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# QUESTION

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

Economic torts are becoming more prevalent in the 21st century.

Economic torts 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 and 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 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.

In order to understand the relevance passing off as an economic tort in the 21st century Nigeria, we must first understand what **“passing off”** means. Passing off, can be said to be,a wrong, a common law tort which protects the goodwill of a trader from misrepresentation, misleading the public into believing falsely, that the brand being projected was the same as a well known brand is also the tort of passing off. Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage.

Raising an action of passing off can help you to prevent other people from using the goodwill associated with your business for their own benefit.

### Elements of passing off

To establish a claim for passing off, you must meet three key requirements:

* **goodwill** - you must prove that you own a 'reputation' in the mark that the public associates with your specific product or service
* **misrepresentation**- you must show that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours
* **damage** - you must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss

Rights relating to passing off are established gradually with use. Goodwill in a mark can be particularly difficult to define. Reputation and goodwill of a business is generally considered as something that provides an identity to a business and its goods or services, and distinguishes them from those of their competitors.

### Remedies for passing off

If you are successful in a passing off claim, there are several **remedies** available:

* apply for an injunction to prevent the business from using your trade mark or goodwill[[1]](#footnote-2)
* apply to have the infringing goods destroyed
* sue for damages or seek account for lost profit
* request an inquiry to establish loss

### Passing off defences

You may encounter different **defenses** if you pursue a claim for passing off. For example, the defendant may argue that:

* functional design or packaging[[2]](#footnote-3)
* the mark is generic
* they have used carefully and honestly their own name
* CONSENT, such as license given to him by the plaintiff[[3]](#footnote-4)
* you have given consent or encouraged the use of the mark
* you can't demonstrate damage or loss

The law on passing off is complicated. Claims can be hard to prove and taking action can be expensive, as the evidential burden of proof is solely on the trade mark owner.

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 persons business or reputation, has committed the economic tort of passing off.

As held in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation***, “A man may not sell his own goods under the pretence that they are the goods of another man.”

The common forms of passing off

1. **Trading with a name resembling that of the plaintiff**

In this form of passing off, the defendant is usually engaged in the same type of business as the plaintiff, and he uses the plaintiffs name,We have the case of ***Hendriks v Montague[[4]](#footnote-5)*** the plaintiffs who were insurers trading as “Universal Life Assurance Society” obtained an injunction to restrain the defendants which was subsequently incorporated as insurers from trading as “Universe Life Assurance Society”

1. Marketing fake products as that of the plaintiff by using the plaintiffs label or design.
2. Marketing products with a name resembling that of the plaintiff’s goods.
3. Marketing products with the plaintiffs trademark
4. Imitating the appearance of the plaintiffs product
5. Selling inferior or expired goods of the plaintiff as current stock
6. False advertisement by copying the plaintiffs advertisement

# Relevance of the tort of passing off as a form of Economic torts in the 21st century Nigeria.

The tort of passing of is common in a competitive business community or economy. It is designed to protect a person’s interest from the unfair trade practices. Its objective is to protect the reputation and goodwill a business has built up for itself.

It is actionable per se on its occurrence. A plaintiff does not have to prove damages in order to succeed[[5]](#footnote-6). The right of action lies even though no damage has been suffered nor proved. The probability of damage occurring is enough for a plaintiff to succeed. Therefore, once passing off has been committed, the plaintiff has right to sue and is entitled for remedy[[6]](#footnote-7).

So, in Nigeria, the tort of passing off is very relevant, because it prevents unfair trade practices from occurring. It prevents the above listed forms of the tort of passing off from being committed, and makes sure that offenders are punished.

We can see in the following case:

Ogunlende v Babayemi, the plaintiffs who were building and civil engineering contractors carrying on business as “mercury builders” were given an injunction to restrain the defendants from carrying out a business under the name “mercury builders Nigeria Limited”.

It is this tort that protects for originality and differences in business.

For instance we all know “blue band” as a margarine brand, but If some other brand names their margarine “blue butter band”, “blue band” can sue under the tort of passing off.

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**References**

1. Olarinde E.S, Chigbo C.C, Ikpeze, N.G. (2018). The modern Law of Torts, a kaleidoscopic perspective. Ado Ekiti, College of Law: Afe Babalola University.
2. Malemi. E.(2013) Law of Tort Lagos: Princeton Publishing Company.

1. John walker and sons ltd v Henry Ost & co Ltd (1970) 2 106 [↑](#footnote-ref-2)
2. J. B. Williams co v Bronnely and co ltd, supra canadian Shredded Wheat co v Kelogg co (1938) 1 all ER 618 [↑](#footnote-ref-3)
3. Lee v Haley (1869) 5 Ch App 155. [↑](#footnote-ref-4)
4. (1881)50LJ Ch 456 Tussaud v Tussaud (1890). [↑](#footnote-ref-5)
5. Draper v Trist (1939) 3 ALL ER 513 CA [↑](#footnote-ref-6)
6. McCulloch v May Produce Distributors Ltd (1947) 2ALL ER 845 [↑](#footnote-ref-7)