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IGHO PRUDENCE OREVA

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LPB 302

LAW OF TORT II

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**QUESTION**

ASSIGNMENT TITLE: ECONOMIC TORTS

Discuss the relevance of passing off as a form of economic tort in the 21st Century Nigeria

**ECONOMIC TORT.**

Just as tort law recognizes that one can negatively affect a person or their property through either negligence or intent, tort law also provides a framework for dealing with negligent or intentional acts done against a person’s business or livelihood. Indeed, if these were not in place a malicious actor could satisfy themselves with destroying an individual financially, whilst leaving their person and property untouched

Economic tort offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another therefore to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.

Economic torts are defined to mean tort claim 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 are torts which inflict economic losses. They are tort which inflict financial losses or financial injury. Economic tort occurs mainly in the economic, commercial or business sector of life. Economic torts include:

1. Passing off;
2. Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
3. Injurious falsehood/Malicious falsehood.
4. Interference with contracts
5. Conspiracy to interfere, conspiracy and so forth.

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

We will be focus on passing off and its relevance to the Nigerian 21st century.

**PASSING OFF**

The tort of passing off is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. 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 person whose goods must have been passed off in this manner may have an action in tort in respect of any losses which he has incurred.

**It should be noted that the plaintiff in the passing off action is not the member of the public who has been deceived but the person whose goods have been passed off and he has not been deceived**.

In the tort of passing off, a person carries on his business or sell his goods under a name, trademark, description, or imitation of another person’s product in order to deceive the public to patronize it. Passing off is the deceit of the public to patronize one’s business, product or services. **Passing off is an unfair and unconscionable competition.**

The classic definition of the tort of passing off can be found in the judgement of Lord Diplock in ***Erven Wamink BV v. J Townend & Sons (Hull) Ltd.***[[1]](#footnote-1) Lord Diplock identified the five essentials of the tort when he said that it is:

***“… possible to identify characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequences) and (5) which causes actual damage to the business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so”.***

Passing off is described as an unfair competition by **misrepresentation** or literally speaking **“the cause of deception or confusion”.** Generally, an action for passing off arises where the deception is made in the course of trade, which could to lead to confusion amongst customers. This applies to both ecommerce businesses and businesses with physical addresses.

**The Duhaime’s Legal 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.**

**THE COMMON FORMS OF PASSING OFF.**

The tort of passing off is committed in various forms, as businesses resort to different strategies in imitating the products and business of their rivals. 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 fake product as that of the plaintiff by using the plaintiff’s label or design.
3. Marketing a product with a name resembling that of the plaintiff’s goods
4. Marketing products with the plaintiff’s trademark or its imitation
5. Imitating the appearance of the plaintiff’s product
6. Selling inferior or expired goods of the plaintiff as current stock; and
7. False advertisement by copying the plaintiff’s advertisement; and so forth. +

**THE PURPOSE OF THE LAW OF PASSING OFF.**

The importance of the law of passing off was reduced by the Trade Marks Act 1994, particularly in so far as the Act allowed a trade mark to be registered in respect of the container or the “get-up” of the goods. Nevertheless, even where there appears to be a strong case of trade mark

infringement it remains common to run a parallel claim for passing off for passing off and it will be the only remedy where the law of trade marks is inapplicable or the registration is invalid or, of course, where there has been no attempt at registration. [[3]](#footnote-3)

The tort of passing off is common in a competitive business community or economy. People resort to every strategy to market their products and services, to survive and expand their business: 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. Its object is to protect the reputation and goodwill a business has built up for itself. It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business. It protects that attractive force of business which brings customers to it.

The tort of passing off protects a business against misrepresentation of his business, directed at its customers and calculated to damage the reputation and goodwill of business. **SIR JOHN SALMOND** in his book **Law of Tort** stated the reason for the tort of passing off thus:

***“The law… is designed to protect traders against… unfair competition which consists in acquiring for oneself, by means of false, or misleading devices, the benefit of the reputation already achieved by rival traders” [[4]](#footnote-4)***

In the words **of LORD KINGSDOWN in Leather Cloth Co. v American Leather Cloth Co:**

***“the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader” [[5]](#footnote-5)***

And **LORD LANGDALE MR** explaining the law in **Perry v Truefit** stated that:

***“A man is not to sell his own goods under the pretense that they are goods of another person; he cannot be permitted to practice such a deception, not to use the means which contribute to that end” [[6]](#footnote-6)***

In the law of passing off, the basis of the legal action is that the passing off by the defendant of his goods or his business as that of the plaintiff, is injuring the right to property, product, services and business of the plaintiff.

# Bibliography

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W Peel and J Goudkamp, Winfield & Jolowicz Tort (19th edn. Sweet & Maxwell publication 2014)

1. (1979) AC 731 [↑](#footnote-ref-1)
2. Franis Day & Hunter Ltd v Twentieth Century Fox Co (1939) 4 All ER 192 at 199 PC. [↑](#footnote-ref-2)
3. A trade mark is not to be registered in so far as its use is liable to be prevented by the law of passing off: Trade Marks Act 1994, s.5(4)(a) [↑](#footnote-ref-3)
4. Salmond op cit. para 149 [↑](#footnote-ref-4)
5. (1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435 [↑](#footnote-ref-5)
6. (1842) 49 ER 749 at 725. Draper v Trist (1939) 3All ER 513 at 526 [↑](#footnote-ref-6)