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**LAW OF TORTS**

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

**ECONOMIC TORTS**

Economic Torts , have as their primary function, the protection of a claimant’s economic interests. They include the torts of; breach of intellectual property rights, conspiracy to interfere, civil conspiracy, unlawful interference with trade/contracts, deceit, injurious falsehood and malicious falsehood. They also include passing off, one of the most useful of the economic torts, which though in practice normally involving deliberate harm, is in fact a tort of strict liability. In this paper, the writer will examine and discuss the relevance of ‘passing off’ as a form of economic torts in the 21st century and also a brief but detailed study of the elements a plaintiff needs to prove to succeed in action for passing off in Nigeria.

**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”** .

Passing Off’ is a cause of action that is primarily founded in tort and is historically rooted in common law. 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-1) This tort occurs where, for instance, X presents his business or services out to the world as that of Y, for which the latter(Y) has consequentially occasioned or is likely to occasion damage. In the case of ***Leather Cloth Co. v American Leather Cloth Co***.[[2]](#footnote-2), **Lord Kingsdown** noted the underlying principle for the tort of passing off as “…*one man has no right to put off his goods for sale as the goods of a rival trader*.” Here, the intention of the defendant in respect to liability in this tort is immaterial, seeing this tort of passing off, is a strict liability one. However, to succeed in an action on tort of passing off, the plaintiff must prove certain elements that are discussed below.

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

The importance of the tort of passing off cannot be denied even though it is not a statutory right. Though the origin of the tort of passing off are ‘doubtful’, by the nineteenth century the tort was seen as originating in the tort of deceit. However, unlike deceit, it gives the trade rival, rather than the deceived customers, the right to sue. The tort of passing off seeks to protect goodwill. It has adapted to meet new circumstances and to restrain a broad range of conduct. THE tort of passing off is embedded in the world of commerce. Its roots are in an age when customers patronised local speciality shops. Today it operates in a world of e-commerce operating across national boundaries. In Nigeria, as elsewhere, the major purpose underlying the tort of ‘passing-off’ is the protection of an established trade goodwill already acquired by a trade mark or trade name. It presupposes therefore, that such goodwill must be established by the party alleging infringement.

**ELEMENTS OF THE TORT OF PASSING OFF.**

For a plaintiff to succeed in an action on tort of passing off there are three essential elements that he must prove. The House of Lords in ***Reckitt and Coleman Products Ltd v Borden Inc.,[[3]](#footnote-3)*** adopted the ‘***Trinity Test’*** in establishing the ingredients of ‘passing-off’, and explained same as follow:

i. The plaintiff must establish a goodwill attached to the goods or service in question and the identifying ‘get up’ under which the goods and services are offered to consumers.

 ii. The plaintiff must also establish that there has been a misrepresentation by the defendant which has caused or has the potential of causing the members of the public to believe that goods or service emanate from the plaintiff;

 iii. Finally, the plaintiff must demonstrate that he has suffered or is likely to suffer loss by the reason of the defendant’s misrepresentation that the source of the defendant’s goods or services is the same as the source of those offered by the plaintiff.

It is imperative to note that in every situation where an infringement has been alleged by a party, all the ingredients of passing-off already identified above are to be construed conjunctively and not otherwise.

The first requirement is that there is an existing goodwill in the goods or service in question.In the case of ***IRC v. Muller Margarine[[4]](#footnote-4)*** the House of Lords, in part, described ‘goodwill’ in relation to ‘passing off’, as ‘***the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom****.*’A plaintiff in an action for passing off cannot succeed where he cannot show that he has an existing goodwill known to the public. Thus, where a plaintiff has no distinct goodwill, he cannot, *prima facie* be heard of, to say that the defendant has infringed upon his trade-mark or name or converting his goodwill.[[5]](#footnote-5)

The second requirement that a plaintiff needs to establish to succeed in an action for passing off is that there was a misrepresentation against that very goodwill by the defendant. This means that the defendants conduct is calculated to deceive the public in to believing that the defendant’s goods are those of the plaintiff. For instance, in the case of ***Niger Chemists Limited v. Nigeria Chemists[[6]](#footnote-6)***, the plaintiff sold drugs as Chemists in Onitsha, Eastern Nigeria and the defendant opened shop on the same street and started the same line of business of dispensing drugs. On being sued, the court granted an injunction against the defendant on the basis that their use of the name Nigeria Chemists was intended to deceive the members of the public to believe that they had a relationship of some sort with Niger Chemists. This was also seen in the case of ***U.K. Tobacco Co. Ltd v. Carreras Ltd.[[7]](#footnote-7)*** It is also important to note that where the alleged act of infringement is declared to be calculated to deceive the members of the public, it is not required of the plaintiff to prove that the act has actually deceived some people[[8]](#footnote-8). It is enough that under the circumstance(s), there was a possibility that potential consumers would be confused or deceived.

The third requirement is that that he suffered or is likely to suffer consequential damages. The last element to succeed in the tort of passing off, in which the plaintiff must prove, is that he suffered or that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant’s misrepresentation. Where he merely establishes the foregoing two elements, but fails in this last element, he may have no or at least nominal damages. Thus, the plaintiff may establish that he has suffered or he is likely to suffer loss of profit; damage to reputation in certain circumstances; and loss of an opportunity to expand[[9]](#footnote-9).

**for an individual dual to be held liable in an action for passing-off, all the enunciated ingredients of the tort must exist at the same time within the particular circumstance(s) giving rise to the alleged infringement of the individual’s right**

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➢ https://www.mondaq.

1. Black’s Law Dictionary (9th ed.) [↑](#footnote-ref-1)
2. (1865) 11 HL Cas. 523 at 53 [↑](#footnote-ref-2)
3. 5 (1990) 1AER 873. [↑](#footnote-ref-3)
4. (1901) AC 217, 223 et seq [↑](#footnote-ref-4)
5. The Tort of Passing Off;An Overview, Triumph P.A. [↑](#footnote-ref-5)
6. (1961) ANLR 180 [↑](#footnote-ref-6)
7. (1931) 16 NLR 1 [↑](#footnote-ref-7)
8. See the Niger Chemist’s case above at p. 173. [↑](#footnote-ref-8)
9. The Tort of Passing off; An Overview, Triumph P.A. [↑](#footnote-ref-9)