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**ASSIGNMENT QUESTION**

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

**ABSTRACT**

*This paper considers the concept of economic tort, with particular reference to the tort of passing off as an economic tort. A critical analysis as to the concept, features, forms, defences and remedies of the tort of passing off will be clearly stated. At the ends of this paper, this writer seeks to establish the relevance of the tort of passing and also establishing case laws, where appropriate, in order to buttress the facts of its relevance.*

**INTRODUCTION**

Economic torts are torts which inflict economic or financial loss. It seeks to protect a person’s financial interests. Some forms of economic tort include interference with contract, civil conspiracy, passing off, amongst others. However, the focus of discourse is the tort of passing off as an economic tort. Passing off could be identified as an economic tort because the subject matter of the tort of passing off is the protection of the plaintiff’s financial interest which is also the very subject matter or purpose of economic torts.

**DEFINITION OF PASSING OFF**

Passing off can be defined as the false representation of one’s products, services, or business as the business of another person to customers for the customers to patronise them. It can also be defined as the selling of one’s business, products or services as if it were that of another person, whose reputation and goodwill one thereby enjoys[[1]](#footnote-1).

**PURPOSE OF THE LAW OF PASSING OFF**

The purpose of the tort of passing off is to protect the reputation and good will a business has built for itself, against any form of misrepresentation, in a bid to prevent unfair trade practices. In ***Perry v Truefitt*[[2]](#footnote-2),** the court stated that a man is not to sell his goods under the pretence that they are the goods of another.

**ELEMENTS OF PASSING OFF**

In the case of ***Warnick BV V Townsend & Sons*[[3]](#footnote-3),** the court stated five essential elements[[4]](#footnote-4) to determine whether an action will lie in passing off .they include: (1) a misrepresentation, (2) made by the defendant in the course of his trade, (3) to prospective customers, (4) which is calculated to injure the business and good will of another person, (5) which causes damage to the person’s business and goodwill, or is likely to do so. It is pertinent to note that note that the tort of passing off is actionable per se, that is, the plaintiff doesn’t not have to prove damage to succeed in a claim. The probability of damage occurring is sufficient.

For the plaintiff to succeed in an action for passing off, he has to prove that the activity of the defendant is calculated to deceive the public. Thus, the liability in tort of passing off is strict. This means that once the plaintiff establishes that the act of the defendant is likely to deceive the public, his claim succeeds. However, where there is evidence that the public has in fact, been deceived, the plaintiff may provide such evidence. Where there is no likelihood of the public being deceived, no passing off has occurred. The plaintiff does not have to prove that there was an intention to deceive the public[[5]](#footnote-5). Therefore, it is not necessary to prove the element of fraud on the defendant’s part and the plea of innocence by the defendant doesn’t suffice as a defence in escaping liability. However, where fraud is proven, it helps the plaintiff prove the likelihood of damage and makes it easier for the court to award punitive damages. For the court to determine the likelihood of confusion on the part of the public, the court will take into account the experience, prospectiveness and standards of literacy of the prospective purchasers of the goods[[6]](#footnote-6). The likelihood of the public being deceived varies from one customer to another.

It is however, important to note that an action for passing off and an action for trademark infringement, as an action for passing off is for unregistered marks, while an action for trademark infringement is a for registered marks.

**COMMON FORMS/METHODS OF PASSING OFF**

The tort of passing off can be committed in several ways, as businesses resort to various strategies in imitating the products, business or services of their rivals. The most common forms include the following

1. MARKETNG A PRODUCT AS THAT OF THE PLAINTIFF: The tort of passing off occurs where the defendant makes a direct statement that the goods are that of the plaintiff, where they are not, in a bid to sell his products. There must have been no agreement between the plaintiff and the defendant for the defendant to market the plaintiff’s goods. In ***Lord Byron v Johnston*[[7]](#footnote-7),** the court restrained the defendant from using the name of the plaintiff as the author of their poems, when he was not.
2. IMITATING THE APPEARANCE OF THE PLAINTIFF’S GOODS: Where the appearance of the defendant’s goods imitates the plaintiff’s goods in a manner that deceives the public into believing that the defendant’s goods are the plaintiff’s goods, the defendant would be held liable for the tort of passing off. In ***U.K Tobacco Co. Ltd v Carreras Ltd*[[8]](#footnote-8),** where the defendants marketed cigarettes called “Barrister”, on which the packet was a white man wearing a barristers wig and gown, which imitated the appearance of the plaintiff’s cigarette called “Bandmaster”, on which the packet was a man in a band mater’s uniform, the court held that it was an actionable imitation of the plaintiff’s cigarette[[9]](#footnote-9). However, it is pertinent to note that there are instances where a claim for passing off based on imitating the plaintiff’s good would not succeed.
3. MARKETING GOODS WITH A NAME SIMILAR TO THAT OF THE PLAINTIFF’S GOODS: The tort of passing off may occur where the defendant markets his goods with a name closely related to that of the plaintiff which confuses the customers and thus, the defendants goods are mistaken to be that of the plaintiff and are bought as products of the plaintiff. A trade name was defined by SIR JOHN SALMOND, as one under which goods are sold, or made by a certain person, and which by established usage has become known to the public as indicating that those goods are the goods of that person[[10]](#footnote-10). Trade names protect products and also trade names of different kinds of business. However, it important to note that an action for passing off does not lie for the use of generic names and descriptive names (names that describe the nature of the product). However, where he (plaintiff) can prove that the particular descriptive name has a secondary meaning exclusively associated with it, in which use of such descriptive name will confuse the buyers, the plaintiff’s action for passing off may lie. In ***Hines v Winnick*[[11]](#footnote-11),** the Court granted an injunction restraining the defendant from featuring a band on his program who used the same name as the plaintiffs’ and further stated that the plaintiff’s name has inevitably become part of his stock trade.
4. TRADING WITH A NAME RESEMBLING THAT OF THE PLAINTIFF: in this form of passing off, the defendant is usually engaged in the same type of business as the plaintiff, and he uses the plaintiff’s name or a semblance of the name, which renders the public confused and thus, are misled into believing that the plaintiff’s business and the defendant’s business are one and the same. In ***Niger Chemists Ltd v Nigeria Chemists*[[12]](#footnote-12),** the court granted an injunction to stop the defendants from trading as Niger Chemists and further stated that, as a matter of common sense, where two firms trade in the same town, in the same street and in the same line of business, there must be a grave risk of confusion and deception.
5. IMITATTING THE PLAINTIFF’S ADVERTISEMENT: The tort of passing off occurs where the defendant copies or imitates he the plaintiff’s advertisement in a manner that resembles that of the plaintiff, which is a capable of misleading the customers to purchase the defendant’s goods instead of the plaintiff’s goods[[13]](#footnote-13).

**REMEDIES OF PASSING OFF**

1. Damages: Where a plaintiff can establish the tort of passing off, is entitled to damages. The damages could be general, specific or punitive.
2. Injunction: This is an order of the court to prohibit or suspend the use of a mark.
3. Intervention by relevant regulatory agency such as NAFDAC, SON
4. Account for Profit: The plaintiff will be entitled to the profits made by the defendant

**DEFENCES**

1. Consent: This is where permission has been given by the plaintiff to the defendant to produce or market his goods
2. Functional design
3. Mere descriptive name of the product.

**RELEVANCE OF THE TORT OF PASSING OFF IN 21ST CENTURY NIGERIA**

It is imperative for every society to have the right to engage in any kind of legal and economic activity for sustenance. However, in a country like Nigeria, where a considerable amount of the population stays in the rural parts of the country, it is very easy to pass off goods. Also, in Nigeria, the unemployment rate is high and thus, people are looking for every possible way to make money. The rise in the technological advancement of the country also gives more room as to the ease of passing off. Thus, the relevance of the tort of passing off in Nigeria cannot be overemphasized, as it keeps people in check. In a situation where this tort had not been established in Nigeria, many people will be able to pass off the goods of others who have earned a good reputation in their business as their own. The effect of this will be of serious danger to the business which has been passed off and also, to the society at large as one of its consequences will be that it will give rise to a numerous counterfeits of a particular product. Although, the issue of counterfeit products is already existent in Nigeria, the tort of passing off helps to keep the level of this issue in check. In the famous case of ***Trebor Nigeria Limited V Associate Industries Limited***[[14]](#footnote-14) where the plaintiff, the makers of the Trebor peppermint brought an action against the defendants, the makers of Minta Supermint, claiming that the wrapper used to package his product was similar to that of the plaintiff. The court found the defendant liable for passing off his products as that of the plaintiff.

Another consequence is the health hazard attached with such passed off goods. Many of those passed off goods may not adopt healthy guidelines in producing such goods, which as a result will pose as a great health risk to the society. Thus, as this tort has been put in place, where the original products lay claim of passing off of their goods, it reduces the health risk associated with such passed off goods. Furthermore, another consequence would be its effect on the business both nationally and globally. The business starts to lose profit as people are deceived into believing that such passed off goods are the original goods. It also takes effect in the global sphere, in the sense that companies who export their products will also be on the losing end if the rival company which passed of the original goods as its own also exports.

Thus, the tort of passing off in Nigeria is very important as it helps to ensure that people don’t use the good reputation acquired by goods to their own advantage and to the detriment of the original owners of the goods and the society at large.

**CONCLUSION**

In conclusion, this writer is of the opinion that the relevance of the tort of passing off in the 21st century Nigeria cannot be over emphasized. The protection of one’s goodwill and reputation recognised by the public is pertinent to the health and growth of one’s business. Thus, this writer recommends that adequate legal framework which provides for the tort of passing off to be strengthened. Also, the government should try to ensure that there is adequate publicity in relation to the tort off passing off.

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