & co***, the plaintiff raised an action on grounds that they had been driven from the Chinese tea market by a ‘shipping conference’ that had acted together to underprice them. The court held that the act was nothing more than a war of competition waged in the interest of their own trade. The action was however lawful and the defendants actions were legal. This tort offers protection for a person’s trade or business from acts the law considers unacceptable.

[[3]](#footnote-3)Examples of economic tort are as follows;

1. Passing off
2. Breach of intellectual property rights (breach of contractual and copy rights, patents, trademarks)
3. Injurious falsehood or malicious falsehood
4. Contractual interference
5. Conspiracy to interfere with contract (civil conspiracy)
6. Tortious interference, these include (interference with economic relations or unlawful interference with trade.

These group of tort protect an individual’s intangible (business) interest from unlawful interference. Unlike damages under contract law where the redress for damage puts a claimant in the position he would have been if the contract was performed, the aim of the damage in tort law is to put the claimant in position they would have been if the tort hadn’t occurred. There could however be tortious liability in a contract if there is damage to the property. For the sake of this paper focus will be laid on one of the groups of economic tort, passing off.

**Summary of Passing off**

This 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 defendants’ product or business is that of the plaintiff. The law here protects traders against the forms of unfair competition which consists in acquiring for oneself by the means of false or misleading devices the benefit of the reputation already achieved by rival traders.

Types of passing off

[[4]](#footnote-4)There a however 5 five types of passing off which will be briefly discussed.

* **Trading under a name so closely resembling that of a plaintiff as to likely mislead the public into believing that the defendants business and that of the plaintiff are one same:** in the case of [[5]](#footnote-5)***Hendriks V. Montagu***, the plaintiffs “universal life assurance society” were granted an injunction restraining the defendant company which was incorporated subsequently from carrying on a business under the name “universe life assurance association”. Also in the case of [[6]](#footnote-6)***Niger Chemists V. Nigeria Chemists***, where the plaintiffs had carried on business as chemists for years and had several branches in Onitsha and other towns in Nigeria. The defendants started a business exactly the same type of business in Onitsha under the name “Nigeria Chemists”. Plaintiff argued that the defendants’ use of a name similar to their own was actionable passing off. The court granted injunction holding that the name would deceive people. That it will bring about confusion and deception. In the case of [[7]](#footnote-7)***Ogunlende V. Babayemi***, the court also issued injunction to the defendants. The plaintiff a business civil engineer contractor and plumber under the name “mercury builders” and the defendants had opened a business just like the plaintiff with the name “mercury builders Nigeria LTD”.
* **Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff or under a name so similar to the plaintiffs trade name as to be mistaken for it.** Trade name is a name by which something is known in a particular trade or profession. A trade name is one under which goods are sold or made by a certain person and which established usage are made public, indicating that those goods are goods of that person. Is of no news that protection of trade name doesn’t only apply to the traders or manufacturers but also artists, writers, musicians who are known under a particular name.
* **Marketing goods with trade mark of the plaintiff or with deceptive imitation of such mark.** A trade mark is any picture, design, mark placed on goods which identified those goods with the plaintiff manufacturer or seller. Trademarks receive protection from the law and also from the Trade Marks Act (TMA) 1965.
* **Imitating the get-up or appearance of the plaintiffs’ goods.** Where there is anything in the appearance of the plaintiff goods which particularly identifies those goods as the plaintiffs, defendant will be held liable for passing off. If he imitates such appearance in a manner likely to confuse the public, it will be deemed as passing off. In [[8]](#footnote-8)***U.K. Tobacco V. Carreras***, the defendants marketed cigarettes called “barristers” which had a white man in a barristers wig and gown. It was held to be actionable imitation of plaintiffs’ cigarette called “bandmaster” which had a white man in a bandmaster’s uniform. Also in the [[9]](#footnote-9)***De Facto Works V. Odunmotun Trading*** case, the defendant were held liable in passing off where they sold bread wrapped in yellow and brown paper with name “odus” written in large scroll letters in chocolate colour, and the plaintiffs own bread wrap was in yellow and brown paper with large scroll name “De Facto”.
* **Marketing a product as that of the plaintiff.** This is marketing a product as if it were yours. For example, marketing your tyres as Dunlop tyres.

**Elements of passing off include**

* **Goodwill:** one must prove that he owns a reputation in the mark that the public associates with your specific product or service. Goodwill is a law term that means the attractive force that brings in the custom.
* **Misrepresentation:** one must prove that the trader has caused confusion and mislead or deceived the customers into believing that their goods and services are actually the traders.
* **Damage:** one must prove that the misrepresentation damaged or is likely to damage ones or his goodwill or cause actual financial loss.

**Remedies of passing off**

* One can apply to have the infringing goods destroyed
* Another form of remedy is applying for injunction to prevent the business from using your trade mark
* Suing for damages

**Defenses under passing off**

* that there’s no goodwill in the mark they use
* demonstrating that no loss may occur from the use of the mark or name
* that the mark itself is actually distinctive
* that they had an honest thought while they made the mark and it wasn’t to deceive customers

It is however possible a defendant could be liable for passing off but his conduct could be entirely honest in the sense that he had no intention to deceive. The plaintiff will have to prove that the defendants’ activities are calculated, that is, to deceive the public, [[10]](#footnote-10)***Niger Chemist V. Nigeria Chemists***. It’s not necessary to prove deception has taken place, it will be sufficient for the plaintiff to show deception is likely to occur in the future. In Niger chemist case Palmer J said “the question is not whether the words have in fact deceived, but whether they are calculated to deceive”. In determining whether confusion is likely to occur, the court will take into account the thinking and prospective of purchasers of the goods, if they can tell the difference between the fake and the original.

**Relevance of passing off in the 21st century**

In a Nigeria over the years, there has been a rapid growth in population which has led in an outrageous demand in commodities, most times the demands of Nigerians are not met, this is when passing off comes into play. Private individual then take advantage of this opportunity by make the exact same brands of product therefore confusing the customers or purchasers of that certain brand into buying their fake products. Also the increase in demand and unavailability of jobs have pushed so many individuals into passing off brands, which has made the original brand owner become bankrupt or have economic or financial loss without knowing the cause of their problem. Passing of can also come about when the competitors of a brand seeks to tarnish the image of their competitors by making fake products of their competitors, and distributing to the public, hereby dissuading the public and customers from patronizing that brand and therefore, using the alternative, thereby causing the that brand to loose profit or income or have a bad reputation. In Nigeria it is very easy to passing off goods as there are so many rural areas in the country. So many private individuals sit in their homes and make fake replicas of brands that have had their names established. Passing off goods can go from pencil making (goods) to investment (services). Also with the society developing and increase in technology, the tort of passing off has been aided.

In recent times there has however been laws and legal solution that protect an individual’s product and services from being passed off. For example, the Intellectual Property Rights(IPRs)1967 is defined and regulated by several statutes which include, Copyrights Act(CA)2004, Patent and Designs Act(PDA)1990, Trademark Act(TA)1990,e.t.c, these instruments are used by the legislative to protect trademarks and other IPRs. The 1999 Constitution of the Federal Republic of Nigeria (CFRN) also provided for protection of properties in Section 251(1) (f), which gives the Federal High Court (FHC) exclusive jurisdiction over any Federal enactment relating to copyright, patents, design, trademark, and passing off and so on. This tort has helped in bringing down to a certain level the passing off of goods and services in Nigeria.

In conclusion, the establishment of passing off as an economic tort has aided in curbing the business eating parasite, passing off, by employing government officials and legislative bodies to enforce laws relating to passing off of goods and services and other property related laws.

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The Relevance of Passing Off as a Form of Economic Tort in the 21st century in Nigeria

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2. Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) LR 23 QBD 598

   3 Olarinde Smaranda , Chigbo Clement , Ikpeze Nnamdi , The Modern Law of Tort: A Kaleidoscopic Perspective (A Study Guide To The Law Of Torts) [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. Kodilinye & Aluko: The Nigerian Law of Tort (Revised Edition) [↑](#footnote-ref-4)
5. Hendriks v Montagu (1881) 50 L.J. Ch. 456 [↑](#footnote-ref-5)
6. Niger Chemists v Nigeria Chemists (1961) ALL N.L.R. 171 [↑](#footnote-ref-6)
7. Ogunlende v Babayemi (1971) 1 U.I.L.R. 417 [↑](#footnote-ref-7)
8. U.K. Tobacco Co. Ltd. v Carreras Ltd. (1931) 16 N.J.R, 1 & N.L.R. 11 [↑](#footnote-ref-8)
9. De Facto Works Ltd. v Odumotun Trading Co Ltd. (959) L.L.R. 33 [↑](#footnote-ref-9)
10. Niger Chemists v Nigeria Chemists (1961) ALL N.L.R. 171 [↑](#footnote-ref-10)