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LAW OF TORT

17/LAW01/226

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

**ECONOMIC TORTS**

Economic torts are also called business torts, they are [torts](https://en.wikipedia.org/wiki/Tort" \o "Tort) that provide the [common law](https://en.wikipedia.org/wiki/Common_law" \o "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](https://en.wikipedia.org/wiki/Pure_economic_loss" \o "Pure economic loss).

Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable.

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 include:

1. Injurious /Malicious falsehood
2. Passing off
3. Breach of intellectual property rights
4. Conspiracy to interfere
5. Interference with contracts

**PASSING OFF**

**MEANING**

The tort of passing off applies where there is a representation that a person’s goods or services are those of someone else.[[1]](#footnote-0) This law, tort of passing off, as Lord Kingsdown in Leather Cloth Co. v. American Leather Cloth Co.[[2]](#footnote-1) noted,seeks to protect traders from unhealthy competition, for “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.”

The tort of passing off as an economic tort, seeks to protect two classes of persons: the innocent public and an existing bonafide person or business, from the misrepresentation of another person. Passing off is governed by the civil law. This tort occurs where, for instance, X presents his business or services out to the world as that of Y, for which the latter has consequentially occasioned or is likely to occasion damage. Passing off takes place when someone, such as a business, passes off another party’s goods or services as if they are their own, by misrepresentation.

The law of passing off protects the goodwill of a business of person from other traders. Sparkling Breweries Ltd. v. Union Bank of Nigeria**[[3]](#footnote-2)** made a pronouncement in an action founded on the Tort of Unlawful Interference and not passing off. The principle underlying the tort of passing off is that “A man is not to sell his own goods under the pretence that they are the goods of another man” (Perry v Truefitt).[[4]](#footnote-3) In each case of passing off, the key issue is the danger of misrepresentation as to the origin of goods or services. If someone leads consumers to believe that their goods or services are connected with another business when they are not, they may give the other business grounds to sue for passing off.

**Burden of Proof**

The [burden of proof](https://hallellis.co.uk/burden-proof-balance-probabilities/" \l "_burden) is with the claimant the business harmed to show on the [balance of probabilities](https://hallellis.co.uk/burden-proof-balance-probabilities/" \l "_balance).

**Element of passing off**

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

1. Reputation
2. Misrepresentation
3. Goodwill
4. Damage

**Reputation** - 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.In any passing off action, the representation must create a confusion of connection between the two products. It cannot be mere description to amount to passing off but to market a product in a similar way to another may be passing off. The key to misrepresentation is the confusion it creates.The most famous case is Reckitt and Colman Products v Borden Inc (1990). Here the defendants were selling lemon juice in containers similar to the lemon-shaped containers of Jif Lemon. Despite being a different size and having a different label, the court held that there was a misrepresentation and granted an injunction.

**Goodwill**: You must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputation loss. In Manitoba Fisheries Ltd. v. The Queen**[[5]](#footnote-4)**, this Court adopted the following definition of "goodwill": "Goodwill" is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this.

A plaintiff must therefore prove the existence of a commercial reputation or goodwill created through the exclusive association of the name, mark or other indicia relied upon with its business, wares or services. This proof necessitates that the plaintiff’s name or mark be distinctive of the plaintiff’s business, wares or services. Distinctiveness is the very essence of a trade-mark at common law and under the Trade-marks Act - without it there is no protectable right.[[6]](#footnote-5)

**Damage:** The final element is damage, or the likelihood of damage. Goddard LJ noted in Daper v Trist and Tristbestos Brake Linings Ltd (1939) that law assumes ‘if the goodwill of a man’s business has been interfered with by passing-off of goods, damage results there from’. In this case the claimant was able to succeed on the basis that there was a real possibility of damage.

**Remedies**

An action for passing off is a civil litigation. The relief (in the form of various kinds of court order) available to the victim includes:

1. Damages or an account of the defendant’s profits;
2. An order for the delivery up or the destruction of the infringing articles or products;
3. An injunction to prevent further actions that amount to passing off;
4. Interim injunction if you need to act quickly;

**Defences:** The following are available as a defence to a passing off claim:

1. The claimant’s mark, slogan, etc is not distinctive
2. The mark, slogan, etc has become generic
3. The defendant may be innocently using his or her own name
4. Consent: The claimant has given his consent

References

* Lawyer and trade-mark agent, Barry Gamache is a partner with ROBIC, LLP, a multidisciplinary firm of lawyers and patent and trade-mark agents. Published as part of the IP Benchbook (update 200905-31). Publication 404
* Blacks law dictionary
* <https://thestudentlawyer.com/2014/01/22/understanding-passing-off/>
* R. Scott. Jolliffe, “The Common Law Doctrine of Passing Off” in Gordon F. Henderson ed., Trademarks Law of Canada (Toronto: Carswell, 1993) at 206 – 207
* <https://www.clic.org.hk/en/topics/intellectualProperty/passing_off/>

1. Blacks law dictionary [↑](#footnote-ref-0)
2. (1865) 11 [↑](#footnote-ref-1)
3. LPERL-3 109(2001) S.C [↑](#footnote-ref-2)
4. 1842 [↑](#footnote-ref-3)
5. [1979] 1 S.C.R. 101, at p. 108 [↑](#footnote-ref-4)
6. R. Scott. Jolliffe, “The Common Law Doctrine of Passing Off” in Gordon F. Henderson ed., Trademarks Law of Canada (Toronto: Carswell, 1993) at 206 – 207 [↑](#footnote-ref-5)