OKAFOR VICTORY

MATRIC NO: 17/LAW01/213.

COURSE TITLE: LAW OF TORTS II.

COURSE CODE: LPB 302.

LECTURER: OYEBANKE APARA (MRS).

ASSIGNMENT:

Discuss the relevance of passing off as a form of economic torts in the 21st century Nigeria.

 Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another and thereafter to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.

 Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or injury. Economic torts occur mainly in the economic, commercial or business sector of life.

 Generally, where a person has suffered economic loss, redress has traditionally been in contract law. The justification for this has been the doctrine of consideration. Where a person had entered a bargain promise and provided consideration. Economic torts include passing off which is my main course of study. Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. As held in the famous case of *N. R. Dongre Vs. Whirlpool Corporation[[1]](#footnote-1)* “A man may not sell his own goods under the pretence that they are the goods of another man.”  The essence of passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff, and the law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders.

According to Lord Kingdown, in the case of *Leather Cloth Co v. American Leather Cloth Co[[2]](#footnote-2).* he said that “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”.

Where passing off is proved by the plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong, also he can claim damages for any loss he has incurred thereby and to an account of the profits made by the defendant in consequence of the tort, that is the passing off.

‘Passing off’ has different types and forms which include;

1. MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff, when the truth and the fact of the matter is that the goods are not. For example, it would be passing off for *A* , a manufacturer of tyres, to advertise and sell his tyres as ‘*Dunlop’* or ‘*Michelin’* tyres or B, a marketer of baby products, markets their products and sells products as ‘*cussons’ or ‘huggies’*, because it would be an attempt to profit from the good will and reputation established by the rival businesses.

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

*Niger Chemists Ltd vs. Nigeria Chemists (1961) All N.L.R 171[[3]](#footnote-3).* “…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 a grave risk of confusion and deception”. Per Palmer, J.

1. 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.

 A popular example of this type of passing off is *Hendriks v. Montagu[[4]](#footnote-4)*, where the universal Life Assurance Society were granted an injunction restraining the defendant’s company, which was incorporated subsequently, from carrying on business under the name ”Universe Life Assurance Association”. James L.J asked if there was a similarity between the two names that would ordinarily course human affairs to be confounded with others. He also asked if people who heard the Universal would be misled into going to the Universe. He then said that speaking for himself he would most likely indeed be misled. This is because many people do not care to bear in mind exactly the very letters of everything they have heard of.

The principle in *Hendriks v. Montagu* was applied in *Niger Chemists Ltd v. Nigeria Chemists*. In this case the plaintiff had carried on business as chemists and druggists for several years and had several branches in Onitsha and other towns in what was then Eastern Nigeria. The defendants later founded a firm carrying on exactly the same type of business in Onitsha under the name “Nigeria Chemists “. The plaintiffs contended that the defendants’ use of a name very similar to their own was actionable passing off and they sought an injunction to restrain its further use. Palmer J. granted the injunction, based on the fact of the name’ Nigerian Chemists ‘he said it was calculated to deceive people who know of and intend to deal with Niger Chemists.

 Similarly, in the case of *Ogunlende v. Babayemi[[5]](#footnote-5)*, the plaintiffs carried on business as civil engineering contractors and plumbers under the name ‘Mercury Builders’, Taylor C.J granted an injunction restraining the defendant from conducting a similar business under the name ‘Mercury Builders (Nigeria) Ltd’ on the bases that since “there can be doubt at all that the name of the defendant company is calculated to deceive due to its similarity with the name of the plaintiff association”.

1. 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 one under which goods are sold and which by established usage has become known to the public as indicating that those goods are the goods of that person. So the defendant knowing that the plaintiff’s trade name is a big name and really sells would then also start advertising or marketing his own goods with the trade name of the already known name and people would buy it because in their own opinion the product is trusted seeing that it is being sold under a trusted trade name. For better understanding, Mr. X has a new sports brand he wants to put in the markets called **aeroway**, since it is new and no one knows it the product might not be much of a success, so Mr. X decides to sell **aeroway** as a product under the trademarked Nike brand because he knows that everyone knows this brand name and trusts it. Mr. X has committed the tort of passing off because his brand **aeroway** has no affiliation with the Nike trademark.

4. MARKETING GOODS WITH THE TRADE MARK OF THE PLAINTIFF OR WITH ANY DECEPTIVE IMITATION OF SUCH MARK.

A trade mark is any design or other arrangement affixed to goods which identifies those goods with the plaintiff or manufacturer or seller. Trademarks receive protection not only under the law of passing off but also, if registered, under the *Trade Marks Act 1965[[6]](#footnote-6)*, under which most actions are brought.

 In the case of *ErvenWarnink v. Townend*[[7]](#footnote-7), **Lord Diplock** gave the elements of the passing off action.

1. Misrepresentation
2. Made by a trader in the course of trade
3. To prospective customers of his or ultimate consumers of goods and services supplied by him.
4. Which is calculated /likely to injure the business or goodwill of another trader?
5. Which causes actual damage to a business or goodwill of the trader by whom the action is brought?

In the case of Reckitt& *Colman Ltd V. Borden Inc[[8]](#footnote-8)*. It was stated that the three fundamental elements of passing off are Reputation, Misrepresentation and Damage to goodwill. These three elements are also known as the **classical trinity**, as stated by the House of Lords. It was stated that in a suit for passing off the plaintiff must establish firstly, goodwill or reputation attached to his goods or services. Secondly, he must prove a misrepresentation by the defendant to the public. Finally, he must demonstrate that he has suffered a loss due to the belief that the defendant’s goods and services are those of the plaintiff’s.

We must proffer a remedy for every tort and passing off is not an exception. Its remedies include;

1. Injunction**;** This may be made in a qualified form i.e. restraining the defendant from disposing of his goods without sufficiently distinguishing them from the plaintiff’s.
2. Damages may be granted in respect of losses to the plaintiff.
3. Interim injunction if you need to act quickly.
4. An enquiry to establish loss.
5. Delivery up for destruction of infringing goods: this is usually claimed where physical goods are involved. This occurs where goods are produced in breach of the trademark of another identical product. Thus, the plaintiff usually claims for the goods to be delivered up especially so that in can be destroyed.
6. Anton pillar orders: this is an order for inspection and delivery up of infringing materials in the possession or control of an infringer.
7. Account to profit: the plaintiff is entitled to profit off of goods wrongly sold by the infringer.

The purpose or relevance of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.
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.
The Supreme Court should also resolve with one voice the jurisdiction of the Federal High Court in line with the Constitution to prevent unnecessary objections and delay of justice at court.
It is also suggested that the Trademarks Act be further amended to reflect the times, happenings and changes in the Nigeria. In particular, we have observed that the Trademarks Registry has witnessed a serious backlog in the successful completion of the registration of marks and this has the resultant effect of limiting the rights of most product owners to Passing off as opposed to the an action on the infringement of a trademark.

In conclusion, the tort of passing off arises in three cases, firstly, when it has injured the claimant’s good will, secondly in misrepresentation and thirdly in damages. The passing of action is applied in unregistered goods and services, and in infringement of suit and passing off both the cases, will have the same remedy.

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S 5. Trademark Act

1999 CFRN, as amended

1. N. R. Dongre vs Whirlpool Cooperation [↑](#footnote-ref-1)
2. *Cloth Co v. American Leather Cloth Co* [↑](#footnote-ref-2)
3. *Niger Chemists Ltd vs. Nigeria Chemists (1961) All N.L.R 171* [↑](#footnote-ref-3)
4. *Hendriks v. Montagu* [↑](#footnote-ref-4)
5. Ogunlende v. Babayemi [↑](#footnote-ref-5)
6. *Trade Marks Act 1965* [↑](#footnote-ref-6)
7. ErvenWarnink v. Townend [↑](#footnote-ref-7)
8. *Colman Ltd V. Borden Inc* [↑](#footnote-ref-8)