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**MATRIC NO: 17/law01/013**

**COURSE: LAW OF TORTS II**

**COURSE CODE: LPB 302**

**ASSIGNMENT TITLE: ECONOMIC TORTS (PASSING OFF)**

 **Introduction**

Economic torts, which are also called business torts, are torts that provide that 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[[1]](#footnote-1)As held in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation*** “A man may not sell his own goods under the pretense that they are the goods of another man.” Law aims to protect trade 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.

**Passing Off**

The essence of **passing off** is 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 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 traders[[2]](#footnote-2).

The concept of **passing off** has undergone changes in the course of time. At first it was restricted to the representation of one person's goods as those of another. Later it was extended to business and services. Subsequently it was further extended to professions and non-trading activities. Today it is applied to many forms of unfair trading and unfair competition where the activities of one person causes damage or injury to the goodwill associated with the activities of another person or group of persons. The concept of equity was largely used to realize the scope of passing off. The predominant view was that equity intervened to restrain what would be a fraud if allowed to go ahead and that it protected proprietary rights. This particular viewpoint led to the equity courts to awarding compensations instead of injunctions.

* **Elements of Passing Off**

The three fundamental elements of passing off are Reputation, Misrepresentation and Damage to goodwill. These three elements are also known as the **CLASSICAL TRINITY**, as restated by the House of Lords in the case of ***Reckitt & Colman Ltd V Borden Inc.*** It was stated in this case that in a suit for passing off the plaintiff must establish; **1)** Goodwill or reputation attached to his goods or services. **2)** That there was misrepresentation by the defendant to the public i.e. leading or likely to lead the public to believe that the goods and services offered by him are that of the plaintiff. **3)** He must demonstrate that he has suffered a loss due to the belief that the defendant's goods and services are those of the plaintiff.

Passing off takes various forms, and the **most common forms** are being explained below;

* **Marketing a product as that of the plaintiff.**

It is actionable passing off for the defendant to sell merchandise with a direct statement that goods are manufactured by the plaintiff, when in fact they’re not. For example, the two parties sell goods which is the same product but has different brand name like Dunlop or Michelin (tyre), Milo and Ovaltine (Beverage), Omo and Ariel (Detergent) since this would be an obvious attempt to profit from the goodwill and reputation established by rival businesses.

* **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.**

The principle in ***Hendriks v Montagu[[3]](#footnote-3)*** was applied in ***Niger Chemists Ltd v Nigeria Chemists*** where the plaintiff had carried on business as chemists and druggists did several years and had several branches in the then Eastern Nigeria, the plaintiff thereby contended that the defendant using a similar name was actionable passing off and sought injunction. Per Palmer, J Granted injunction. Similarly in ***Ogunlende v. Babayemi (1971) 1 U.I.L.R 417*** where the plaintiffs carried on business as civil engineering contractors and plumbers under the name ‘Mercury Builders,’ Taylor, C.J. granted an injunction restraining the defendant from conducting a similar business under the name ‘Mercury Builders (Nigeria) Ltd.’ since “there can be no doubt at all that the name of the defendant company is calculated to deceive due to its similarity with the name of the plaintiff association”

* **Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiff’s trade name as to be mistaken for it.**

A trade name is one under which goods are sold and which by established usage has become known to the public as indicating that those goods are the goods of that person. The plaintiff in this case must prove 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. The protection of trade name not only applies to traders but also artists, writer, actors, musician who get to known by a particular name which becomes inevitably part of one’s stock-in-trade.[[4]](#footnote-4)

* **Marketing goods with the trade mark of the plaintiff or with any deceptive 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 *Trade Marks Act 1965*, under which most actions are brought.

* **Imitating the get-up or appearance of the plaintiff’s goods.**

Where there is anything in the appearance of the plaintiff’s goods which identifies those goods as the merchandise of the plaintiff, if the defendant in marketing his goods imitates such manner of appearance then he will be liable for passing off. In ***U.K. Tobacco Co. Ltd. v. Carrera Ltd. (1931) 16 N.L.R 1,*** the defendant marketed cigarettes called ‘Barrister’ in packets which had a white man in barrister’s wig and gown, he was held liable as it was an imitation of the plaintiff’s ‘bandmaster’ cigarette which had a man in bandmasters uniform. An important limitation to this head of passing off is that an action will not succeed where the appearance complained of is necessary and of great efficiency to the defendant’s goods; that is where the appearance is purely functional.

* **Defendant’s conduct must be calculated to deceive**
* A defendant may be liable for passing off although his conduct was entirely honest and innocent in the sense that he had no intention to deceive. Liability is strict, and all the plaintiff needs to show is that the defendant’s activities are likely to deceive the public. In the ***Niger Chemists case***, Palmer J said[[5]](#footnote-5);

*‘It is not necessary to prove that there was an intention to deceive: this had bern held in a long series of cases, and not disputed...’*

However, the presence of absence of fraud on the defendant’s part is not entirely **a)** irrelevant since where fraud is established, the burden of proving likelihood of damage is comparatively light but where there is no fraud the burden of prove is heavy. **b)** it has been suggested, but not conclusively decided that where passing off is innocent, only nominal damages will be awarded.

* It is not necessary to prove that deception has actually taken place. It is sufficient for the plaintiff to show that deception us likely to occur in the future and if he can show this, he may be awarded a *quia timet* injunction. As in the ***Niger chemist case***, the legal issue was whether the words are calculated to deceive, not whether they have in fact deceived.
* In determining whether confusion is likely, the court will take into account that experience, perceptiveness and standards of literacy of the prospective purchasers of the good. In the case of ***U.K. Tobacco Co. Ltd. v. Carrera Ltd. (1931)*** the question was; ‘can it be said that an illiterate customer having asked for a particular product and being shown another would be in a position to notice the difference and say that is not what I want?’ Even where the potential buyers are not illiterates, the standard of awareness to be expected is not that of an observant person making careful examination but a casual and unwary buyer[[6]](#footnote-6).

Another variety, somewhat rarer is so-called **'reverse passing off**'. This occurs where the defendant markets the plaintiff's product as being the defendant's product. It will be recalled that orthodox passing off entails the defendant representing that his product is the plaintiff's product.

* **Remedies**
1. Injunction. This may be made in a qualified form i.e. restraining the defendant from disposing of his goods without sufficiently distinguishing them from the plaintiff’s.
2. An account of profit.
3. Damages may be granted in respect of losses to the plaintiff. One possible reason for the scarcity of authority on the question of damages is the primary remedy sought in passing off is injunction and an account of profit, damages play only a very subordinate role.

In **conclusion** 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 one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference. The basic question in this tort turns upon whether the defendants' conduct is such as to tend to mislead the public to believe that the defendants' business is the plaintiff's or to cause confusion between the business activities of the two.

* **Bibliography**
* Ese Malemi Law of Torts, 2ND Edition (Princeton Publishers 2017)
* Smaranda O and Clement C and Nnamdi J The Modern Law of Torts, 2018
* Kodilinye and Aluko: The Nigerian Law of Torts (Revised Edition, 1999)
1. https://en.m.wikipedia.org [↑](#footnote-ref-1)
2. Salmond op cit para 149 [↑](#footnote-ref-2)
3. (1881) 50 L J Ch 456. [↑](#footnote-ref-3)
4. Hines v Winnick (1947) AC 199 [↑](#footnote-ref-4)
5. Supra, at p. 3 [↑](#footnote-ref-5)
6. Ibid; Gottschalk & Co Ltd v Spruce Manufacturing Co Ltd (1956) 1 FSC 42, Trebor (Nigeria) Ltd v Associate Industries Ltd (1972) NNLR 60 p. 79. [↑](#footnote-ref-6)