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Question: Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria

**Introduction**

Economic torts refer to a convenient nomenclature to bring together a number of torts or delicts with an independent line of authority that regulate economic activity.[[1]](#footnote-1) 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 unacceptable interference. Economic torts are torts that inflict financial losses or financial injury, they occur mainly in the economic, commercial and business sector of life.

Economic torts include Passing off, Breach of intellectual property rights and much more. The law of passing off is to protect traders most especially unregistered business against all forms of unfair competition. Passing off and its benefits in the 21st century would be briefly considered below.

**Passing Off**

Passing off is defined as an actionable wrong for a trader so to conduct his business as to lead to the belief that his goods, services or business are the goods, services or business of another. This tort is known as “passing off”.[[2]](#footnote-2) Passing off is when a trader by some device induces or endeavors to induce purchasers or persons who may become purchasers to believe that the goods offered for sale are of a kind, or quality, or from a source, or having a reputation, other than their own, e.g., by improperly using trade mark or a trade name or its distinctive part. The law of passing off arose to prevent unfair trading and protects the property rights of a trade in his goodwill.[[3]](#footnote-3) Jowitt’s Dictionary of English Law defines passing off as the wrong committed by a person who sells goods or carries on with business, etc. under such a name, mark, description or otherwise in such a manner as to mislead the public into believing that the goods or business, etc. are those of another person. The latter person has a right of action in damages[[4]](#footnote-4) or for an account, and for injunction to restrain the defendant for the future.

The classical form of passing off is also called classical trinity. The classical trinity has been restated in ***Reckitt & Colman Products Ltd Case.[[5]](#footnote-5)*** This case is important in two respects. First, the House of Lords confirmed that each passing off case depended on its own facts. Secondly, their Lordships reverted to the classical trinity for their definition of the elements of the cause of action. Lord Oliver put the matters that a successful claimant must prove: he must establish a goodwill or reputation, secondly he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to belief that the goods or services offered by him are the goods and services of the plaintiff, thirdly he must demonstrate that he suffers or in a *quia timet* action, that he is likely to suffer damages by reason of erroneous belief endangered by the defendant’s misrepresentation that the source of the defendant’s goods or services is the same source of those offered by the plaintiff.

To succeed in a claim for passing off, all that a plaintiff has to prove is that the activity of the defendant is likely to deceive the public. Liability is strict, therefore, innocent passing off is not a defense. The plaintiff does not have to prove intention to deceive on the part of the defendant.[[6]](#footnote-6) The tort of passing off is actionable per se on its occurrence which means that a plaintiff does not need to prove damage in order to succeed.[[7]](#footnote-7)

**Purpose of the Law of Passing off**

Passing off is a common law tort that was established long before trademarks became registered. Its purpose is to protect traders by allowing them to bring an action against a trader attempting to ride off the back of their established relationship(goodwill) by using a similar mark or get up as their own. **Sir John Salmond** in his book ***Law of Tort*** stated the reason for the tort of passing off as thus:

*“The law … is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of reputation already achieved by rival traders”[[8]](#footnote-8)*

In the words of Lord Kingsdown in the case of ***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”[[9]](#footnote-9)* In the law of passing off, the basis of legal action is that passing off by the defendant of his goods and business as that of the plaintiff, is injuring the right of property, products, services and business of the plaintiff.

**Common forms of passing off**

The common forms of passing off include: Trading with a name resembling that of the plaintiff, Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design, Marketing a product with a name resembling that of the plaintiff goods, Marketing products with plaintiff’s trademark or imitation, Imitating the appearance of the plaintiffs product, Selling inferior and expired goods of the plaintiff as current stock and False advertisement by copying the plaintiffs advertisement and many more. A few of these common forms of passing off would be explained briefly.

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

In this form of passing off, the defendant is involved in the same kind of business as the plaintiff and he uses the plaintiff’s name or a name resembling that of the plaintiff, as a result the public is confused and misled into thinking they are the one and the same business. Innocence or bona fide honesty is not a defense. A well-known example is ***Hendriks v. Montague***,[[10]](#footnote-10) where the Universal Life Assurance Society were granted an injunction restraining the defendant’s company which was incorporated subsequently from carrying on with business under the name “Universal Life Assurance Association”. The principle in the case above was applied in ***Niger Chemists v. Nigeria Chemists***,[[11]](#footnote-11) where the learned judge granted the injunction against the defendant holding that the use of the name “Nigeria Chemists” was intended to deceive persons who know and intend to deal with “Niger Chemists”.

**Marketing a product as that of the plaintiff**

The tort is committed in this regard when a defendant sells his goods off to people by stating falsely that the goods are produced by the plaintiff whereas they are not. In the case of **Lord** ***Bryton v. Johnson[[12]](#footnote-12)***where the defendant publishers were restrained from advertising and selling a book of poems with Lord Bryon’s name written on the cover page and title page where in fact the famous poet was not the author.

**Imitating the appearance of the plaintiff’s product**

It is passing off for the defendant to do anything which makes his product appear like the plaintiff’s product. It includes appearance, package, label and design.

An early example is ***U.K Tobacco Co ltd v. Carreras Ltd***,[[13]](#footnote-13) where the defendants marked cigarettes called “Barrister” in packets on which appeared a white man in barrister’s wig and gown. This was held to be an actual imitation of the plaintiff’s cigarettes called “Bandmaster”, whose packets appeared a white man in bandmaster’s uniform. A limitation to this head of passing off is that an action will not succeed where the appearance complained of is necessary for the better performance of the defendant’s goods or for greater efficiency in handling and processing them; that is where appearance is purely functional.[[14]](#footnote-14)

**Marketing products with plaintiff’s trademark or its imitation**

It is passing off for a defendant to market his goods using the plaintiff’s trademark or its imitation, leading to a confusion of the buyers, who then patronize his products thinking that they are the products of the plaintiff. A trademark is any design, picture, mark, name or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller.[[15]](#footnote-15) Trademarks are registered and protected under the Merchandise Marks Act.[[16]](#footnote-16) In the case of ***Perry v. Truefitt[[17]](#footnote-17)***, the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations.

**Remedies of passing off** include: Damages, Account for profit or for loss of sales, Injunction,[[18]](#footnote-18) Intervention by the regular regulatory agencies such as NAFDAC, SON etc.

**Relevance of Passing off in the 21st century Nigeria**

Passing off was originally intended to protect traders by allowing them bring action against a trader attempting to ride off the back of their established reputation (goodwill) by using a similar mark or get up as their own. In 1875, a statutory system of registering trademarks was introduced. This solved the earlier problem of having to show title to the mark by establishing goodwill as is necessary for a passing off action. The law has been amended by numerous statutes until the Trade Mark Directive was finally implemented into the English law in the form of Trade Mark Act 1994 (TMA).

In the 21st century Nigeria, a lot of small scale enterprises and business are unregistered such as retail shops and the law protects them from unfair situations. It plays a big role in Intellectual Property. By virtue of TMA, the importance and relevance has somewhat been diminished but there are still certain things which are unregisterable as trademarks. An instance is where descriptive words are concerned, the TMA prevents registration of descriptive words unless qualified by the proviso that they’ve acquired a distinctive character while in passing off, it allows descriptive words in a passing off action. The scope of passing off where descriptive words are in issue was extended in the case of ***Antec International v. South Western Chicks[[19]](#footnote-19)***

Passing off offers protection in the aspect of Intellectual property, it protects personal names which is an area where intellectual property rights are at issue and particularly where celebrity names are concerned. The law of passing off, protects the intellectual property rights a person has in their creation where another person seeks to exploit a similarity between their creation and another creation.

The law of passing off provides more targeted protection mainly within the field of consumer law to businesses whose products are patented and made use by other corporate actors whose use of trademarks is intended to make them profit though taking advantage of another’s protected patent.

**Conclusion**

In conclusion, the common law tort of passing off remains relevant in the 21st century Nigeria even with existence of the Trade Marks Act as it is a vital form of protection of Intellectual property and there are instances where passing off is the only form of protection.

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1. Collins Dictionary of law, W.J. Stewart, 2006 [↑](#footnote-ref-1)
2. Margaret R Brazier- “Clerk & Lindsell on Torts” p.1403 (1995, 17th Edition). [↑](#footnote-ref-2)
3. Winifield- “Tort” p.485 9th Edition. [↑](#footnote-ref-3)
4. The plaintiff will recover damages for the loss of profits he has suffered as a result of customers being diverted from him to the defendant. He may also recover for loss of business reputation and goodwill*: Spalding v. Gamage* (1918) 35 R.P.C. 101. [↑](#footnote-ref-4)
5. (1990) R.P.C 341, HL. [↑](#footnote-ref-5)
6. *Niger Chemists v. Nigeria Chemists Ltd*, supra [↑](#footnote-ref-6)
7. *Draper v. Trist* (1939) 3 All ER 513 CA [↑](#footnote-ref-7)
8. Salmond op cit. para 149 [↑](#footnote-ref-8)
9. (1865) 11 HL Cas 523 at 528, (1865) 11 ER 1435 [↑](#footnote-ref-9)
10. (1881) 50 L.J. Ch. 456. [↑](#footnote-ref-10)
11. (1961) All N.L.R. 171. [↑](#footnote-ref-11)
12. (1816) 35 ER 851 [↑](#footnote-ref-12)
13. (1931) 16 N.L.R.1. [↑](#footnote-ref-13)
14. In *Williams v. Bronnley* (1909) 26 R.P.C. 765 where it was held that a defendant who manufactured shaving sticks could not be prevented from marketing a standard type of container already used by the plaintiff since the appearance of the container was vindicated primarily by functional considerations. But it was held in *Trebor (Nigeria) Ltd v. Associated Industries Ltd*. (1972) N. N.L.R. 60 at pp.71, 72, that the use of a functional packaging having “capricious” design, shape or size closely resembling the plaintiff’s product did not constitute passing off. [↑](#footnote-ref-14)
15. *Millington v. Fox* (1863) 40 E.R 956. [↑](#footnote-ref-15)
16. 2004 [↑](#footnote-ref-16)
17. (1842) 49 ER 749 [↑](#footnote-ref-17)
18. John Walker & Sons Ltd v. Henry Ost & Co ltd (1970) 2 106 [↑](#footnote-ref-18)
19. (1998) EWHC [↑](#footnote-ref-19)