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**COURSE: LAW OF TORTS**

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**Question**

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

DEFINITION OF ECONOMIC TORT?

Economic torts, which are also called business torts, are torts that provide the 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. Economic torts may arise from actions which may have caused loss in the commercial transaction of the plaintiff. 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 tortious interference actions designed to protect trade or business. The area includes the doctrine of restraint of trade and, particularly in the United Kingdom, has largely been submerged in the twentieth century by statutory interventions on collective labour law and modern competition law, and certain laws governing intellectual property, particularly unfair competition law. The "absence of any unifying principle drawing together the different heads of economic tort liability has often been remarked upon."[[1]](#footnote-0) Economic torts are committed within the curb of economic, commercial or business environment. 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

CATEGORIES OF ECONOMIC TORT:

The categories of economic torts are as follows;

• 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 torts represent the common law's historical attempt to balance the need to protect claimants against those who inflict economic harm and the wider need to allow effective, even aggressive, competition (including competition between employers and their workers). These groups of torts protect some of a person’s intangible interests – those which may loosely be called his business interests – from unlawful interference. Two cases demonstrate economic torts' affinity to competition and labour law. In Mogul Steamship Co Ltd[[2]](#footnote-1) the plaintiffs argued they had been driven from the Chinese tea market by a 'shipping conference', that had acted together to underprice them. But this cartel was ruled lawful and "nothing more [than] a war of competition waged in the interest of their own trade."[[3]](#footnote-2) Nowadays, this would be considered a criminal cartel.

 Generally, where a person has suffered economic loss, redress has traditionally been in contract law. The justification for this has been the doctrine of Consideration. Where a person had entered a bargain promise and provided consideration, this would justify the court protecting their expectation interest in a breach of consideration.

Damages for breach of contract are to put the claimant in the position they would have been in if the contract had been performed. The objective of damages in torts is to put the claimant in the position they would have been if the tort had not been committed. This protects the status quo interest. For example, take the facts of Donoghue v Stevenson.[[4]](#footnote-3) The duty of care owed by the defendant was a duty not to cause physical damage, in this case, personal injuries to the plaintiff caused by a contaminated drink. If the plaintiff had been sick over her clothes as a result of drinking the contaminated ginger beer, she would not have had a claim for damage to property. Breach of contract may lead to tortious liability if there is damage to property. Both claim for personal injuries and the claim for property damage are status quo claims. But she could not have claimed for the cost of the ginger beer. This is regarded as a claim for economic loss and as the plaintiff had no contract, she had no claim in contract.

THE TORT OF PASSING OFF

Definition and Nature of the Tort of Passing Off

Passing off is 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 a wrong and is known as the tort of “passing off”. The tort of passing off is a civil wrong that is committed by a person where he passes off somebody else’s business or goodwill as though it were his. The tort of passing off means also, the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff. Passing off is 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 a wrong and is known as the tort of passing off. The law on this tort 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 benefits of the reputation already achieved by a rival trader. Where this tort is successfully established, the aggrieved party will be entitled to damages for any loss he has incurred therefrom. 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.” Law aims to protect traders from this form of unfair competition. Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. So basically it is an intangible asset. It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favourable location, reputation of the brand in the community, or the quality of its employer and employees. The value of goodwill of a brand can be calculated by a number of methods, like subtracting the value of all tangible assets from the total value to establish the value of the intangible assets the amount of earnings that are in excess of those normally earned by a similar business averaging the past five years net income and subtracting a reasonable expected rate of return for tangible assets and salary requirements capitalising the resulting value.

Goodwill can be classified into two zones, viz. institutional goodwill and professional practice goodwill. While institutional goodwill associates itself with business houses, their market position, professional practice goodwill, as is quite obvious from the name, associates itself with professional practices like law, medicine, architecture, engineering and many others.  It could be illustrated hypothetically that a tort of passing off is committed where A who is a rice producer produces bags of rice weighing 10kg each for the purpose of sale but rebrand each bag with a tag that is associated with B’s business name to mislead the public into believing the bags of rice sold are B’s.

FORMS OF THE TORT PASSING OFF

Passing off takes different or various forms, the common of which are the following:

1. Marketing a product as that of the plaintiff.

2. Imitating the appearance of the plaintiff’s goods.

3. Trading with a name resembling that of the plaintiff.

4. Marketing goods with the trademark of the plaintiff or its imitation.

5. Selling inferior or expired goods of the plaintiff as current stock.

6. False advertisement by copying the plaintiff’s advertisement.

A BRIEF ANALYSIS OF PASSING OFF AND TRADEMARKS

Passing off is often relied upon when a product is unregistered as a trademark. For example, a slogan or a name may not be registered as a trademark, but it has sufficient goodwill attached to it to be protected by passing off laws. This is why it will be true to say it is a common law doctrine. Unfortunately, passing off claims can be much more time consuming and less straightforward than claims for trade mark infringement. If your name, slogan or similar feature is capable of being registered as a trade mark, then it strongly recommended you take legal advice in relation to registering it as a trade mark rather than risk having to rely on the common law of passing off in future. Whether a person may rely on passing off if he has already registered his trademark the answer seems to be in the affirmative. A passing off claim as well as a case for trade mark infringement may be sustained concurrently. A claim for trade mark infringement could fail but a passing off claim succeeds. So if there is doubt as to whether a claim for trademark infringement would succeed, making a passing off claim could prove highly beneficial. In practice, both claims would be made.

REMEDIES AVAILABLE IN THE TORT OF PASSING OFF

In successful passing off claims, the following remedies are available:

i. Damages or an account of the defendant’s profits;

ii. An order for the delivery up or the destruction of the infringing articles or products;

iii. An injunction to prevent further actions that amount to passing off;

iv. Interim injunction if you need to act quickly;

v. An enquiry to establish loss.

DEFENCES AVAILABLE IN THE TORT OF PASSING OFF

In a claim for the tort of passing off, a defendant may plead a number of defences. The below are some of these defences:

1. Consent, such as licence given to him by the plaintiff to produce and or market the product.30

2. Innocent passing off: Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.

3. The mere descriptive name of the product: An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.

CONCLUSION

In a country where a considerable percentage of the population lives in rural areas, it is very easy to pass off goods. with the Trademarks Act, 1999 providing protection against passing off, situation has improved, Passing off has come a long way through the common law system and now has some well-defined principles and ambit. Perhaps the time is ripe to bring in legislation and enact a statute concerning passing off.

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2. *[Mogul Steamship Co Ltd v McGregor, Gow & Co](https://en.wikipedia.org/wiki/Mogul_Steamship_Co_Ltd_v_McGregor%2C_Gow_%26_Co)* (1889) LR 23 QBD 598 [↑](#footnote-ref-1)
3. per [Bowen LJ](https://en.wikipedia.org/wiki/Bowen_LJ), (1889) LR 23 QBD 598, 614 [↑](#footnote-ref-2)
4. Donoghue v Stevenson (1932) A.C. 502 [↑](#footnote-ref-3)