

NAME: APENA ADEOLUWATOONI KHADIJAT

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QUESTION

Discuss the relevance of passing off as a form of Economic Torts in the 21st Century Nigeria.

The Relevance of Passing off as a Form of Economic Torts in the 21st Century

Nigeria.

We cannot begin a discussion about passing off without acknowledging that it is in fact one of the torts classified as an economic tort. To this effect, an economic tort can simply be made reference to as a tort or civil wrong which mainly affects the commercial or economic life or financial life of a person, causing said person to suffer financial or economic loss, damage or harm. Economic torts are also identified as Business torts as they typically involve commercial transactions, and include tortious interference with trade or contract. Economic torts are tort claims that do not allege physical contact with victim or his property or harm to such non financial or at least non-commercial goods as business reputation and personal privacyⁱ.

Economic torts serve the purpose of offering protection for a person's trade or business from acts which the law considers to be unacceptable. Thus the tort seeks to protect the individual from suffering pure economic loss. Economic torts were developed to regulate excessive competitive practice. They had the limited function of stretching existing civil liability where a defendant deliberately inflicted economic harm on a claimant, through the use of an intermediaryⁱⁱ. The tort simply put, prevents acts of unacceptable interference in an individuals' commercial or economic or financial sector of life.

It is surprising to note that the economic literature on economic torts is sparse despite the fact that economic torts covers a number of other torts which include; passing off, breach of intellectual property rights (such as breach of copyright, patent, trademarks and other merchandise marks), injurious falsehood or malicious falsehood, Interference with contracts, conspiracy to interfere (i.e. civil conspiracy) and many others, all of which require individual discussions. However for the purpose of this paper emphasis would be laid especially on passing off.

Passing Off

Passing off is a wrong or common law tort which seeks to protect the trader from suffering economic loss as a result of misrepresentation of his product or business. Where goods are sold or business is carried out in such a manner as to mislead the public or consumers of a particular product into believing that the defendants product or business is that of the plaintiff, the tort of

ⁱ E Olarinde and C Chigbo and N Ikpeze, *The Modern Law of Torts: A Kaleidoscopic Perspective A study guide to the Law of Torts*. (Afe Babalola University Press 2018).

ⁱⁱ Carty, H, 'The Modern Functions of The Economic Torts: Reviewing The English, Canadian, Australian, and New Zealand Positions' (2015) 74(2) 261-283 The Cambridge Law Journal. < <https://www.cambridge.org/core/journals/cambridge-law-journal/article/modern-functions-of-the-economic-torts-reviewing-the-english-canadian-australian-and-new-zealand-positions/CAE19BB198F9D15D32B3EB1DC0E180AB>> accessed 30 April 2020

passing off will provide the plaintiff a way to claim for financial loss suffered from such actions. The law governing this particular aspect of the law of torts was laid down by Lord Kingsdown, where he stated that, “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”ⁱⁱⁱ. In essence the defendant uses misrepresentation to trick buyers into buying his own product based on the established goodwill and reputation of the plaintiffs product.

When a person(the defendant) sells his own goods or carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person(the plaintiff), thereby taking advantage of the plaintiffs reputation and goodwill, the tort of passing off will have been committed^{iv}. The purpose of the tort of passing off is to protect the reputation and goodwill a business has built up, this is because the law recognizes that the tort of passing off will be prevalent in a competitive business community or economy and vulnerable businesses may be subjected to unfair trade practices and the sharp practices of other persons. There are different forms of passing off. This was established in *Francis Day & Hunter Ltd v. Twentieth Century Fox Co. Ltd*^v. The different forms are discussed below;

1. **Trading with a name resembling that of the plaintiff**

Here, the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant’s product/business and that of the plaintiff are one and the same. This form of passing off arose in the case of *Hendriks v Montague*^{vi} where the court held that it was held that ‘Universal Life Assurance Society’ and ‘Universe Life Assurance Association’ are very likely. The same facts and judgement were applied in *Niger Chemists Ltd v Nigeria Chemists*^{vii}

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

This also constitutes a form of passing off, where the defendant sells his goods with a direct statement that his goods were manufactured by the plaintiff whereas they were not. This was established in the case of *Byron v Johnston*^{viii} where it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship. When the defendant sells his product under the false representation that it is that of the plaintiff by marking his

ⁱⁱⁱ *Leather Cloth Co. v American Leather Cloth Co.* (1865) 11 H.L Cas.523 at p. 538

^{iv} *Niger Chemists Ltd v Nigeria Chemists* (1961) All NLR 171

^v (1939) 4 ALL ER 192 at 199 P.C.

^{vi} (1881) 50 LJ Ch 456

^{vii} (1961) All N.L.R 171

^{viii} (1816) 35 ER 851

(defendant) product with the logo or name or label or any design of the plaintiffs' product where in fact the plaintiff has nothing to do with such product and is not the producer of the product and there is no agreement between parties or any license given to sell such a product under the plaintiffs name, the tort of passing off is actionable.

3. **Marketing a product with a name resembling that of the plaintiff's goods**

It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiffs goods, with the result that the customers are confused, and the defendants goods are mistaken as made by the plaintiff and are and the defendants goods are mistaken as made by the plaintiff and are bought as the products of the plaintiff. This was highlighted in the case of *Hines v Winnick*,^{ix}

4. **Marketing products with the plaintiffs trademark or its imitation**

A Trademark is a legally protected (by the **Merchandise Marks Act 2004**) and registered design, picture, mark, name or other merchandise mark, affixed to goods, which identifies those goods with the manufacturer or seller. Thus it is passing off where a defendant markets his product or goods using the plaintiff's trademark or its imitation which leads to confusion among buyers who then patronize his products thinking that they are the products of the plaintiff. This was established in *Perry v. Truefitt*^x.

5. **Imitating the appearance of the plaintiff's product**

Where the defendant does anything to make his products look like the plaintiffs product, the tort of passing off has been committed. Copying or making a product to look exactly like another product in a manner to confuse the public consumer and benefit from the goodwill of the product is passing off. It usually covers general appearance, package, label, design or physical appearance of the product. This was stated in *De Facto Works Ltd v Odunmotun Trading Co Ltd*.^{xi}

6. **Selling inferior or expired goods of the plaintiff as current stock**

Where the plaintiff discards an expired or inferior product and the defendant comes into possession of such and further sells it as current or fresh stock then the defendant will have committed the tort of passing off.^{xii} This has a potential of causing enormous financial loss as plaintiff will have to recall and further destroy products which are clearly unfit for consumption. It should be further noted that where it is clear that products being sold are

^{ix} (1947) Ch 707 at pg 13

^x (1842) 49 ER 749

^{xi} (1959) LLR 33

^{xii} Gillette Safety Razor Co & Anor & Franks (1924) 40 TLR 606, Spalding & Brothers v Gamage Ltd (1915) 84 LJ Ch 449 HL

second hand to the public then the tort of passing off has not been committed. This was stated in *General Electric Co v Pryce's Stores*^{xiii}

7. False advertisement by copying the plaintiff's advertisement

An advertisement by the defendant which copies, or imitates the plaintiff's advertisement of his products, may amount to passing off, where such advertisement so resembles that of the plaintiff, as to be capable of misleading the buyers to patronize the defendant's goods as those of the plaintiff. This was stated in *Cadbury Schweppes Pty Ltd v. Pub Squash Co. Pty Ltd*^{xiv}.

ELEMENTS OF PASSING OFF

Liability in the tort of passing off is strict thus there is no necessity to prove fault on the part of the defendant. It is sufficient that the acts of the defendant had the likelihood of causing the public to be deceived or could cause possible deceit to the consumer at a future date. To succeed in a claim for passing off, the plaintiff must prove the following;

- a) **The Effect of Fraud by the Defendant:** The plaintiff must prove that the activity of the defendant is 'calculated to deceive' the public. A defendant may be held liable for passing off even if his conduct was totally honest and innocent in the sense that he had no intention to deceive.^{xv} Where fraud on the part of the defendant is ascertained, it makes it easier for the court to award aggravated or punitive damage and also assists the plaintiff in proving the likelihood of damage.
- b) **Whether the public is likely to be confused:** In determining whether the public is likely to be confused, the court looks into the following factors; the experience of the buyer, the level of perception of the buyers and the level of literacy or awareness of the buyers
- c) **The Likelihood of Deception:** Once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction. It should be noted that the likelihood of deception varies with each customer and a different standard of awareness that is presumed of potential buyers differs.

The Relevance of Passing off as a Form of Economic Torts in the 21st Century Nigeria

The Nigerian economy is one of the largest in Africa. As of the 21st century the Nigerian government had successfully privatized a number of its enterprises. This brought about a rise in competition among business enterprises and as such enterprises began to employ various

^{xiii} (1933) 50 RPC 232

^{xiv} (1981) I ALL ER 213 PC

^{xv} *Baume & co. Ltd. V Moore Ltd. (1958) Ch. 907*

tactics to outsell their rival companies. The tort of passing off comes into play here, to simply ensure that business enterprises are not subjected to unnecessary interference usually in the form of misrepresentation which leads to significant financial loss.

The cut throat nature of the Nigerian economy especially in the 21st century has witnessed an increase in the number of cases of passing off. At least 80% of Nigerians can attest to experiencing buying a trusted product at the store or market only to discover that they have simply bought an identical brand made to look exactly like the original trusted product. This is an issue especially since most goods are seldom labeled properly.

Thus, it is obvious that the tort of passing off is very relevant in the current Nigerian economy to protect business enterprises from suffering financial loss as a result of deception on the part of the defendant. In cases where the defendant is held liable for passing off, the court awards remedies to the plaintiff to bring some sort of succor to the plaintiff. Some of the remedies are;

- a) Injunction: This is a court order to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of the mark pending the outcome of the case and a perpetual injunction when the case has been concluded to totally stop the use of the mark.
- b) Damages: It has been established through decided cases that a successful litigant in a Passing off action is entitled to damages. Damages here could be general, special or punitive.
- c) Account of profit: Here, the Plaintiff is entitled to profit on goods for loss of sales.
- d) Other forms of remedies such as delivery up for destruction of infringing goods, Anton Piller Orders, inspection by the relevant regulatory bodies such as NAFDAC, SON, Intellectual Property Commission and so forth.

Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by *Section 3* of **The Trademarks Act**. Thus, in the current privatized economy of Nigeria where the most important thing is profit, the tort of passing off seeks to “protect traders against that form of unfair completion which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders”. The relevance of passing off cannot be underscored in the 21st century Nigeria; this is strongly backed by the existence of a number of decided Nigerian cases.^{xvi} It should also be noted that a defendant can plead a number of defences which include; functional design or package, mere descriptive name of the product, innocent passing off and consent.

^{xvi} *Continental Pharmaceutical Ltd. v Sterling Products Nigeria Plc. and SmithKline Beecham Plc.* (1995) suit No: FHC/L/CS/460/95; *Ayman Enterprises Ltd. v Akuma Industries Limited* (2003) 13 NWLR (Pt.836)22; *Dyketrade Ltd. v Omnia Nigeria Ltd.* (2000)12 NWLR (pt. 680) 1; *Patkun Industries Ltd v Niger Shoes Company Ltd* (1988) 12 SC (Pt. II) 1 13

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