

NAME: IGBOCHI RUTH ENYO-OJO

MATRIC NUMBER: **17/LAW01/141**

COURSE: LAW OF TORTS II

COURSE CODE: LPI 302

LEVEL: 300

ASSIGNMENT: Discuss the Relevance of  
Passing Off as a form of Economic Torts in  
the 21st century Nigeria.

## **INTRODUCTION: What is an Economic Tort?**

Economic torts in English common law refer to a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business<sup>1</sup>. This line of tort serves to protect people from interference with their trade or business.

The principal torts under this umbrella can be listed as *passing off, intimidation, conspiracy, deceit and injurious falsehood*<sup>2</sup>. The aforementioned have been employed by the common law courts not only to ensure fair competition in the market system, but also to maintain and safeguard the individual interests of competitors as well as public interest in fair and sound competitions.

### **Passing Off**

This is a branch under the law of tort that focuses on a representation of a person's business or product by another in such a way that it deceives the society as to the relationship between the products<sup>3</sup>. This analogically means that if a person opens a company with the name 'Deli Foods' and another party opens another company with the name 'Dali Foods', there is a high probability that the general public can get confused and believe that these two companies are one and the same, save for a typographical error.

Thus, passing off is a false representation of one's product as that of another person which, in a manner likened to that of undue influence, deceives the general public into patronizing that product. It therefore arises when, in a competitive business environment, a person adversely affects the plaintiff's business interest by marketing his goods that of plaintiff's business<sup>4</sup>. The tort of passing off recognises and protects the proprietary right in business goodwill and prevents a trade competitor from adopting the goodwill of the plaintiff's business in a manner that is calculated to deceive the public.

---

<sup>1</sup> Wikipedia, 'Economic Torts' < [https://en.wikipedia.org/wiki/Economic\\_torts](https://en.wikipedia.org/wiki/Economic_torts) > accessed 1<sup>st</sup> May, 2020.

<sup>2</sup> Saleh H., 'The Law of passing off and its application in Nigeria' (2019) <<https://penprofile.com/blogs/4039/842/the-law-of-passing-off-and-its-application-in-nigeria>> accessed 1<sup>st</sup> May, 2020.

<sup>3</sup> Owolabi, A.A. "UNFAIR COMPETITION: AN ESSAY ON ECONOMIC TORTS." (2001) *Journal of the Indian Law Institute*, vol. 43, no. 4, pp. 512. <[www.jstor.org/stable/43953397](http://www.jstor.org/stable/43953397)> accessed 1<sup>st</sup> May, 2020

<sup>4</sup> Owolabi, A.A. "UNFAIR COMPETITION: AN ESSAY ON ECONOMIC TORTS." (2001) *Journal of the Indian Law Institute*, vol. 43, no. 4, pp. 518. <[www.jstor.org/stable/43953397](http://www.jstor.org/stable/43953397)> accessed 1<sup>st</sup> May, 2020.

It has been said that Passing off is in consonance with the fundamental maxim; *ubi jus ubi remedium- where there is a wrong, there is a remedy*. Thus, an unregistered owner of certain goods and services is not without a remedy when there is an infringement on his products, trademark, trade name etc. Paraphrasing the Trademark Act<sup>5</sup>, a man is not to sell his own goods under the pretence that they are the goods of another man. Thus the fundamental rule as held by Lord Kingsdow is that “one man has no right to put off his goods for sale as the goods of a rival trader.”<sup>6</sup>

It was held in the case of *Byron v. Johnston*<sup>7</sup> that it is an actionable tort of passing off for a book publisher to advertise and sell books of poems with the name of Lord Byron at the title page when in fact the famous poet had nothing to do with the authorship. Lord Langdale in *Perry v. Truefitt*<sup>8</sup> had also opined that “a man is not to sell his own goods under the pretence that they are goods of another person; he cannot be permitted to such practice such as deception, nor to use any means which contributes to that end”.

### **Typical Forms of Passing Off**

In line with the Latin phrase *vive et alteros vivere permitte- live and permit others to live*, everyone has a right to reap the benefits of what they create, be it monetary benefit or simply the goodwill and reputation that comes with it. In a society like Nigeria, where people have little or no regards for the rights of others or anything goes, infringement on the trade mark of many people has become of great concern to the public.

1. It is actionable as passing off for a trader to market his goods with the trademark of his/her trade competitor, or with any deceptive imitation of such mark. A trademark is any mark (including names, logos and whatnot) attached by a trader to goods manufactured or sold by him in order to indicate that they are his merchandise or by established usage known to the public as possessing that significance.

A typical example of this can be found in the second grade shoes we purchase from our brothers in the Eastern part of Nigeria popularly called *Aba shoes*. You see some of them bear the renowned Adidas Logo (the three stripes) and the particular model, in this case “Superstar”

---

<sup>5</sup> Cap T 13, Laws of the Federation of Nigeria 2004

<sup>6</sup> *Leather Cloth Co Ltd v American Leather Cloth Co Ltd* (1865) 11 HL Cas 523 at 538

<sup>7</sup> (1816) 35 ER 851

<sup>8</sup> (1842) 49 ER 749

would be coined “Supastar” by them. Thus the shoe some unsuspecting people would purchase for the same price as the Original would bear the false remake on it.

The researcher can personally attest to the above example and many more atrocities of the same manner.

It has been declared advisable that the plaintiff who suffers this, should bring an action for the infringement of the registration of the trademark rather than to bring an action under the procedurally complex and cumbersome tort of passing off<sup>9</sup>.

2. An action in passing off will also lie when the defendant who is engaged in similar business as the plaintiff adopts a similar name in a manner calculated to make the consumers of the goods and services to believe that he is part of the Plaintiff’s business.

The court in the case of *Beecham Group Ltd v. Esdee Food Products Nig Ltd*<sup>10</sup> held that the trade mark ‘GLUCOS-AID’ is calculated to confuse and deceive the public in its sound in their consideration of the trade mark ‘LUCOZADE’. It was held that such similarity in sound will undoubtedly mislead the public. A similar thing was declared by Palmer J. in *Niger Chemist v. Nigerian Chemist*<sup>11</sup>.

3. It is also actionable as passing off for a trade competitor to imitate the getup or appearance of the plaintiff’s goods in a manner that is likely to confuse the public.

In the case of *Trebor Nigeria Ltd v. Associated Industries Ltd*<sup>12</sup> where the plaintiff had brought an action against the defendant claiming that the wrapper used to package the latter’s product was similar to that of the former and constituted passing off. The court found the defendant liable

### **Elements to prove Passing Off**

Other than the key ingredient of deception, Justice Nnaemeka Agu, in the case of *The Boots Company Ltd v. United Niger Imports Ltd*<sup>13</sup> listed what he considered to be the components of a successful passing off action. They are;

---

<sup>9</sup> Owolabi, A.A. “UNFAIR COMPETITION: AN ESSAY ON ECONOMIC TORTS.” (2001) *Journal of the Indian Law Institute*, vol. 43, no. 4, pp. 512–530. <[www.jstor.org/stable/43953397](http://www.jstor.org/stable/43953397)> accessed 1<sup>st</sup> May, 2020

<sup>10</sup> (1985) JELR 42523 (CA)

<sup>11</sup> [1961] 1 All NLR 171

<sup>12</sup> (1972) NNLR 60 Suit no K/127/71

<sup>13</sup> (1977) (1) ALR Comm. 279

- Proof that the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of the public or persons involved in a trade in the relevant market as coming from a particular source;
- That the defendants who are engaged in a common field have used a name, mark, sign so identical to the plaintiff's that is likely or calculated to deceive or cause confusion in the minds of the common consumer; and
- That the use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiff's business.

### **Remedies available to a Plaintiff**

The following reliefs can be claimed in an action for passing off

- ***Injunction:*** An order of the court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of the mark in dispute pending the outcome of the case and a perpetual injunction when the case is concluded in the claimant's favour. A perpetual injunction would totally stop the use of the mark.
- ***Damages:*** A successful claimant in an action for passing off is entitled to damages. Damages here could be general, special or punitive. These usually emanate from the losses which the plaintiff is deemed to have suffered prior to the case.
- ***Delivery up:*** This occurs where goods are produced in breach of the trademark of another identical product. Thus, the plaintiff usually claims for the goods to be delivered up specifically so that it can be destroyed.
- ***Anton Piller Order:*** An order of inspection and delivery up of infringing materials in the possession and control of the erring party. Such order was granted in ***Ferodo Ltd anor v. Ibeton Industries Ltd***<sup>14</sup>.
- ***Account of Profit:*** In this case, the plaintiff is entitled to profit on goods wrongly sold by the erring party.

---

<sup>14</sup> (2004) 5 NWLR (Pt.866)31

### **Defences available to a Defendant**

- Consent of the Plaintiff to use the name, mark, sign or slogan as in the case of a Franchise
- Indistinct name, mark, sign, slogan of the plaintiff
- That the Plaintiff's mark, name, sign, slogan has become generic or common place
- Dissimilarities in the mark of the Plaintiff and Defendant.
- Innocent usage of the plaintiff's name

### **Conclusion**

The purpose of an action in passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. It is a sad thing to note that a lot of people have and continue to fall victim due to lack of awareness on how to protect their Goods or ensure that they get the right remedy in the event of infringement.

Seeing that passing off is not a criminal action, a police report would hardly suffice, therefore the right institution to handle such problems (the company manufacturing the product one intended to purchase or the Consumer Protection Council (CPC)) should be publicized effectively.

### **BIBLIOGRAPHY**

1. Wikipedia, 'Economic Torts' < [https://en.wikipedia.org/wiki/Economic\\_torts](https://en.wikipedia.org/wiki/Economic_torts)
2. Saleh H., 'The Law of passing off and its application in Nigeria' (2019)
3. Owolabi, A.A. "UNFAIR COMPETITION: AN ESSAY ON ECONOMIC TORTS." (2001) Journal of the Indian Law Institute, vol. 43
4. Cap T 13, Laws of the Federation of Nigeria 2004
5. Leather Cloth Co Ltd v American Leather Cloth Co Ltd (1865)