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ASSIGNMENT

Discuss the relevance of Passing Off as a form of Economic Torts in the 21<sup>st</sup> Century Nigeria.

## INTRODUCTION

Before addressing the subject matter of this question, it is important to help the reader understand certain terms such as “economic torts” and “passing off”. First of all, economic torts are torts which are designed to offer protection for a person’s trade or business from acts which the law considers unacceptable. Although it is a fundamental element of business that businesses compete with one another and therefore to this extent, one business may succeed to the disadvantage of another. Therefore, economic torts ensure that businesses are protected from acts of unacceptable interference. They include: passing off, breach of intellectual property rights, injurious falsehood, interference with contracts and so forth. However, for the sake of this paper, the major focus is on passing off.

## DEFINITION

The tort of passing off is committed where the plaintiff’s goods are passed off by the defendant as being his own (that is, the defendant’s) goods. 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. This tort is designed to protect traders against 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<sup>1</sup>. In the words of Lord Kingsdown, “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader<sup>2</sup>.” Also, Lord Mangale in the case of *Perry v Truefitt* stated that “a man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end.”<sup>3</sup> The tort of passing off is actionable per se. Therefore, the plaintiff does not have to prove damages in order to succeed. The right of action lies even though no damage has been suffered or proved.

## FORMS OF PASSING OFF

The common forms of passing off are as follows:<sup>4</sup>

1. Trading with a name resembling that of the plaintiff
2. Imitating the appearance of the plaintiff’s product
3. Selling inferior or expired goods of the plaintiff as current stock
4. False advertisement by copying the plaintiff’s advertisement

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<sup>1</sup> Salmond op cit. para 149

<sup>2</sup> *Leather Cloth Co. v American Leather Co.* (1865) 11 HL Cas. 523 at 538; (1865) 11 ER 1435

<sup>3</sup> *Perry v Truefitt* (1842) 49 ER 749 at 725.

<sup>4</sup> *Draper v Trist* (1939) 3 ALL ER 513 CA

5. Marketing a product with a name resembling that of the plaintiff's goods
6. Marketing a fake product as that of the plaintiff by using the plaintiff's label or design
7. Marketing products with the plaintiff's trademark.

### ELEMENTS OF PASSING OFF

In order to succeed in an action for passing off, the plaintiff must be able to prove the following elements:

**1. The effect of fraud by the defendant:**

Where fraud is proved on the part of the defendant, the burden of proving likelihood of damage is comparatively light, for the court will readily assume that the defendant will succeed in accomplishing that which he has set himself to accomplish. Also, the court faces a lesser burden in awarding aggravated or punitive damages.

**2. The likelihood of deception:**

The plaintiff must be able to prove that the activity of the defendant is calculated to deceive the public. A defendant may be liable for passing off although his conduct was entirely honest and innocent. This is because liability in passing off is strict. The word "calculated" is another way of saying the defendant's act is likely to deceive the public<sup>5</sup>. Therefore, the plaintiff only needs to show the likelihood of the defendant's act to do such. The likelihood of deception varies from customer to customer.

**3. Whether the public is likely to be confused:**

In order to determine the likelihood of the public being confused or misled by the defendant's activities, the court will take into account the experience, perceptiveness and standards of literacy of the prospective purchasers of the goods. In the case of U.K Tobacco Co. Ltd v. Carreras Ltd., the court established that the likelihood of confusion varies with the intelligence and education of the consumers. A trademark which might not confuse a literate person might easily confuse an illiterate person.

### REMEDIES FOR PASSING OFF

There are remedies which a plaintiff can seek for in action for passing off. They include the following:

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<sup>5</sup> Salmond. op. cit., p.403

1. Injunction

In an action, a plaintiff can seek for an injunction to restrain the defendant from continuing to pass off his goods as if they were the plaintiff's. The injunction may be granted on terms, such as where the defendant is permitted to continue to manufacture the goods as long as he distinguishes his goods from those of the plaintiff. The behavior of the parties is a major factor in the decision of the judge to grant an injunction.

2. Damages

3. Account for profit or loss of sales

4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission.

### DEFENCES FOR PASSING OFF

In a claim for the tort of passing off, a defendant may plead a number of defences by saying that the passing off complained of is a:

1. Innocent passing off:

However, it should be noted where a defendant pleads innocent passing off; he will still be held liable for the tort of passing off. The defence only has a mitigating effect on the amount of damages that may be awarded by the court.<sup>6</sup>

2. Consent:

The defendant can plead this defence if he can show evidence that he had obtained the products from the plaintiff by consensual means such as a license given to him to produce or market the product.

3. The mere descriptive name of the product:

An action in passing off does not lie for the use of the purely general or descriptive name of products such as car, fan, bread, furniture which are not exclusive names of the product of any particular person.

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<sup>6</sup> Young & Co Ltd v Holt (1947) 65 RPC 25.

4. Functional design or package
  
5. Dissimilarities in the trademark of the plaintiff and defendant

#### THE RELEVANCE OF THE TORT OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21<sup>ST</sup> CENTURY NIGERIA

Throughout the paper, it can be observed that the relevance of the tort of passing off cannot be underestimated. Passing off is of high relevance to the Nigerian economy as it protects business owners, names or companies from suffering economic loss. This helps businesses to rest assured that they are given due protection from illegal activities based on imitation, deceit, fraud and so forth which confuses or deceives purchasers. In the occasion of these happening, the business owners are secured to seek legal remedies to protect their enterprise.

In Nigeria, businesses are a source of livelihood to the owners and workers involved. Therefore, it is very necessary that they are given protection and security. In the case of Trebor Nigeria Limited v. Associated Industries Limited, Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Supermint claiming that the wrapper used to package the product by the defendant was similar to that of the plaintiff and that they were guilty of passing off their products like that of the defendant. The defendants raised dissimilarities in the two products as a defence to the action, the judge however found the defendants liable for passing off their products as that of the plaintiff. In this instance, passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same.

Also, in the case of Niger Chemists Limited v. Nigeria Chemist, the plaintiff had an established chemist business using the name “Niger Chemist” while the defendants established the same business on the same street with the plaintiff using the name “Nigeria Chemist”. The plaintiff sued the defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The court agreed with the plaintiff and granted an injunction against the defendant on the use of the name. In this instance, passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

In the case of *Ogunlende v. Babayemi*, the plaintiffs who were civil and building engineering contractors carrying on business as “Mercury Builders” were granted an injunction to restrain the defendants, from carrying on a similar business under the name “Mercury Builders Nigeria Ltd.”

Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by Section 3 of the Trademarks Act which provides that:

“No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trademark; but nothing in this Act shall be taken to affect rights of action against any person for Passing off goods as the goods of another person or the remedies in respect thereof.”

In conclusion, the tort of passing off is very necessary in protecting and preserving economic stability in the country.

## BIBLIOGRAPHY

E. Smaranda Olarinde, Clement C. Chigbo, Nnamdi G. Ikpeze, *The Modern Law of Torts: A Kaleidoscopic Perspective; A Study Guide To The Law Of Torts* (2018) Afe Babalola University Press.

Ese Malemi, *Law of Tort*, 2<sup>nd</sup> Edition (2017), Princeton Publishing Co.

Kodilinye Gilbert and Aluko Oluwole, *‘The Nigerian Law of Tort’* Lagos (Spectrum books Ltd., 2001)

T & A Legal, *‘Nigeria: An Appraisal of Passing off Actions under Nigerian Law’* (2018) Mondaq Limited GB <<https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law>> accessed 2<sup>nd</sup> May 2020.