

NAME: OKUNOLA BUSAYOMI AISHA

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QUESTION: DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA.

INTRODUCTION

In Nigeria today, individuals carry out unlawful intentional activities that may destroy another person's business. These activities can be done in different forms and may all be classified under Economic tort. However, for the purpose of this question, this writer will briefly discuss the concept of economic tort talking extensively on the aspect of passing off and how important it is in our society today.

ECONOMIC TORTS

This can be defined as an intentional tort where a defendant uses unlawful means to cause the plaintiff some form of economic loss. Tort recognizes that as with personal integrity or property, one's business or livelihood can be open to negligent or intentional acts. The law thereby, provides a framework by which malicious actors may be prevented from destroying and individual financially. Economic torts are torts which mainly inflict economic losses. These occur mainly in the economic, commercial or business sectors of life. They include; passing off, civil conspiracy, deceit, interference with contracts etc.

PASSING OFF

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is a wrong and is known as the tort of "passing off"¹ as held in the famous case of *N.R. Dongre v. Whirlpool Corporation*² "a man may not sell his own goods under the pretense that they are the goods of another man".

Passing off developed from the common law of deceit and it has a long tradition. Passing off is the selling of goods or the carrying on of business in such a way to mislead the public into believing that the defendant's product or business is that of the plaintiff. The passing off action was first developed to meet a classic case, *Reddaway v. Banham*³. Lord Halsbury stated inter alia "nobody has any right to represent his goods as the goods of somebody else". Where consumers are

¹ All Answers Ltd, 'Tort of Passing-Off Project Assignment for Law of Torts.' (2018) Lawteacher.net <<https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php?vref=1>> accessed 7 May 2020

² [1996] PTC (16) 583 (SC)

³ [1896] AC 199

confused about the source of a product or service will not be enough for a trader to bring a successful passing off action against another trader with whom their products are being confused. Therefore, before a trader is able to bring an action, there must be evidence of goodwill in relation to the product or service. It is what leads customers to return to the same business or to buy the same brand over and over again. Hence, it can be said that the owner of goodwill has a property right that can be protected by an action in passing off. Proprietary rights, also known as property rights, are the theoretical or legal rights that an entity has to own property, whether tangible or intangible.⁴

ELEMENTS OF PASSING OFF

The case of *Erven Warnink Besloten v. J. Townend & sons*⁵ also called the *Dutch Advocaat case* was the first case where the basic elements of this tort were stated. In order to create a valid cause of action for passing off, the following must be proven;

- Misrepresentation
- made by a trader in the course of trade,
- to prospective customers of his or ultimate customers of goods and services supplied by him
- which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and,
- which causes actual damage to a business or goodwill of a trader by whom the action is brought.

CATEGORIES OF PASSING OFF

Passing off may arise under any of the following categories

1. Marketing a product as that of the plaintiff

⁴ 'Proprietary Rights: Everything you need to know' (2020) Upcounsel <<https://www.upcounsel.com/proprietary-rights>> accessed 7 May 2020

⁵ [1979] AC 731, 1980 R.P.C 31

Passing off is actionable where the defendant sells merchandise with a direct statement that the goods are manufactured by the plaintiff, when in fact they are not.⁶ For example, marketing a detergent as Sunlight or Ariel

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 is when a trader uses a brand name so close to that of the plaintiff that would make a reasonable man think that both brands are the same. For instance, in the case of *Hendriks v Montagu*⁷, where the Universal Life Assurance Society were granted an injunction restraining the defendants company, which was incorporated subsequently, from carrying on business under the name Universe Life Insurance Association because there are similarities between Universal and Universe and its likely to mislead the public.

Also, in the case of *Ogunlende v Babayemi*⁸, the plaintiff did their business under the name 'mercury builders', the defendant wanted to establish a similar business under the name 'mercury builders (Nigeria) ltd. The judge granted an injunction to restrain the defendant from continuing the process.

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 when goods are sold or made by a certain person and which by established usage has become known to the public as indication that those goods are the goods of that person. Therefore, names, purely descriptive names which merely indicate the nature of the goods sold and not that they are the products of any particular person, eg. Pot, vacuum cleaner, textiles are not protected unless the plaintiff can prove that the descriptive name in question has acquired a secondary meaning.

⁶ Kodilinye and Aluko, The Nigerian Law of torts (Spectrum Publishers 2012)

⁷ [1881] 50 LJ Ch. 456

⁸ 1971 1 UI LR 417

4. Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark

A trademark is a recognizable insignia, phrase, word, or symbol that denotes a specific product and legally differentiates it from all other products of its kind. A trademark exclusively identifies a product as belonging to a specific company and recognizes the company's ownership of the brand.⁹ So if a defendant markets his goods with the trademark of the plaintiff or a simulated form of the trademark, it would amount to passing off. For instance, selling a pair of shoes with an adidas trademark.

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

This is when anything in the appearance of the plaintiff's good which particularly identifies those goods as the merchandise of the plaintiff, the defendant will be liable for passing off if, in marketing his goods, he imitates or copies such appearance or get up in a manner likely to confuse the public. For instance, in the case of *U.K Tobacco Co Ltd v Carreras Ltd*¹⁰, it was held that the appearance on the defendant's cigarette "Barrister" was an actionable imitation of the plaintiff's cigarette "Bandmaster". Also, in the case of *De Facto Works Ltd v Odumotun Trading Co. Ltd*¹¹.

REMEDIES

- Injunction; The court may give an injunction to restrain the defendant from disposing of his goods without sufficiently distinguishing them from the plaintiff's
- Damages/Account for lost Profit; This may be granted in respect to what the plaintiff has lost.

⁹ Carla Tardi ' Business Essentials, Trademark' (2019) Investopedia
<<https://www.investopedia.com/terms/t/trademark.asp>> accessed 7 May 2020

¹⁰ [1931] 16 NLR 1

¹¹ [1959] LLR 33

DEFENCES

- Consent of the Plaintiff to the use of the name, mark, sign or slogan.
- Indistinct name, mark, sign and slogan of the plaintiff
- That the Plaintiff's name, mark, sign and slogan has become generic/common place.

RELEVANCE OF PASSING OFF IN THE 21ST CENTURY NIGERIA

As earlier said, the law recognizes that some businesses are destroyed due to unlawful interference by another person. In Nigeria today, many upcoming businesses hide under the goodwill and reputation of higher brands and businesses thereby misrepresenting products in such manner that a customer believes that both products are one and the same, but with an action in passing off many businesses and brands have taken proper caution in creating a name for themselves. Hence, reducing imitation of products, trade names etc. For instance, because of the tort of passing off, Nigerians, who make and market footwears under the misrepresentation that they are 'NIKE' footwears can be stopped.

Also, in recent years we would notice that more companies and businesses take the proper measures to register their businesses and brands as a person who does not have a registered trademark almost cannot prove that another business is trading under their or similar to their trademark. This is done to protect their rights so that if the need arises, they would be eligible in bringing an action in passing off. In addition, passing off prevents any form of similarity or unlawful imitation or adoption of the same business name

In conclusion, it has been established that the whole concept of passing off evolves around protection of unhealthy and unethical competition among businesses. Therefore, this writer is of the opinion that more legislations to guide and strict sanctions should be put in place for the proper and effective enforcement of this tort. Furthermore, 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.

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