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LAW OF TORT

THE RELEVANCE OF PASSING OFF AS A FORM OF ECONMIC TORT IN THE 21st CENTURY NIGERIA

INTRODUCTION

Generally, economic tort seeks to protect a person’s trade or business from acts which the law considers to be unacceptable. On the other hand passing off as one of the elements of economic tort is committed where the plaintiff’s goods are passed off by the defendant as being his own, and the plaintiff will have an action in tort in respect of any losses which he has incurred.

This article seeks to address summarily what economic tort is and also explain passing as one of the element of economic tort and lastly highlight the relevance of passing off as a form of economic tort in the 21st century in Nigeria.

SUMMARY OF ECONOMIC TORT

Economic tort is a tort that cause’s damage to someone’s property, economic property, or business relationships, but not to the physical aspect of that individual. Economic tort seeks to protect a person’s trade or business from acts which the law considers to be unacceptable. According to Wikipedia Economic torts, which are also called business torts, are [torts](https://en.wikipedia.org/wiki/Tort) that provide the [common law](https://en.wikipedia.org/wiki/Common_law) rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve [pure economic loss](https://en.wikipedia.org/wiki/Pure_economic_loss)[[1]](#footnote-2). In the case of **Quinn v Leathem**[[2]](#footnote-3), which is one of the laid ground work for economic torts, in that case the defendant, acting alone, injured the plaintiff’s economic interest by directing or threatening unlawful means towards a third party, who thereby lawfully withdrew from its business relationship with the plaintiff. It will however be legal if a business enterprise uses the disadvantage of another business for the betterment of there own business which will help create a healthy business competition. In the case of **Mogul steamship Co ltd v McGregor**[[3]](#footnote-4), also one of the laid ground work of economic tort, it was held that the defendants had acted in an effort to protect their own profits and trade which was considered to be a lawful objective. No unlawful acts had taken place to warrant any wrongdoing, so therefore the plaintiffs had no cause of action.

Economic torts 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 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 a person’s intangible interests – those which may loosely be called his business interests from unlawful interference. But for the purpose of this work i will like to lay emphasis on passing off which is one of the components of economic tort.

PASSING OFF

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Generally, misleading the public into believing falsely that the brand being projected was the same as a well known brand is a wrong and is known as the tort of passing off. The tort of passing off is committed where the plaintiff’s goods are passed off by the defendant as being his own goods. The person whose goods have been passed off in this manner may have an action in tort in respect of any losses which he has incurred[[4]](#footnote-5).

Passing off is a tort under economic tort which protect a person’s trade or business from acts which the law considers to be unacceptable. The tort of passing off according to Kodilinye is the selling of goods or carrying on a business in such a way that will mislead or deceive the public that the defendant’s product or business is that of the plaintiff.

The position of law on the tort of passing off is designed to protect traders against any form of unfair competition which consist of acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by the rival trader. According to **LordKingsdown** in the case of **LEATHER CLOTH CO LTD V AMERICAN LEATHER CLOTH CO[[5]](#footnote-6),*“the fundamental rule is that one man has no right to put up his goods for sale as the goods of a rival trader”***. This simply means no one has the right to trade his goods as if it belongs to another person; it is legally wrong.

**METHODS OF PASSING OFF**

The passing off of a plaintiff goods as if they were the defendant’s goods can take place in different ways/methods, they include;

* **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.**

The well established case on this is **Hendrick v Montagu**[[6]](#footnote-7), where the Universal life assurance society were granted injunction by the court in order to restrain the company of the defendant which was incorporated later on from carrying on the business under the name “ Universe Life Assurance Association”. In Nigeria the court has decided a similar situation in **Niger Chemists Ltd v Nigeria Chemist**[[7]](#footnote-8).

* **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.
* **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.
* **Imitating the appearance of the plaintiff’s goods;**

Where there is anything in appearance of the plaintiff’s goods which particularly identify those goods as the merchandise of the plaintiff’s goods, the defendant would be held liable for passing off. In **DE FACTO WORKS LTD V ODUMOTUN TRADING CO LTD[[8]](#footnote-9)**, the defendant were held liable in passing off where they sold bread wrapped in yellow and brown paper with the name “Odus” written in large letters in chocolate colour, this being an imitation of the plaintiff’s bread which for some time previously had been wrapped in a yellow and brown paper with the name “DE Facto” written in large chocolate coloured scroll letters. Also in **U.K TOBACCO CO LTD V CARREARS LTD[[9]](#footnote-10)**; it was held to be an actionable imitation of the get-up of the plaintiff’s cigarettes

**REMEDIES FOR THE TORT OF PASSING OFF**

There a two remedies for the tort of passing off, they are;

* Injunction.
* Damages.
* **Injunction;**

Injunction is an order given by the court refraining the defendant from carrying out activities that will not benefit the plaintiff but inflict injury on the plaintiff. Under this tort, the court will award injunction to restrain the defendants from disposition of goods and services that are similar to that the plaintiff which is inflicting financial injury on the plaintiff.

However, the court may decide to grant injunction if the plaintiff has failed to respond to reasonable enquiries and the defendants have as a result, expended much time and expense marketing their product. An injunction is the first response to the tort of passing off.

* **Damages;**

A plaintiff may seek remedy in damages from the loss which he has suffered as a result of the defendant’s activities, or he may seek from the defendant an account of the profits which he has made as a result of the passing off.

**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.

RELEVANCE OF PASSING OFF AS A FORM OF ECONMIC TORT IN THE 21st CENTURY NIGERIA

In Nigeria, due to the high population this has resulted in products being scarce, and when manufacturers can’t meet the high demand of the population on a certain product private individual then take advantage of this opportunity by making the exact same brands of product therefore confusing the customers or purchasers of that certain brand into buying their fake products . Counterfeit products are everywhere nowadays, filing the markets with twin scourges,  often very similar, or even fairly identical to the originals, with almost certainly lower quality but much cheaper, which makes them very understandably more attractive for consumers that have no means to purchase the real deal – the first generation goods. Also the high unemployment rate and unavailability of jobs have pushed so many individuals into passing off brands, which has made the original brand owner have economic or financial loss without knowing the cause of their problem. All these are why the tort of passing off in Nigeria today is relevant, in other to protect people from being exploited.

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 HighCourt (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 purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses and also small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on Passing off and take advantage of the remedies available to protect their goodwill, trade name and profits.

REFRENCES

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* The Tort of Passing Off in Nigeria <http://<https://www.academia.edu/40734546/The_Tort_of_Passing_Off_in_Nigeria>>
* An Appraisal of passing off Action under Nigerian Law <http:// <https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law>>

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1. Economic Tort <https//en.m.Wikipedia.org/wiki/Economic\_torts> [↑](#footnote-ref-2)
2. Quinn v Leathem (1901) UKHL [↑](#footnote-ref-3)
3. Mogul Steamship Co Ltd v McGregor, Gow& Co (1889) LR 23 QBD 598 [↑](#footnote-ref-4)
4. OlarindeSmaranda , Chigbo Clement , IkpezeNnamdi , The Modern Law of Tort: A Kaleidoscopic Perspective (A Study Guide To The Law Of Torts) [↑](#footnote-ref-5)
5. Leather Cloth CO LTD V American Leather Cloth CO (1865) HL 1 [↑](#footnote-ref-6)
6. Hendrik v Montagu (1881) 50 L.J. Ch. 456 [↑](#footnote-ref-7)
7. Niger Chemists v Nigeria Chemists (1961) ALL N.L.R. 171 [↑](#footnote-ref-8)
8. De Facto works LTD V Odumotun Trading CO LTD (1959) LLR 33 [↑](#footnote-ref-9)
9. UK Tobacco CO LTD V Carrears ltd (1931) 16 NLR 1 [↑](#footnote-ref-10)