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Matric No\_: 17/law01/263

COURSE: LAW OF TORTS II

ASSIGNMENT :

Question

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

Use NALT guidelines for footnotes, you should also include a bibliography at the end.

Times New Roman Font size 12, 1.5 spacing, maximum of 5 pages

***Abstract***

*The concept of passing off has undergone changes in the course of time. At first it was restricted to the representation of one person’s goods as those of another. Later it was extended to the business and services. Subsequently it was further extended to professions and non trading activities. Today it is applied to many forms of unfair trading and unfair competition where the activities of one person cause damage or injury to the goodwill associated with the activities of another person or group of persons.An action of passing off would be maintainable where the plaintiff could prove injury to its business or goodwill, which could take a variety of forms even though the defendant was not passing off its goods as the goods of the plaintiff. It is possible that the defendant states the truth in its label or in the description, but partly mixes it up with descriptions and devices which are misleading or which are likely to confuse an unwary purchaser of the product. This work will talk on the meaning, aim, elements, forms or types of passing off, the remedies and defences.*

**Meaning of Passing Off**

[[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. It is also a deceit of the public to patronise one’s business, product or services. Passing off is an unfair and unconscionable competition.

The selling of goods or carrying on of business under a name, description or mark in such a way as tomislead  the public or consumers into believing that the goods or business is that of another  person is passing off.

[[2]](#footnote-2)Where a party (defendant) makes false representation in order to sell his goods and services  with the intention to deceive a purchaser (an innocent man) into thinking that the goods and  services he is selling are those of another party (the plaintiff), that is Passing Off. The tort of passing off is practiced in Common Law countries like Nigeria, the United Kingdom,  New Zealand, Australia etc.The tort of passing off is designed to protect traders/ businessmen against unfair  competitionacquired  by false or misleading information and to prevent a rival trader from  benefitting from  the reputation already achieved by a trader/ businessman

[[3]](#footnote-3)In essence, “A man may not sell his own goods under the pretence that they are the goods of  another  man”

**Aims of the Tort of Passing Off**

The following are what the tort of passing off seeks to achieve in every common law legal  system;

1.To enable businesses continue to earn profit and;

2.To protect the right of property that exists in goodwill (i.e. business value).

**Elements of the Tort of Passing Off**

A claimant needs to establish the following in order to succeed in an action of passing off;

1.**Goodwill**: The claimant must show the court that there is business value (Goodwill i.e. the  attractive force that brings customers) which is attached to the goods and services he  produces in a suit for passing off.

2.**Misrepresentation**: The claimant/ plaintiff needs to demonstrate and explain to the court that  the goods and services the defendant is offering the public deceitfully (whether intentionally or  not) are actually the goods and services of the claimant.

3.**Damage**: The claimant/ plaintiff needs to show to the court that a loss has been suffered due to the belief that the goods and services of the defendant are those of the plaintiff/ claimant. (The  Claimant/plaintiff needs to show that the defendant’s activities are calculated to deceive the  public).

These (3) three elements known as the Classic Trinity were stated in the House of Lord’s case of

 **Reckitt & Colman products ltd v. Borden Inc. [[4]](#footnote-4)(HL 1990) per Lord Oliver.**

**Forms of Passing Off**

The elements of passing off need to be proved in any of the forms which passing off can take  which  include;

 a)**Trading under a name which is closely related to that of the claimant/ plaintiff such  name being likely to mislead the public: - The wellestablished case on this is “ Hendriks v Montagu”[[5]](#footnote-5)**where the Universal Life  Assurance  Society were granted an injunction by the court in order to restrain  the company of the defendant  which was incorporated later on from carrying on business under the name

“Universe Life Assurance Association”. In Nigeria, the court has decided a similar situation in : **Niger Chemists ltd. v. Nigeria Chemists [1961] 1 All NLR 171[[6]](#footnote-6)** where Palmer J. granted an  injunction restraining the defendants from using the name “Nigeria Chemists” as it was  calculated to deceive those who had the intention to deal with Niger Chemists. It is important to note that both parties in the suit were engaged in a similar business. Thus, where a name is made to deceive a consumer or the public due to its similarity with that of a plaintiff then that is a form of passing off and there exists a tort.

 b)**Trading under a name already given for goods of that kind by the plaintiff or trading  under a name  so similar to that of the plaintiff’s as to be mistaken for it:-**Where a trade name is already in use by the plaintiff for his goods and services, it will be  actionable  passing off for a defendant to trade under the name of the plaintiff. [[7]](#footnote-7)A trade name is a name under which goods and services are sold by a certain individual and which by established  usage has become known to the public to the effect that the goods and services are that of the individual.[[8]](#footnote-8)Descriptive names such as ‘water’, ‘beer’ ‘stout’ are not protected unless the  plaintiff can prove that thedescriptive name has acquired a secondary name exclusively  associated with the plaintiff’s own product.

c)A**direct statement by the defendant that the goods and services are that of the plaintiff**:- Actionable passing off occurs where the defendant markets his products as that of the plaintiff.  **See  Byron (Lord) v. Johnston[[9]](#footnote-9)…** Here the defendant publishers were restrained from advertising and selling a book of poems with the name Lord Byron written on the cover and title page, when in fact the famous poet was not its author.

d)**Where the defendant trades under the trademark of the plaintiff or any deceptive  imitation of the plaintiff’s mark.**

 A trademark refers to a mark used by a trader in order to indicate a connection between the  marked goods and the trader and also to show that the marked goods are the tradermerchandise[[10]](#footnote-10)See, **Perry v. Truefitt…**Here, the plaintiff obtained injunction to restrain the defendants from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations.

e)**Imitating the Get Up or Appearance of the Plaintiff’s Goods:**-

Where there are characteristics in the Get Up or appearance of the plaintiff’s goods which  identifies the goods as those of the  plaintiff, any adoption or imitation of the appearance or get  up of the plaintiff’sgoods by another in a manner likely to deceive will give rise to the tort of  passing off. Thus, where the defendant imitates the get up or appearance of the plaintiff’s goods, the defendant is liable for  passing off. See **Trebor Nigeria ltd v. Associated Industries ltd  (1972) NNLR 60 Suit no K/127/71 May 29 1972[[11]](#footnote-11)**. Where the plaintiffs claimed that the  defendants were guilty of  passing off their products as that of the plaintiffs. The court per J. R. Jones (Senior Puisine Judge) held that the defendants had in every aspect from carton to tablet to manufacturing marketed a product as similar as possible to that of the plaintiffs.

**Remedies in Passing Off**

Passing Off injures the property rights of the plaintiff especially in business. The following  remedies can be claimed by the plaintiff in a Passing Off action;

1.**Damages**: - A successful plaintiff in a suit for passing off is entitled to damages. The court can award  general damages, special damages or punitive damages. This is because it is  presumed that the plaintiff must have suffered losses especially in the course of business[[12]](#footnote-12).

2.**Injunction**: - A plaintiff can ask the court to restrain or prohibit the use of a mark subject  matter of the passing off suit in court. Further, a perpetual injunction can be granted by the court when the suit has been concluded i.e. the defendant will never use the mark again.

3.A plaintiff can also approach the court to grant him/her the delivery of the goods of the  defendant which breach the trademark to be destroyed.

**Defences available to a Defendant[[13]](#footnote-13)**

The following are available defences for a defendant faced with a claim of Passing Off;

1.Dissimilarities in the mark between that of the defendant and that of the plaintiff.  Se**e Trebor Nig. Ltd[[14]](#footnote-14)(Supra).**

2.Consent of the plaintiff was sought before using the name or mark or slogan as the case may be

 3.The defendant can also plead innocent usage of the plaintiff’s name.

4.The plaintiff’s name or mark has become common/ generic.

5.The mark of the plaintiff is not distinctive.

**Conclusion**

The purpose 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.

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2. R.F.V Heuston, *Salmond on the Law of Torts* (16th edn, Sweet and Maxwell London, 1973)408 [↑](#footnote-ref-2)
3. G. Kodilinye and O. Aluko, *Nigerian Law of Torts*(Spectrum Books Limited 1999) 221 [↑](#footnote-ref-3)
4. HL 1990 [↑](#footnote-ref-4)
5. [1881] 17 Ch. D 638 [↑](#footnote-ref-5)
6. [1961] 1 All NLR 17 [↑](#footnote-ref-6)
7. G. Kodilinye and O. Aluko, *Nigerian Law of Torts (Spectrum Books Limited)1999* [↑](#footnote-ref-7)
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10. Section 67(1) Trade Marks Act CAP T 13 LFN 2004 [↑](#footnote-ref-10)
11. Nigerian Law of Intellectual Property https://nlipw.com/a-peek-into-passing-off-cases-in-Nigeria [↑](#footnote-ref-11)
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