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

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Abstract

The tort of passing off, one of the most important in the law of tort is an unfair competition by misrepresentation or falsely representing one's own product as that of another in an attempt to deceive potential buyers into believing it is another's product. Generally, an action for passing off arises where the deception is made in the course of trade, which could lead to confusion amongst customers. This applies to both ecommerce businesses and businesses with physical addresses. The question that arise from this tort is, when can a business owner seek relief from the tort of passing off? What is the rationale of the tort especially to the 21st Century? This work seeks to tackle such judiciously.

INTRODUCTION

The tort of passing off is the false representation of one's business or product as that of another person thereby deceiving buyers to patronize it¹. It is inducing another in believing that such goods or products, services, property is that of another there by injuring the business of that person. Whenever a person sells his product, goods or carries on his business under a name, trademark, description or otherwise does anything similar to mislead the public in believing that the goods, services or business are those of another thereby taking advantage of that person's reputation, goodwill and market, that is passing off.

A good example is the popular brand 'Adidas.' If someone makes a brand named 'adibas' or 'addidas' (as we mostly see in the market) in order to gain from available market of the popular brand that is passing off. Another example is if A sells bread named 'Ohia' and designed in a yellow and black package. B decided to sell bread with the name 'Ohio' and packaged it in yellow and brown package. B has committed tort of passing off and A can seek relief from court.

There is a link between passing off and tort of malicious falsehood. Both protects the goodwill and reputation of a business and its product and services. There is also a link between the tort of passing off and that of deceit as the person who passes off his goods as belonging to another deceives the public. Passing off differs from other intellectual property on the ground that the basis of law lays in common law and not in statute.²

Passing off is classified as an economic tort because the subject matter of the tort is the protection of the plaintiff's financial interest in his property in other words it prevents people from wrongfully taking advantage and enjoying the goodwill of the business of another person. Passing off is actionable per se put in another way the plaintiff doesn't need to prove that damage had been suffered by him. The probability of occurrence of damage is enough for plaintiff to succeed.

PURPOSE OF PASSING OFF

¹ Ese Malemi, *Law of Tort* (2nd edn Princeton Publishing Company 2013)

² E Smaranda Olarinde and Clement C Chigbo and Nnamdi G Ikpeze, *The Modern Law of Torts: A Kaleidoscopic Perspective* (College of Law, Afe Babalola University 2018)

The fundamental reasoning of the tort of passing off is that it protects a person's business interest from unfair trade practices. It protects the good name, reputation, patronage customers and goodwill a business has built for itself. In the words of Lord Kingsdown in *Leather Cloth Co v American Leather Cloth Co* 'The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.'³

JURISDICTION OF THE COURT

In *Omnia (Nig.) v Dyktrade Ltd*⁴, it was held that the Federal High Court has exclusive jurisdiction to hear and determine a claim for Passing off whether the claim arises from the infringement of a registered or unregistered trade mark. **Constitution of the Federal Republic of Nigeria, s 25(f)** specifically makes provisions for Passing off actions as follows:⁵

*"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters on any Federal enactment relating to copyright, patent, designs, trademarks **and Passing-off**, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards".*

The Constitution⁶ also provides that if there is any other law that is inconsistent with its provisions, the Constitution will prevail, and that other law shall, to the extent of the inconsistency, be void. These provisions in the grundnorm places the correct position in perspective and emphasizes the position of the Federal High Court as the Court with exclusive jurisdiction in Passing off actions.

WHEN AN ACTION LIES FOR PASSING OFF

In the case of *Warnink BV v Townend & Sons*,⁷ Lord Diplock stated five characteristics for determination when an action lies in passing off. They are whether there is:

1. A misrepresentation

³ (1865) 11 ER 1435 (CH)

⁴ (2007) 15 NWLR 576 (SC)

⁵ CFRN 1999 s25(f)

⁶ CFRN s1(3)

⁷ (1979) AC 731 (HL)

2. Made by a defendant in the course of trade
3. To prospective customer
4. Which is calculated to injure the business and goodwill of another person; and
5. Which causes damage on that person's business and goodwill or will likely do so.

ELEMENTS PASSING OFF

Aside from the key component of deception, Justice Nnaemeka Agu, in case of *The Boots Co Ltd v United Niger Imports Ltd*⁸ carefully listed what he considered to be the ingredients of a successful Passing off action as follows:

1. Proof that the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of the public or persons involved in a trade in the relevant market as coming from a particular source;
2. That the defendants who are engaged in a common field have used a name, mark, sign so resembling to the plaintiff's that it is likely or calculated to deceive or cause confusion in the minds of the common customer; and
3. That the use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiff's business.

In *Niger Chemists Ltd v Nigeria Chemists*,⁹ it was held that liability in the tort is strict, therefore, innocent passing off is not a defense. Where fraud is proved, it helps the plaintiff prove the likelihood of damages and makes it easier for the court to award aggravated or punitive damages.

THE COMMON FORMS OF PASSING OFF

1. Trading with the name resembling that of the plaintiff
2. Selling inferior or expired goods of the plaintiff as current stock
3. Imitating the appearance of the plaintiff's product
4. False advertisement by copying the plaintiff's advertisement
5. Marketing products with the plaintiff's trademark or its imitation; and so forth.

⁸ (1977) 1 A.N.S.L.R 144 (SC)

⁹(1961) ANLR 180 (SC)

THE FACTORS TO DETERMINE WHETHER THE PUBLIC IS LIKELY TO BE CONFUSED

1. The experience of the buyers.
2. The level of perception of the buyers; and
3. The level of literacy or awareness of the buyers.

The likelihood of deception varies from customer to customer with regard to the level of intelligence and education of a given product. In the case of *De Facto Works Ltd v Odumotun Trading Co*,¹⁰ it was held that literate persons are subject to confusion, it is worse with illiterate persons as in many cases, they only have the recollection to go by.

The law presumes that literate persons are observant persons making informed choices while illiterates are casual observers making unwary choice. However, the presumption is not always the case because even an educated person is a casual observer and an unwary customer.

REMEDIES OF PASSING OFF

The remedies of passing off are damages, injunction, account for profit or for loss of sales, intervention of relevant regulatory authorities such as NAFDAC, SON, Intellectual Property Commission and so forth.

DEFENCES FOR PASSING OFF

The plaintiff can plead:

1. Consent, such as license given to him by the plaintiff to market his goods.
2. Innocent passing off. The defendant will still be liable but likely to get off with nominal damages or reduce award of damages.
3. The mere descriptive name of a product. E.g. shoe, shaving stick and so on.
4. Functional design or package.

¹⁰ (1959) LLR 33 (HC)

CONCLUSION

In conclusion, the relevance of an action for Passing off especially to the 21st Century is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another and also helps to seek remedies such as damages and injunction, just to mention a few. The principle is that no man is entitled to represent his goods or his business as that of another. It is therefore my recommendation that the necessary framework for Passing off actions be strengthened by the government for justice to prevail and to defend the goodwill and reputation of businesses.¹¹ Unfortunately, passing off is not a criminal offence which will lead to criminal proceeding and heavy punishment awarded to erring members and helps deter other people from committing such.

Passing off also remains the vital form of protecting intellectual property, goods and services from infringement. It hinders erring members from destroying the market of another which can lead to that person losing his reputation, bankruptcy of a business which could lead to economic or financial injury.

¹¹ T & A Legal, 'Nigeria: An Appraisal of Passing Off Actions Under Nigerian Law' (2018) Mondac <<https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law>> accessed 6 May 2020

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