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LEVEL: 300

MATRICULATION NUMBER: 17/LAW01/185

COURSE: LAW

QUESTION: DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA

INTRODUCTION

The ECONOMIC TORTS, as their name proposes, have as their essential capacity, the assurance of petitioner's financial advantages. They incorporate the torts of basic connivance, unlawful scheme, prompting break of agreement, terrorizing, unlawful impedance with exchange, misdirection, and malignant deception. These are torts of aim. They additionally incorporate going off, a standout amongst the most helpful of the monetary torts, which however practically speaking regularly including intentional damage, is in reality a tort of strict risk. At long last, the monetary torts likewise incorporate the tort of carelessness, however connected barely. It is normal to isolate the financial torts into two classes: the general torts and the distortion torts. The general monetary torts include scheme, instigating rupture of agreement, terrorizing, and unlawful obstruction with exchange. The deception monetary torts are duplicity, noxious [4] misrepresentation, and going off. Be that as it may, it is an error to make such an unbending division while endeavoring an appropriate examination.

WHAT IS THE ECONOMIC TORT OF PASSING OFF?

The doctrine of passing off may be seen as 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, and the [[1]](#footnote-1)‘‘law on this matter 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 the reputation already achieved by rival trader.’’[[2]](#footnote-2) Where passing off is proved, the plaintiff will be enetitled to an injuction restraining the defendant from continuing the wrong to damages for any loss he has incurred thereby and to an account of the profits made by the defendant in consequence of the tort. Passing off takes various forms, the most common of which are following.

TYPES OF PASSING OFF

1. MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff, when in fact they are not. It would passing off for X a manufacturer of tyres to advertise and sell his tyres as Dunlop or Michelin tyres, since this would be an obvious attempt t profit from the goodwill and reputation established by rival businesses. Also, it has been held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Byron on the titlt-page when in fact that famous poet had nothing to do with its authorship.[[3]](#footnote-3)

1. TRADING UNDER A NAME SO CLOSELY RESEMBLING THAT OF THE PLAINTIFF AS TO BE LIKELY TO MISLEAD THE PUBLIC INTO BELIEVING THAT THE DEFENDANT’S BUSINESS AND THAT OF THE PLAINTIFF ARE ONE AND THE SAME

A well-known example of this type of passing-off is Hendriks v Montagu, [[4]](#footnote-4) where the Universal Life Assurance Society were granted an injuction restraining the defendant’s company, which was incorporated subsequently, from carrying on business under the name ‘Universe Life Assurance Association’.

The principle in Hendriks v. Montagu was appied in Niger Chemists Ltd v Nigeria Chemists[[5]](#footnote-5). In this case the plaintiffs had carried on business as chemists and druggists for several years, and had several branches in Onitisha and other towns in what was then Eastern Nigeria. The defendants later founded a firm carrying on exactly the same type of business in Onitsha under the name ‘Nigerian Chemists’. The plaintiffs contended that the defendants use of a name similar to their own was actionable passing-off, and they sought an injuction to restrain its further use. The court granted the injuction, holding that the use of the name ‘Nigeria Chemists’ was calculated to deceive persons who know of and intend to deal with Niger Chemists.

1. MARKETING GOODS UNDER A TRADE NAME ALREADY APPROPRIATED FOR GOODS OF THAT KIND BY THE PLAINTIFF, OR UNDER A NAME SO SIMILAR TO THE PLAINTIFFS TRADE NAME AS TO BE MISTAKEN FOR IT

A trade name is one under which goods are sold or made by a certain person and which by established usage has become known to the public as indicating that those goodsare the goods of that person.[[6]](#footnote-6)

Purely descriptive names, that is to say names which indicate merely the nature of the goods sold and not that they are the merchandise of any particular person eg ‘stout’[[7]](#footnote-7), ‘vacuum cleaner’[[8]](#footnote-8) are not protected unless the plaintiff can prove( and the burden of proff is a heavy one- that the descriptive name in question has acquired a secondary meaning so exclusively associated with the plaintiff’s own product that its use by the defendant is calculated to deceive purchasers[[9]](#footnote-9).

The protection of trade names applies not only to traders and manufacturers but also to any artist, writer or musician who gets to be known under a particular name which becomes inevitably part of his own stock in trade [[10]](#footnote-10)

1. MARKETING GOODS WITH THE TRADE MARK OF THE PLAINTIFF OR WITH ANY DECPTIVE IMITATION OF SUCH MARK.

A trade mark is any design, picture, mark or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. Trademarks receive protection not only under the law of passing off but also, if registered, under the trademarks act 1965, under which most actions are brought. Where there is anythimg in the appearance of the plaintiff’s goods which particularly identifies those goods as the merchandise of the plaintiff, the defendant will be liable for passing off if, in marketing his goods, he imitates or copies such appreance or get up in a manner likely to confuse the public. An early Nigerian example is U.K Tobacco Co Ltd v Carreras ltd. More recently, in De Facto Works ltd v Odumotun Trading Co. Ltd[[11]](#footnote-11) where the defendants were held liable in passing off where they sold bread wrapped in yellow and brown paper.

1. IMITATING THE GET-UP OR APPEARANCE OF THE PLAINTIFF’S GOODS.

Where there is anything in the appearance or ‘get-up’ of the plaintiff’s goods which particularly identifies those goods as the merchandise of the plaintiff, the defendant will be liable for passing off if, in marketing his goods, he imitates or copies such appearance in a manner likely to confuse the public. An early Nigerian example is Uk Tobacco Co. Ltd v. Carreras Ltd.[[12]](#footnote-12)

The purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.

Unfortunately, Passing off is not a criminal offence, such that Mrs. Ramota above could make a report to the Police or relevant institution. However, any victim of Passing off may first make a report to the person/company manufacturing the product one intended to purchase to make them aware that another person/company is reproducing a similar product and passing it off as theirs. Mrs. Ramota may also go further to report the misrepresentation by the manufacturers of 'Tunio' seasoning powder to the Consumer Protection Council ("CPC") and seek compensation as a dissatisfied consumer.

Though she may not have the locus standi to pursue a civil suit in this regard, the CPC will be happy to investigate the subject matter. The main objective of this being to increase the awareness of Passing off towards the association of Passing off to bad business.

Furthermore, small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on Passing off and take advantage of the remedies available to protect their goodwill, trade name and profits.

The Supreme Court should also resolve with one voice the jurisdiction of the Federal High Court in line with the Constitution to prevent unnecessary objections and delay of justice at court.

It is also suggested that the Trademarks Act be further amended to reflect the times, happenings and changes in the Nigeria. In particular, we have observed that the Trademarks Registry has witnessed a serious backlog in the successful completion of the registration of marks and this has the resultant effect of limiting the rights of most product owners to Passing off as opposed to the an action on the infringement of a trademark.

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1. Salomond op cit. para 149 [↑](#footnote-ref-1)
2. Leather cloth co v American leather cloth co. (1865) 11 H.L Cas 523 at p.538;

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3. Byron v Johnson (1816) 35 E.R 851. [↑](#footnote-ref-3)
4. (1881) 50 L.J Ch. 456 [↑](#footnote-ref-4)
5. {1961} All N.LR 171 [↑](#footnote-ref-5)
6. Salmond, op. cit. p. 401 [↑](#footnote-ref-6)
7. Ragget v Findlater [↑](#footnote-ref-7)
8. British Vacuum Cleaner Co Ltd v New Vacuum Cleaner Co. Ltd (1907) 2 Ch 312 [↑](#footnote-ref-8)
9. See Reddaway v Baniam (1896) A.C 199 [↑](#footnote-ref-9)
10. Hines v Winnick (1947) Ch 708 at p. 713 [↑](#footnote-ref-10)
11. (1959) L.L.R>33 [↑](#footnote-ref-11)
12. [↑](#footnote-ref-12)