**INTRODUCTION**

The tort of passing off is simply an economic tort where a person copies another person’s brand name thereby luring people to buy his own without knowing. Passing off is not only the copying of a person’s brand name but there are different methods through which a person’s trade or product can be passed off. This tort has been recognized for a number of years now but reporters or commentators have continued to disagree on its classification. This tort is classified as part of economic torts because the subject matter of this tort is usually the protection of the plaintiff’s interest; financial interest precisely.

Economic torts deal with injury to financial or intangible interests and not personal injury like other torts. Economic torts protect economic interest and offer protection to a person’s trade or business from acts which the law considers to be unacceptable. Asides passing off, other economic torts are breach of intellectual property rights, injurious or malicious falsehood, conspiracy, interference with contracts.

There are quite a few definitions of passing off. Legal Dictionary defines it as making some false representation likely to induce a person to believe that the goods or services are those of another.

An excellent definition of passing off can be seen in the case of [[1]](#footnote-1)*Erven warnink bv v J Tounend and sons (hull) ltd* where Lord Diplock defined it as:

*“…a representation made by a trader in the course of trade, to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.”*

The elements of the tort can be taken from the definition by Lord Diplock above. The elements are:

1. Misrepresentation
2. The misrepresentation must be made by a trader in the course of trade
3. To prospective customers of his or ultimate consumers of goods and services supplied by him
4. It must be calculated to injure the business or goodwill of another trader
5. Must cause actual damage to a business or goodwill of the trader by whom the action is brought. This means that the tort of passing off is not actionable per se.

Before I proceed to discussing the relevance of passing off as a form of economic torts in the 21st century Nigeria, let’s briefly look at the methods through which the tort can be committed. [[2]](#footnote-2)There are number of ways through which the tort of passing off can be committed but I will identify the most important methods as identified in E. Smaranda’s A Kaleidoscopic Perspective.

* A direct statement that goods belonging to the plaintiff in fact belong to the defendant: This simply a passing off whereby a trader makes a direct statement to the public that the plaintiff’s goods actually belong to him. This was indicated in the case of [[3]](#footnote-3)*Lord Byron v Johnson*
* Imitating the appearance of the plaintiff’s goods: This means copying the appearance of a person’s product for your own. It should be noted that innocence of the defendant cannot be a defense here as held in the case of [[4]](#footnote-4)*Gillette Uk Ltd v Edenwest Ltd.*
* Using a name similar to the plaintiff’s goods: For example, a person imitating NESTLE brand name and naming theirs NISSLE. This would amount to passing off because it is capable of misleading the public. In the case of [[5]](#footnote-5)*Reddaway v Banham* where the defendants copied the name of the plaintiff’s design which contained a camel and the inscription ‘Camel Hair Belting’ and made theirs ‘Camel Hair Belting’ as well but without the camel, the court held that the defendants had committed the tort of passing off.
* Using the plaintiff’s name: Using the plaintiff’s name for one’s trade amounts to passing off and doesn’t matter even though the locations are not close. This was illustrated in the case of [[6]](#footnote-6)*Maxims ltd v Dye.*
* Using the defendant’s name: Generally, the defendant is entitled to use his own name to advertise his products but this is subject to the qualification that the defendant cannot do so where it would be to mislead the public. This is evident in the case of [[7]](#footnote-7)*Parker Knoll v. Knoll international ltd.*
* False attribution of authorship: In the case of [[8]](#footnote-8)*Clark v Associated* *Newspapers Ltd*, the defendant who was publishing articles written by a Mr. Peter Bradshaw which were parodies of the diaries of the plaintiff was issued an injunction to stop publication of the articles. This is because the articles were in a form that a substantial number of the newspaper’s readers attributed them to Mr. Peter Bradshaw’s authorship. The Lordship’s judgment should not be seen as a bar to the publication of parodies.
* False endorsement: The court held in the case of [[9]](#footnote-9)*Irvine v Talksport ltd* that passing off could also apply to false endorsements and it is not necessary to show that the parties shared a common field of activity when it comes to cases of false endorsements.
* Made by a trader in the course of a trade: Where the parties are not in the same trade, it is hard for the plaintiff to succeed in his claim. In the case of [[10]](#footnote-10)*Granada Group ltd v Ford Motor co ltd,* the court held that the plaintiffs were not entitled to an injunction because there was no risk of confusion in the minds of the public between the two trades. There is also a similar judgment in the case of [[11]](#footnote-11)*Mcculough v May.*

The remedies available under this tort of passing off are basically injunction and damages while the defenses are consent of the plaintiff to the use of the name, mark, sign or slogan, indistinct name, mark, sign and slogan of the plaintiff, that the plaintiff’s name, mark has become generic, dissimilarities in the mark of the plaintiff and the defendant. (Malemi, 2013)

**RELEVANCE OF PASSING OFF IN THE 21ST CENTURY NIGERIA**

Passing off is very relevant in this 21st century Nigeria. It has helped the economy of Nigeria and even the country as a whole in a number of ways. First of all, passing off as a form of economic tort helps to remove unhealthy and unfair competition. Competition is inevitable in trades and business; but what becomes bad is an unhealthy and unfair competition among trades. The tort of passing off has helped to reduce unfair competitions in trades and this is very relevant to the 21st century Nigeria and is quite evident. It is against unfair competitions in the following ways:

* Dishonesty does not need to be intentional. Whether or not the competitor intends to do the wrong thing or not doesn’t come into it which is what actually makes the tort easy.
* Deception of the buying public and those that can influence purchasing decisions can’t even be unintentionally unfair
* Buyers of goods and services who are deceived don’t even need to know of the business that is protected.
* A competitor’s entire distribution chain can be brought to a halt in an appropriate case

Also, Passing off is employed by the common law courts amongst other economic torts not only to ensure fair competition in the market systems, but also to maintain and safeguard the individual interests of competitors as well as public interest in fair and sound competitions. This is also quite evident. The economic tort of passing off provides remedy for the deceptive use of trade name, trademarks and business goodwill. Passing off recognizes and protects the proprietary right in business goodwill and prevents a trade competitor for adopting the goodwill of the plaintiff’s business in a manner that is calculated to deceive the members of the public. For example in the case of [[12]](#footnote-12)*Byron V. Johnston* it was actionable as a tort of passing off for a book publisher to advertise and sell a book of poems with the name of Lord Byron on the title page when in fact the famous poet had nothing to do with the authorship.

Furthermore, small and medium businesses have been 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. This is really relevant because not only big businesses are protected but also the small ones. In this way, it gives people the courage to start up their businesses bearing in mind that they are covered by the law. The Trademarks Act can also be further amended to reflect the times, happenings and changes in Nigeria. In particular, the Trademarks Registry has witnessed a serious backlog in the successful completion of the registration of marks and this has the resultant effect of limiting the rights of most product owners to Passing off as opposed to the an action on the infringement of a trademark.

The law has even helped in the reduction of the way people pass off other people’s goods or products. This is because of the remedy that has been set out by the law to compensate injured parties. Also, the economic tort of Passing off does not confer monopoly rights to any names, marks, or getups. It does not recognize them as property in its own right.

Furthermore, the law of passing off prevents one trader from misrepresenting goods or services as being the goods or services of another and also prevents a trader from holding out his or her goods or services as having some association or connection with another when this is not true or prevents other people from using the goodwill associated with your business for their own benefit.

The tort of passing off has also helped celebrities because the well- known ones has accrued a certain amount of goodwill in their name, image or slogan because of the offense of using their personality without their knowledge. If these then are affiliated with another product because of the unauthorized use by a trader, it may cause the public to assume the celebrity has given his or her consent to such marketing and this may increase sales for the trader. The damage caused to the celebrity is financial loss of the fee they could have potentially earned through endorsing the said product. Just like in the foreign case of [[13]](#footnote-13)*Irvine V. Talksport* earlier mentioned.

Conclusively, in the 21st century Nigeria, the economic tort of passing off is relevant because it enables businesses to enforce their rights associated with its good name in the market. It prevents competitors stealing or over borrowing the traits of a product or service which has made it a success. It has been written in books and articles on how it has been impossible to determine which court actually has the jurisdiction in passing off cases either the Supreme Court or the Federal court. Both courts have entertained cases on passing off and have given accurate judgments though. This makes it vivid that the tort of passing off is actually very relevant and especially in this 21st century Nigeria because the world is evolving. The businesses of everyone makes up the economy of the country and by protecting people’s trades and businesses, it is safe to say that the economy of the country is safe as well.

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1. ([1996] NLJ 874) [↑](#footnote-ref-1)
2. E. Smaranda, C. Chigbo and G. Ikpeze, The modern Law of Torts: A Kaleidoscopic Perspective. [↑](#footnote-ref-2)
3. (1816) 2 Mer 29. [↑](#footnote-ref-3)
4. (1994) the Times, 9 March. [↑](#footnote-ref-4)
5. (1896) AC 199. [↑](#footnote-ref-5)
6. [1977] 1 WLR 1155. [↑](#footnote-ref-6)
7. [1962] RPC 265. [↑](#footnote-ref-7)
8. [1998] ALL ER 959. [↑](#footnote-ref-8)
9. [2002] ALL ER 414. [↑](#footnote-ref-9)
10. [1972] FSR 103. [↑](#footnote-ref-10)
11. [1947] 2 ALL ER 845. [↑](#footnote-ref-11)
12. 227 App. Div. 797. [↑](#footnote-ref-12)
13. [2002] 2 ALL ER 414. [↑](#footnote-ref-13)