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LPB 302: LAW OF TORTS II

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DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY NIGERIA

ABSTRACT

This writer is going to introduce what economic tort entails, the forms of economic tort of which passing off is one of them. Thereafter, this writer is going explain the specifically the tort of economic tort of passing stating the forms and elements of the tort.

Most importantly, this writer is going to proceed to throw light on the relevance of the tort of passing in the 21st century Nigeria.

INTRODUCTION

 Economic torts are torts which inflict mainly economic losses or financial injury. Economic torts occur mainly in economic, commercial and business sector of life. Passing off which is a form of economic tort can be seen as the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. Such type of tort is mainly common in a competitive business community or economy.

 On the other hand, 21st century Nigeria characterized by these competitive businesses and therefore the economic tort of passing off is relevant and important in protecting these businesses from financial injury which may occur as a result of false representation done by rivalry businesses. The law on this matter is designed to protect 21st century traders against that form of unfair competition which consists in acquiring for oneself, by misleading device, the benefit of the reputation achieved by rival traders.

DEFINITION OF PASSING OFF

 The tort of passing off is committed where the plaintiff’s goods are passed off by the defendant as being his own (that is, the defendant’s) goods. Passing off is the selling of one’s product, or the carrying of one’s business as if it were that of another person whose reputation and goodwill one thereby enjoys.

 In the tort of passing off a person carries on his business or sells his goods under a name, trademark, description or imitation of another person’s product in order to deceive the public to patronize it. Passing off is an unfair and unconscionable competition.

 Passing off is a pretence by one person, that his goods or business are those of another person in other capture the patronage of the customers of a rival trader and enjoy his good will.

 Whenever a person sells his goods, or carries on his business under a name, trademark description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill, he commits the tort of passing off.

WHEN DOES ACTION FOR PASSING OFF LIE?

In the case of **Warnick BV v Townsend & Sons,[[1]](#footnote-1)** LORD DIPLOCK, in the House of Lords stated the five characteristics or guidelines for determining when an action lies in passing off. These five characteristics are whether there is:

* A misrepresentation
* Made by a defendant in the course of trade
* To prospective customers
* Which is calculated to injure the business and good will of another person
* Which causes damage to that person’s business and goodwill or will likely do so

PASSING OFF IS ACTIONABLE PER SE

The tort of passing off is actionable per se on its occurrence. A plaintiff does not have to prove damages in order to succeed. The right action lies even though no damage has been suffered nor proved. The probability of damage occurring is enough for a plaintiff to succeed.

COMMON FORMS OF PASSING OFF

The tort of passing off is committed in various forms, as businesses resort to different strategies in imitating products and business of their rivals

* Trade with a name resembling that of the plaintiff
* Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design
* Marketing a product with a name resembling that of the plaintiff’s goods
* Marketing products with the plaintiff’s trademark or its imitation
* Imitating the appearance of the plaintiff’s product
* Selling inferior or expired goods of the plaintiff as current stock
* False advertisement by copying the plaintiff’s advertisement and so forth

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 name closely resembling that of the plaintiff, as a result the public is confused and misled into thinking that they are one and the same business, or that one is an extension of the other. The customers are thereby confused and misled to patronize either of them thinking that they are patronizing their usual business or organization. The innocence or bonafide honesty of the defendant in his choice of name without notice is not a defence.

**Niger Chemists Ltd v Nigeria Chemists[[2]](#footnote-2)**

The plaintiff’s chemists obtained an injunction to stop the defendant chemists from trading as Nigeria Chemists. Granting the injunction PALMER J said:

*“ It seems to me as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger Chemists and the other ‘Nigeria Chemists, there must be grave risk of confusion and deception.”*

MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

 The tort of passing off is committed when a defendant sells his goods off to people by stating falsely that the goods are produced by the plaintiff, whereas there are not. The defendant by advertising and selling his goods by falsely stating that they are manufactured by the plaintiff, directly but wrongfully benefits and profits from the goodwill and reputation already built by the plaintiff’s business.

 It is therefore a type of passing off for a defendant to produce his goods, and then sell them off the name, label, or any design of the plaintiff, when in fact that plaintiff is not the producer of the goods, and there is no agreement between the parties, nor license given to the defendant to so produce and market his goods with the name of the plaintiff.

**Lord Byron v Johnston[[3]](#footnote-3)**

The defendant publication were restrained from advertising and selling a book of poems with the name of Lord Byron written on the cover and title page, when in fact that famous poet was not its author.

MARKETING GOODS WITH A NAME RESEMBLING THAT OF THE PLAINTIFF’S GOODS

 It is a tort of passing off for a defendant to produce and market his goods with a namely closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendant’s goods are mistaken as made by the plaintiff and are bought as the products of the plaintiff.

A trade name as defined by SIR JOHN SALMOND is 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”*

 The protection of trade names does not only protect products, but also protects that trade name of all kinds of businesses, professionals, and persons who have goods, or services to offer, such as artists, writers, and so forth.

However, an action in passing off does not lie for the use of purely general or descriptive name of products.

MARKETING PRODUCTS WITH THE PLAINTIFF’S TRADEMARK OR ITS IMITATION

 It is passing off for a defendant to markets his goods using the plaintiff’s trademark or its imitation, leading to a confusion of the buyers, who then patronize his products thinking that they are the products of the plaintiff. The ground on which the courts protect trademark, is that it is not right to permit a party to sell his own goods as the goods of another person. Therefore, a party will not be allowed to use the names, marks, letters, or other design by which he may pass off his own goods to purchasers as the products od another person.

**Perry v Truefitt[[4]](#footnote-4)**

The plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations.

IMITATING THE APPERANCE OF THE PLAINTIFF’S PRODUCT

 It is passing off for the defendant to do anything, which makes his products appear like the plaintiff’s products. This passing off includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public. Generally, it includes the general appearance, package, label or design of the product.

**UK Tobacco Co. Ltd v Carreras Ltd[[5]](#footnote-5)**

The defendants who were marketing cigarettes called ‘Barrister’ on which packet was a white man wearing a barrister’s wig and gown were restrained from imitating the appearance of the plaintiff’s cigarette called ‘Band Master’ on which packet was a man in a band master’s uniform.

However, there are some situations where a claim for passing off based on imitation of appearance of a plaintiff’s goods will not succeed.

SELLING INFERIOR OR EXPIRED GOODS OF THE PLAINTIFF AS CURRENT STOCK

 It is passing off for a defendant to sell inferior or expired goods of the plaintiff as current stock, where such has been discarded by the plaintiff. In this passing off, the defendant who has managed to lay hands on the goods, which are unfit for human consumption sells them off as current stock of the plaintiff.

Instances of where defendants have been stopped by an injunction, from selling inferior or expired goods of a plaintiff as current stock includes:

* Selling used Gillete razor blades as new ones
* Selling used footballs as current stock
* Selling old canned milk as current stock
* Selling a used car as a “new morris”

Similarly, there is no passing off when old products or ‘second hand’ goods are sold off as such without pretending or falsely representing that they are new ones.

IMITATING THE PLAINTIFF’S ADVERTISEMENT

 An advertising by the defendant which copies, or imitates the plaintiff’s advertisement of his products, may amount to passing off, where such advertisement so resembles that of the plaintiff, as to be capable of misleading the buyers to patronize the defendant’s goods as those of the plaintiff.

ELEMENTS OF PASSING OFF: WHAT A PLAINTIFF MUST PROVE TO SUCCEED

 To succeed in a claim for passing off, all that a plaintiff has to prove is that the activity of the defendant is ‘calculated’ to deceive the public. Liability in the tort of passing off is strict, therefore, innocent passing off is not a defence

The plaintiff does not have to prove intention to deceive on the part of the defendant.in the words of PALMER J in the case of **Niger Chemists Ltd v Nigeria Chemists:**

*“It is not necessary to prove, that there was any intention to deceive: this has been held in a long series of cases, and is not disputed”*

It is not necessary at all for the plaintiff to prove that the defendant’s conduct has actually deceived the members of public. It is sufficient if the plaintiff can prove that there is the likelihood of the public being deceived, or that it is likely to deceive the public in the future. This will entitle the plaintiff to an award of a *quia timet* injunction, which is an injunction usually issued to prevent an occurrence of a future event which is proposed or imminent.

THE RELEVANCE OF PASSING OFF AS AN ECONOMIC TORT IN THE 21ST CENTURY NIGERIA

 The tort of passing off is common in a competitive business community or economy. People resort to every strategy to market their products and services and to expand their business. This makes this tort relevant in the 21st century Nigeria which is characterized by competitive businesses and companies where people strive to boost sales and expand customer market.

 The tort of passing off is designed to protect a person’s business interests from unfair trade practices and sharp practices of other persons. Its object is to protect the reputation and good will a business has built up for itself. It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business.

 In an ideal situation, passing off in 21st century Nigeria is not only relevant to business owners but also customers who might be intending to purchase a particular product and end up purchasing another one due to a false representation done by another rivalry business and this is a big issue especially in Nigeria where goods on the store shelves are not properly labelled.

 Thus, a tort of passing off allows for business owners to claim damages from the defendant for a false misrepresentation as well as an injunction in order to prevent defendant’s goods taken out of the market to prevent further purchase by customers.

 It should be noted that the tort of passing off as already earlier mentioned comes in different forms asides trading with a resembling name of that of the plaintiff or imitating the appearance of the plaintiff’s product. One of which is selling inferior and expired goods of the plaintiff as current stock. The relevance of passing off in 21st century Nigeria comes to play here in order to prevent consumers from consuming products which are unfit for consumption which may cause high potential health risk.

 The economic tort of passing off is also important in order to protect the plaintiff from losing sales on his new products which would be sent out of the market if the economic tort of passing off occurs in the form of selling inferior goods by the defendant.

 Generally, the tort of passing off as an economic tort is relevant in 21st century Nigeria where they are so manty competitive businesses and where there are customers who may not carefully read or pay attention to the name’s product before taking it out of the shelve with the assumption that it is the product which they wish to purchase, but this assumption is wrong simply because the defendant has imitated the name or look of this product.

 The tort of passing off therefore helps to protect the plaintiff against any financial loss that might occur or in a case in which it has ensures damages are paid to the plaintiff and also helps prevent further misleading of the customer.

 The tort of passing off also plays a significant role in ensuring the health safety of the consumers in consuming wrong and harmful substances. The remedies for passing off include damages and injunction. Damage which put the plaintiff in the position as if the tort never occurs and compensates for any financial loss and injunction which prevents and puts a stop to the tort entirely.

 In summary, the relevance of the tort of passing off in 21st century Nigeria cannot be over emphasized; it is relevant to both the consumers, the plaintiff and on a long run the economy of Nigeria because it helps protect businesses and firms from financial losses due to passing off which if occurs would affect the economy of Nigeria.

Bibliography: Eseoghene Otejiri Malemi, *Law of Tort* (rev ed, Princeton Publishing Co, 2013)

1. [1979] 2 All ER 927 HL [↑](#footnote-ref-1)
2. [1961] All NLR 180 at 182 [↑](#footnote-ref-2)
3. [1816] 35 ER 851 [↑](#footnote-ref-3)
4. [1842] 49 ER 749 [↑](#footnote-ref-4)
5. [1931] 16 NLR 1 [↑](#footnote-ref-5)