NAME: IDIM INEM-ESIT FRIDAY

MATRIC NUMBER: 17/LAW01/136

LEVEL: 300 LEVEL

COLLEGE: LAW

COURSE TITLE: LAW OF TORT II

COURSE CODE: LPB 302

RELEVANCE OF PASSING OFF AS AN ECONOMIC TORTS

INTRODUCTION

The tort of passing off, as an economic tort, seeks to protect two classes of persons: the innocent public and an existing *bona fide* person or business, from the misrepresentation. The tort occurs where, for instance, X presents his business or services out to the world as that of Y, for which the latter has consequentially occasioned or is likely to occasion damage. The remedies available for the plaintiff in this tort are founded under common law and statute, to wit: damages and injunction (interim and perpetual).

MEANING

The tort of passing off applies where there is a representation that a person’s goods or services are those of someone else.[[1]](#footnote-1)

Passing off is the false representation of ones product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of ones product or the carrying on of ones business as if it were that of another person whose reputation and goodwill one thereby enjoys. The tort of passing off is designed to protect a person’s business interests from the unfair trade practices and sharp practices for other persons its object is to protect the reputation and goodwill a business has built up for itself.

This law, tort of passing off, as Lord Kingsdown in *Leather Cloth Co. v American Leather Cloth Co.[[2]](#footnote-2)* noted seeks to protect traders from unhealthy competition, for “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.” It was held in the case of *Byron v Johnson[[3]](#footnote-3)* that it is an actionable tort of passing off for a book publisher to advertise and sell books of poems with the name of Lord Bryon at the title page when in fact, the famous poet had nothing to do with the authorship.

FORMS OF PASSING OFF IN NIGERIA

The tort of passing off is committed in various forms. *Francis Day & Hunter Ltd v Twentieth Century Fox Co. Ltd.[[4]](#footnote-4)* the common forms of passing off which are easily noticed are as follows:

1. Trading with a name resembling that of the plaintiff.
2. Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design.
3. Marketing a product with a name resembling that of the plaintiff’s goods.
4. Marketing products with the plaintiff trademark or its imitation.
5. Imitating the appearance of the plaintiff’s product.
6. Selling inferior or expired goods of the plaintiff as current stock.
7. False advertisement by copying the plaintiff’s advertisement.

ELEMENTS OF PASSING OFF

The elements of passing off are the requirements that a person must prove in order to succeed in a claim of passing off. There are three elements of passing off known as the ‘Classic Trinity’. These three elements were reduced by Lord Oliver from Lord Diplock’s five elements as laid down in the case of *Erven Warnick v Townend & Sons Ltd.[[5]](#footnote-5)* This is also known as the ‘advocate case.’ The elements include:

1. GOODWILL OWNED BY THE TRADER

As a natural law, one cannot place something on nothing and expect same to stand, therefore, a plaintiff in an action for passing off, cannot succeed, where he cannot show that he has an existing goodwill known to the public. Thus, where a plaintiff has no distinct goodwill, he cannot, *prima farcie* be heard of, to say that the defendant has infringed upon his trade-mark or name or converting his goodwill. As to what constitute goodwill, it is a reputation and trust that the public has built, over a long period of time, on a given trader.

1. MISREPRESENTATION

The plaintiff is also to establish that the conduct of the defendant is calculated to deceive the public or to confuse the public into believing that, the defendant’s goods and services are those of the plaintiff. Thus, where X puts forward a name capable of misleading the public to accept his products as though they were those of Y, the former, would not be heard to say that nobody has, in fact, been misled. In the case of *Niger Chemists Ltd. V Nigerian Chemist[[6]](#footnote-6)*, the court held, *inter alia*, that the question was “whether the words calculated to deceive, not whether they have in fact deceived.”

However, in considering the above question, some factors will be put into mind: the nature of the society (customers) and the level of literacy of the public. Thus, what may seem to deceive an illiterate public may not as such, seems to deceive a literate public. This was also noted by the Lagos State High Court, *per* James Tsoho J., in the unreported case of *Continental Pharmaceutical Ltd v Sterling Products Plc & Anor[[7]](#footnote-7).*, that, it is not necessary that deception has occurred; it is sufficient to show that deception is likely to occur in future.

1. THAT HE SUFFERED CONSEQUENTIAL DAMAGES

As in all torts, except those that re actionable *per se,* the last element to succeed in the tort of passing off, in which the plaintiff must prove, is that he suffered or he is likely to suffer consequential damage from misrepresentation. Where he merely establishes the foregoing two elements, but fails in this last element, he may have no or at least nominal damages.

Thus, the plaintiff may establish that he has suffered or he is likely to suffer loss of profit; damage to reputation in certain circumstances; and loss of an opportunity to expand.

GROUNDS OF PASSING OFF

The law of passing off is designed to prevent misrepresentation in the course of trade in a business which is likely to confuse the public. Passing off does not confer monopoly rights to any names, get up, marks etc., it does not recognize them as a property in its own right unlike under trademark.

The grounds for passing off includes trading with a name resembling that of the plaintiff, marketing a product as that of the plaintiff, marketing goods with a name resembling that of the plaintiff’s good, marketing products with the plaintiff’s trademark or it’s imitation, imitating the get up of the plaintiff’s product, imitating the plaintiff’s advertisement or selling inferior or expired goods of the plaintiff as a current stock.

An action for copyright will lie where a defendant is involved in business very similar as a plaintiff and adopts a name which will make the public believe that his business and that his business and that of the plaintiff are the same or connected. In the case of *Beecham Group Ltd v Esdee Food Product Nigeria Ltd[[8]](#footnote-8)* it was held that the trademark ‘glucose-aid’ is calculated to deceive the public in sound in consideration of the trademark ‘Lucozade.’

In the case of *Niger Chemist v Nigerian Chemist*, Palmer J said that “it seems to me a matter of common sense that when two firms trade in the same town, in the same line of business, one calling itself ‘Niger Chemist’ and the other ‘Nigerian Chemist’ there must be a grave risk of confusion and deception.

In *Ogunlende v Babayemi[[9]](#footnote-9)* the plaintiffs were building and civil engineering contractors carrying on business as ‘Mercury Builders’. They were granted an injunction to refrain the defendant carrying out a similar business name as ‘Mercury Builders Nigeria Ltd.’

In the case of *UK Tobacco CO Ltd V Carreras Ltd[[10]](#footnote-10),* the defendants marketed cigarettes called ‘barrister’ with a picture of a white man in a wig and gown. This was restrained from imitating with the appearance of the plaintiff’s cigarettes known as ‘band’ which had a picture of a man in a band master’s uniform.

REMEDIES

INJUNCTION

An injunction under the context in which it is herein used, has been defined by the courts in several cases; for instance, the Supreme Court of Nigeria in the case of ADENUGA v ODUMERU[[11]](#footnote-11), defined it to mean: “An equitable order restraining the person to whom is directed from doing the things specified in the order, or requiring in exceptional situations the performance of a specified act. A claim for an injunction is a claim in equity.”

When an application for an injunction is granted, the legal effect is dependent on the nature of the prayer contained and so granted in the application. Moreso, since an interim injunction is to maintain the status *quo ante litem*, it follows that, an injunction does not purport to restrain a completed act.[[12]](#footnote-12) Once an injunction has been issued, the respondent and his allies or privies are forthwith restrained from doing something, continuing or doing a thing so stated in order, in response to the application. Going against such an order amounts to contempt of court, and leads to an order of committal.[[13]](#footnote-13)

Moreso, in some jurisdiction, if the plaintiff’s business is granted an injunction (or if the defendant voluntarily undertakes to cease dealing in the offending goods) the court may make an order requiring the goods to be either: delivered to plaintiff or his solicitors or destroyed by the defendant with the destruction verified on oath. This approach ensures that the defendant is no longer in possession of the items.

MONETARY DAMAGES

If the plaintiff succeeds, and has pleaded for monetary damages, he will be entitled to an award of damages or an account of profits. Damages, as if it were, are often difficult to assess; but are likely to involve quantifications such as: loss of sales and or damages to goodwill and reputation. He may, in addition, have an option, seeking an account of the defendant’s profits, rather than an award of damages. However, this approach is rarely pursued as it usually difficult to prove the proportion of the profits that were attributable to the passing off.

CONCLUSION

The tort of passing off, as an economic tort, seeks to protect the plaintiff, the owner of a goodwill, from an unlawful conduct of the defendant, the result of which is the damage caused to the business of the former.

BIBLIOGRAPHY

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

Fleming J., *The Law of Torts* (Sydney: The Law Book Company Limited 1992).

Gardiner D., *Outline of Torts*. (Sydney, Butterworths 1991).

Gillies P., *Business Law*, (Federation Press 1993).

Kodilinye G. & Aluko O., *The Nigerian Law Of Torts*, Revised Edition, (Spectrum 2005).

Malemi E., *Law of Torts*, (Princeton Publishing Co. 2013).

Winifield P.H. & Jolowic *Tort,* (W.V.H. Rogers, Sweet & Maxwell, London, 2002).

1. Black’s Law Dictionary (9th ed.) [↑](#footnote-ref-1)
2. (1865) 11 H.L. Cas 523. [↑](#footnote-ref-2)
3. (1816) 35 ER 851 [↑](#footnote-ref-3)
4. (1939) 4 ALL ER 192 at 199 P.C [↑](#footnote-ref-4)
5. (1979) AC 731 [↑](#footnote-ref-5)
6. (1961) 1 All N.L.R. 171 [↑](#footnote-ref-6)
7. Suit No.:FHC/L/CS/460/95 [↑](#footnote-ref-7)
8. (1985) 3 NWLR (PT.11) [↑](#footnote-ref-8)
9. (1971) 1 UILR 417 [↑](#footnote-ref-9)
10. (1931) 16 N.L.R 11 [↑](#footnote-ref-10)
11. (2001) F.W.L.R (pt.3) 1056 at 1068, paras. C-D [↑](#footnote-ref-11)
12. Lafferi v NAL (2001) 35 W.R.N. 107 [↑](#footnote-ref-12)
13. Ojukwu v Military Governor of Lagos State (1986) 1 N.W.L.R (pt.18)621 [↑](#footnote-ref-13)