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**UNIVERSITY**

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**17/LAW01/225**

**LAW OF TORTS**

**LPB 302**

**ASSIGNMENT**

**Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria.**

**Use NALT guidelines for footnotes, you should also include a bibliography at the end.**

**Times New Roman Font size 12, 1.5 spacing, maximum of 5 pages**

# SOLUTION

First off, what is passing off?

Passing off, is the selling of goods or the carrying on of a business in such a manner as to mis lead the public into believing the that 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 benefits of reputation also achieved by rival Traders<sup>1</sup>. Basically Passing off is described as an unfair competition by misrepresentation. An action for Passing off arises where the deception is made in the course of trade, which could lead to confusion amongst customers.

There are 5 types of passing off as seen in KODILINYE AND ALUKO: THE NIGERIAN LAW OF TORTS<sup>2</sup> which include:

## **1) Marketing a product of the plaintiff**

This is where a defendant sells merchandise with a direct statement that the goods are manufactured by the plaintiff.

For example, a situation where Mr A markets his product as if it is that of Mr B

Like marketing your tyres as Dunlop, or marketing your clothes as Gucci

## **2) 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.**

This can be seen in the case of *Niger Chemists Ltd. v. Nigeria Chemists* The plaintiff had carried on a business as a chemist since April 1952 and had several branches in Onitsha and towns in Eastern Nigeria. In June of 1957 the second defendant and his partners founded the Firm carrying on exactly the same business in Onitsha under the name of "Nigeria chemists" and they're only premises was on the same street as one of the plaintiffs businesses full-stop

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<sup>1</sup> KODILINYE AND ALUKO: THE NIGERIAN LAW OF TORTS. P 221

<sup>2</sup> KODILINYE AND ALUKO: THE NIGERIAN LAW OF TORTS p221 - 223

both companies were registered with the corporate affairs Commission in Nigeria. The plaintiff sued

The court granted an injunction against the defendant on the grounds that they are use of the name Nigeria chemists was intended to deceive the members of the public into believing that there was a relationship between Nigeria chemists and niger chemists.<sup>3</sup>

**3) 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 protection of trade names are poisonous only two Traders and manufacturers were offered to any artist writer of musician who goes to Benin under a particular name which becomes inevitable part of his own stock in trade.

**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.

**5) Imitating the get-up or appearance of the plaintiff's goods.**

In *De Facto Works Ltd v Odumotun Trading Co*. In that case in a carefully considered judgement, Coker J discuss the principles on which in a passing of action on the issue of likelihood of deception can be resolved.<sup>4</sup> The defendants were held liable in passing of ready sold bread wrapped in yellow and brown people with the name **odus** written in large scroll letters in chocolate colour this being an imitation of the get out of the plaintiffs bread which was sometime previously had been wrapped in yellow and brown paper with the name **de facto** written in large chocolate coloured scroll letters.

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<sup>3</sup> Niger Chemists Ltd. v. Nigeria Chemists 1961 ALL N.L.R 171

<sup>4</sup> De Facto Works Ltd v Odumotun Trading Co Ltd (1959) L.L.R 33

Despite this confusion as to the tort of Passing off it is included in a textbook on thoughts because it has been consistently recognised as part of the law of torts and because it differs from other types of intellectual property on the ground that the basis of the law lawyers in the common law and not in the statute law<sup>5</sup>. According to Lord Diplock in *Eren Wamink BV v J Townend & Sons (Hull) Ltd*<sup>6</sup> there have been 5 identified elements of the tort referring to it as “characteristics which must be present in order to create a valid cause of action of passing off” and the include

- 1) A misrepresentation
- 2) Made by a trader in cause of trade
- 3) To prospective customers of his or ultimate customers of goods or services supplied by him
- 4) Which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonable foreseeable consequence)
- 5) Which causes a lot of damage to a business or goodwill of the trader by whom the action is brought (or In a quia timet action) will probably do so

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

Economic torts are torts which includes economic losses. They are thoughts which inflates financial losses or financial injury. Economic thoughts or coming in economic commercial or business sector of life and passing off Is a branch under economic thought

Passing off could be classified as part of the economic torts because the subject matter of the tort of Passing off is the protection of the plaintiffs financial interest in his property. It could also be

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<sup>5</sup> The Modern Law of Torts: A Kaleidoscopic Perspective. Prof E. Smaranda Olarinde, Clement Chigbo & Nnamdi Ikpeze. P333

<sup>6</sup> Eren Wamink BV v J Townend & Sons (Hull) Ltd (1979) AC731

classified as part of the law relating to intellectual property and ranked alongside copyrights, trademarks and patents<sup>7</sup>

Lord Kingsdown said in *Leather Cloth Co v American Leather Cloth Co*<sup>8</sup>: ‘ the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader’

The law of tort especially protects the individual in whatever economic activity one is engaged in.. It protects business names, names of product, trademarks among others. Anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable for the tort of passing off.<sup>9</sup> As seen in *Niger Chemists Ltd. v. Nigeria Chemists*<sup>10</sup> where The plaintiff had carried on a business as a chemist since April 1952 and had several branches in Onitsha and towns in Eastern Nigeria. In June of 1957 the second defendant and his partners founded the Firm carrying on exactly the same business in Onitsha under the name of “Nigeria chemists” and they're only premises was on the same street as one of the plaintiffs businesses full-stop both companies were registered with the corporate affairs Commission in Nigeria. The plaintiff sued. The court granted an injunction against the defendant on the grounds that they are use of the name Nigeria chemists was intended to deceive the members of the public into believing that there was a relationship between Nigeria chemists and niger chemists. Which is why 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.

Also, in the case of *ogunleye v Babayemi*<sup>11</sup> where the plaintiffs carried on business are civil engineering contractors and plumbers under the name Mercury builders. Taylor CJ granted an injunction restraining the defendants from conducting a similar business under the name Mercury

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<sup>7</sup> The Modern Law of Torts: A Kaleidoscopic Perspective. Prof E. Smaranda Olarinde, Clement Chigbo & Nnamdi Ikpeze. P 333

<sup>8</sup> *Leather Cloth Co v American Leather Cloth Co* (1865) 11 H.L cas. 523/538

<sup>9</sup> NATIONAL OPEN UNIVERSITY OF NIGERIA: SCHOOL OF LAW by DR. R. OLAOLUWA

<sup>10</sup> *Niger Chemists Ltd. v. Nigeria Chemists* 1961 ALL N.L.R 171

<sup>11</sup> *ogunleye v Babayemi* (1971) u.i L. R 417

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 plaintiffs Association.

Although the passing off principle is effective for protecting copyrights and trademarks, there is need for improvement, 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.<sup>12</sup>

In conclusion, although effective, the principles of passing off, needs to be updated due to the new cases which the passing off principle cannot fix, which is why the principle need to be updated.

## **Bibliography**

**T & A Legal, Nigeria: An Appraisal Of Passing Off Actions Under Nigerian Law**

**Prof E. Smaranda Olarinde, Clement Chigbo & Nnamdi Ikpeze, The Modern Law of Torts: A Kaleidoscopic Perspective..**

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**KODILINYE AND ALUKO: THE NIGERIAN LAW OF TORTS p221 - 223**

**<https://www.lawteacher.net/free-law-essays/business-law/critically-assess-the-importance-law-essays.php>**

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<sup>12</sup> Nigeria: An Appraisal Of Passing Off Actions Under Nigerian Law by by T & A Legal