

Name: ANYANWU ANTHONY CHUKWUEMEKA

Matric number: 17/LAW01/063

Course title: Law of Torts II

Course code: LPB 302

Lecturer Name: Mrs. Apara

Question:

Discuss the relevance of passing off as a form of economic torts in the 21st century Nigeria. Use the NALT guidelines for footnotes, you should also include a bibliography at the end.

Use Times New Roman, Font size 12, 1.5 spacing, Maximum of 5 pages

ANSWER

In the course of this paper, this writer will proceed to examine the importance of passing off as a form of economic torts in the 21st century in order to do this, this writer will proceed to examine the meaning of an economic tort, and passing off as a form of economic tort, and go on to explain the relevance of passing off as a form of economic tort in the 21st century of Nigeria.

Economic torts are torts which cause mainly economic losses. They are torts which may cause financial injury or loss, and they occur primarily in the commercial, economic or business sector of life. This arises when the conduct or behavior which forms a tort causes only an economic harm, which is a financial harm but not a physical harm. Economic torts could also be defined to mean tort claims that do not allege physical contact with the victim or his property or harm to such nonfinancial, or at least non-commercial, goods as business reputation and personal privacy¹. Economic torts, which are also known as **Business torts** are torts which provide the common law rules on liability which arise out of business transactions, and may most likely cause pure economic loss. Economic torts are designed to protect a trade or businesses. Forms of economic torts include; passing off, injurious falsehood, interference with contract, negligent misrepresentation, civil conspiracy etc. The focus of this writer will be on the tort of passing off, for the reason that it relates to the subject matter of the question.

Passing off is a form of economic torts. Passing off is a false representation of one's product or one's business as that of another person, therefore deceiving a buyer to patronize it². In *Leather Cloth Co v American Leather Cloth*³, **Lord Kingsdown** said "*the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader*" as it can be seen from this case, no individual has the right to pass off the goods of another person as theirs. The basis of a legal action is that the passing off by the defendant of his goods and or business as that of the plaintiff, is injuring the right of property, product, services and business of the plaintiff⁴. In passing off the person (the defendant) deceives an individual that the goods which belong to the plaintiff

¹ E. Smaranda Olarinde and Clement C. Chigbo and Nnamdi G. Ikpeze, *The Modern Law of Torts: A Kaleidoscopic Perspective* (Afe Babalola University Press 2018)

² Ese Malemi, *Law of Tort* (2nd edn, Princeton Publishing Company 2017)

³ (1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435

⁴ Ese Malemi, *Law of Tort* (2nd edn, Princeton Publishing Company 2017)

are his. It has been said that there is a linkage between the tort of passing off and injurious falsehood, some have even argued that passing off is a form of injurious falsehood, also it can be said that there is a link between passing off and the tort of deceit as the person who passes off goods as belonging to another deceives the public⁵. The elements of the tort of passing off were identified by **Lord Diplock** in *Warnink BV v J Townend & Sons (Hull) Ltd*⁶, and these elements are whether there is; a misrepresentation, made by the defendant in the course of trade, to prospective customers, which is calculated to injure the business and goodwill of another person; and which causes damage to that person's business and goodwill or will likely do so. Passing off is designed to protect a person's business from the unfair trade practices and sharp practices of other persons. Basically, its main purpose is to protect the reputation, and goodwill a business has built up for itself.

There are several methods of an individual committing the tort of passing off, but the most common ways include;

1. Using a name similar to the defendant's name.
2. Imitating the appearance of the plaintiff's goods.
3. Marketing a fake product as that of the plaintiff by using the plaintiff's label or design.
4. False advertisement by copying the plaintiff's advertisement.

In relation to the question for discussion, the relevance of the tort of passing off in the 21st century Nigeria can be seen from the purpose of the tort of passing off, and that is the fact that it is intended to protect business owners against economic loss and infringement on their business and product by allowing them to bring an action against another business attempting to ride off the back of their established reputation and good will by using a similar mark, name or even get-up as their own⁷. In the 21st century Nigeria, the economic rights of businesses need to be protected and this is essential because protection of the economic rights of businesses will ensure that productivity in the business sector in Nigeria would drastically increase, and the tort of passing off aids in safeguarding the economic rights of business owners in Nigeria. Consequential to the fact that

⁵ E. Smaranda Olarinde and Clement C. Chigbo and Nnamdi G. Ikpeze, *The Modern Law of Torts: A Kaleidoscopic Perspective* (Afe Babalola University Press 2018)

⁶ (1979) All ER 927 at 932 (1979) AC 731 at 472 HL

⁷ 'Critically Assess the Importance of a Passing Off Action' (2018) <<https://www.lawteacher.net/free-law-essays/business-law/critically-assess-the-importance-law-essays.php>> accessed 30 April 2020

passing off would provide a fortification on businesses from infringement by other businesses taking advantage of their product, individuals will be persuaded to start businesses, knowing that the economic interest of their prospective businesses would be protected. In Nigeria, a lot of people depend on their established businesses as a source of their livelihood, and if the source of livelihood of these individuals are not protected, they may be at risk of suffering an economic loss, the relevance of the tort of passing off can be seen here, it provides a protections for individuals who own businesses from other individuals passing off the product of their business as theirs thereby causing them economic loss, and by doing so provides protection for business owners in Nigeria and they would be able to conduct their business properly without the fear of economic loss. It provides for the economic protection of an individual from his product being passed off as belonging to another, and it also provides a remedy to such individual where his product has already been passed off by another business. The tort of passing off is very relevant in a country such as Nigeria where fraudulent practices are rampant, so the presence of passing off protects businesses and by extension business owners in Nigeria against fraudulent practices being initiated against them to their detriment, for example it protects businesses in Nigeria against trademark infringement, copyright abuse etc. In Nigeria, passing off has protected the economic interest of businesses, for example in the case of *Niger Chemists Ltd v Nigeria Chemists*⁸, where the two businesses were trading in the same place with similar names, the plaintiffs chemists obtained an injunction to stop the defendant chemists from trading as Nigeria Chemists, the injunction was granted and **Palmer J** said: “*It seems to me as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger Chemists’ and the other ‘Nigeria Chemists’, there must be a grave risk of confusion and deception*”. The previous case shows an example of a form of passing off, and this form is trading with a name resembling that of the plaintiff, it can be seen that the court provided an injunction in favour of the plaintiffs against the defendants to stop trading with a name similar to that of the plaintiffs, and this protected the economic interests and business of the plaintiff. The tort of passing off has high relevance as an economic tort in the 21st century Nigeria, as it assists in the protection of; the intellectual property of a business, protects a business against copyright infringement, prevents another business from marketing their product as theirs, it would prevent another business from using the name of ones business in order to benefit from the reputation of that business, it

⁸ (1961) All NLR 180 at 182

also protects the interests of a business, these are some of the relevancies of the tort of passing off as an economic tort. In a general sense, passing off as an economic tort basically functions to prevent a business from suffering any undue economic loss. This is helpful because business owners in Nigeria are protected against economic loss and other businesses infringing on the fruit of their labour.

In conclusion, from the analyses carried out by this writer in the course of this paper, the tort of passing off is highly essential and important in the 21st century Nigeria, as it has provided a protection on business owners from having their products being taken advantage off, and this provides them with a protection and also with a remedy in the instance where another individual or business is trying to take advantage of their product. This in turn has helped in the industrialization process because, since businesses have been protected and they have a protection provided for them, more businesses would emerge, and this would lead to more development in the society. This tort has essentially protected business owners from suffering economic loss in their business ventures resultant from another individual or business passing off their goods. So, it can be seen that the relevance of this tort cannot be underplayed because it is essential for the protection of business owners.

BIBLIOGRAPHY

Chigbo C.C, Ikpeze N.G, Olarinde E.S, *The Modern Law of Torts: A Kaleidoscopic Perspective* (Afe Babalola University Press 2018).

‘Critically Assess the Importance of a Passing Off Action’ (2018)
<<https://www.lawteacher.net/free-law-essays/business-law/critically-assess-the-importance-law-essays.php>> accessed 30 April 2020

Malemi E, *Law of Tort* (2nd edn, Princeton Publishing Company 2017).