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**Question**

**Discuss the relevance of Passing Off as a form of Economic Tort in the 21st century Nigeria.**

**Abstract**

This paper will be discussing the tort of passing off and its relevance in the Nigerian society and to the Nigerian business sector. The paper will first address the issue of the current economic state of Nigeria and how it encourages passing off because of the ease in committing the tort. The paper will the dove tail into the tort of passing off by defining and analyzing the tort and what needs to be proved to sustain locus standi in an action. The paper will then address the various ways and methods of committing the tort, defences and remedies to the tort*. La pièce de résistance,* the paper will then answer the question as to the relevance of the tort to 21st century Nigeria.

**Introduction to the Tort of Passing Off**

The current economic situation in Nigeria is nothing to write home about. The country has been riddled with inflation and has even regressed to a flat-out recession since 2016. As a result of the tragic economic events the country’s business sector as well as business environment has suffered dearly. It has become nearly impossible to conduct a successful business venture in the country as a result of various factors such availability of capital, weak labour force, high cost of maintenance, lack of utilities and amenities such as electricity, and now difficulty in enforcing intellectual property rights and laws regarding authenticity of goods which this paper will be discussing.

It has become the norm in Nigeria to find counterfeit goods of well known and established brands so much so that the originality of an item is always brought into question before any purchase is made and this is not so in other places in the world. People in Nigeria always find themselves constantly checking the brand names for any error in order to trace the authenticity of the good before purchase. Even the production of such counterfeit goods is taken so lightly to the point that one might question whether there are truly any laws protecting intellectual property in Nigeria which there are. Therefore, the issue of economic tort especially passing off is one of great significance in Nigeria.

The tort of passing off is committed where the plaintiff’s goods are passed off by the defendant as being his own goods. The tort of passing off is actionable *per se* meaning no actual losses must be incurred for action to arise. Generally, it is known as a form of economic tort as the aim of the tort is to protect the plaintiff’s financial interest. However, there have been some disagreements as to its classification among the scholars of the legal community. This is as a result of its closeness to the tort of malicious falsehood or injurious falsehood. More so, there is also a link between the tort to the tort of deceit. Therefore, making it difficult to classify in practice. However, a sharp line of distinction has been made to prevent such mistake from eventuating. As the person who commits deceit deceives the public by passing off his goods as belonging to another. But however, the it should be noted that the plaintiff in the passing off action is not a member of the public who is deceived but the person whose goods have been passed off and therefore has not been deceived. However, despite the muddle in respect of classification of the tort of passing off, it should be understood that passing off is recognized as part of tort law because it differs from other intellectual property right on the grounds that the basis of the law lies in common law and not statue law.

**Definition of Passing Off**

After a brief explanation of the concept of passing off it is important for a workable definition to be attempted. However, it is well understood that just like any other legal terminology it is virtually impossible to have a single definition flexible enough to encompass the various facets of the concept of passing off and its characteristics. This fact makes it impossible to have a single, universal definition of the concept of passing off. Nevertheless, this has not stopped various authors and jurist from attempting a definition of passing off. There are as many definitions of the concepts as there are authors willing to define it; but the classic definition of the tort lies in the case of ***Erven Warnink BV v J Townend & sons (Hull) Ltd[[1]](#footnote-1)[[2]](#footnote-2)*** where Lord Diplock identified five essential element of the tort when he said that it is:

***“… possible to identify five characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quita timet action) will probably do so”***

These five elements must be proved to secure locus standi in an action for passing off. However, Lord Oliver in the pivotal case of ***Reckitt & Colman Products Ltd v Borden Inc[[3]](#footnote-3)[[4]](#footnote-4)*** abridged these five elements to only three (i.e. often referred to as the Classic Trinity). These are:

* Goodwill owned by a trader
* Misrepresentation
* Damage to goodwill

Meaning the onus falls on the plaintiff to prove that the good will in the product belongs to him and that there was a misrepresentation on the part of the defendant as It is a

prerequisite that the misrepresentation has deceived or is likely to deceive and that the

plaintiff is likely to suffer damage by such deception. Mere confusion which does not lead

to a sale is not sufficient[[5]](#footnote-5), and finally, that there was damage to the good will or that there was a probability of damage (as passing off is actionable *per se*).

**Methods or Form of Passing Off**

The tort of passing off is so common in today’s 21st century that it can take various forms such as:

**Marketing the product as that of the plaintiff**

This is when the defendant issues a direct statement claiming that the goods or item of goodwill belonging to him are produced by the plaintiff. This quite popular in third world countries such as Nigeria where any person can just produce a good under false pretenses and claim it belongs to a popular brand. An example of this is the English case ***of Lord*** ***Byron v*** ***Johnson***[[6]](#footnote-6)where the defendant, who was a publisher, advertised some poems which he had published as being written by Lord Byron when, in fact they were written by someone else. It was held that the defendant had committed the tort of passing off.

**Imitating the appearance of the plaintiff’s goods**

This is when the defendant simulates the appearance or character of the plaintiff’s goods. This is seen in the case of ***Trebor Nigeria Ltd. v. Associated Industries Ltd 14 NIPJD [HC. 1972] 127/71*** where Trebor Nigeria Limited the makers of Trebor Peppermint brought the instant suit against Associated Industries Limited the makers of Minta Supermint claiming that the wrapper used to by the defendant to package their product was similar to that of the Plaintiff and that they were guilty of Passing off their products like that of the Defendant.

**Using a name similar to the plaintiff’s goods**

This is where the defendant makes use of a similar name of even the same name a that of the plaintiff’s goods. This is seen in the case of ***Niger chemist ltd v Nigeria chemist and D.K. Brown (1961)*** where the Plaintiff had an established chemist business using the name "Niger Chemist" while the Defendants established the same business on the same street with the Plaintiff using the name "Nigeria Chemist". The Plaintiff sued the Defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The Court agreed with the Plaintiff and granted an injunction against the Defendant on the use of the name.

**Using the plaintiff’s name**

This is where the defendant uses the plaintiff’s name, as opposed to the name of the plaintiff’s product. This can be seen in the case of ***Maxim’s Ltd v Dye [1977] 1 WLR 1155*** where the plaintiff (Maxim) was the owner of a famous restaurant called Maxim’s in Paris and he sought an injunction to restrain the defendant from opening a French restaurant in Norwich with the same name. The restaurant in Norwich did not operate at the same standard as the in Paris and so the plaintiff was granted an injunction, even though their businesses were no in the same country.

**Imitating the plaintiff’s advertisement**

An advertisement by the defendant which simulates that of the plaintiff may amount to the tort of passing off, as such imitation is capable of misleading the public and can affect the plaintiff’s good will and lead consumers to patronize the defendant’s goods as though they were the plaintiff’s goods.

**Selling inferior or expired goods of the plaintiff as current stock**

It is passing off for a defendant to sell inferior or expired products of the plaintiff as current stock. It is also passing off for the defendant to sell goods which are unfit for human consumption as goods belonging to the plaintiff as this can be damaging to the plaintiff’s good will. This is seen in ***Gillette Safety Razors Co & Anor v Franks [1924] 40 TLR*** 606 where the defendant committed the tort of passing off by selling used razor blades as new ones***.***

**False endorsement**

This is seen in the case of ***Irvine v Talksport Ltd [2002] 2 ALL ER 414*** where Laddie J heard that, having obtain the rights to broadcast live the Formula One Grand Prix World Championship, the defendant radio station had sent a brochure to potential advertisers. On the front of the cover brochure was a photograph of the claimant, a prominent British racing driver, which had been purchased from a photography agency. As purchased the photograph showed the claimant holding a mobile phone: however, as it appeared on the brochure, he was holding a portable radio bearing the defendants name. the court held that the law of passing off applied to false endorsement.

**Defenses**

* Consent of the Plaintiff to the use of the name, mark, sign or slogan.
* Indistinct name, mark, sign and slogan of the plaintiff15.
* That the Plaintiff's name, mark, sign hand slogan has become generic/common place.
* Dissimilarities in the mark of the Plaintiff and Defendant16.
* Innocent usage of the Plaintiff's name

**Remedies**

* Injunction
* Damages
* Delivery up for destruction of infringing goods
* Anton Piller Orders: This is an order for inspection and delivery up of infringing materials in the possession or control of an infringer. ***Ferodo Limited & Anor. V. Ibeto Industries Limited*** ***(2004) LPELR-1275(SC).***
* Account of profit[[7]](#footnote-7)

**Relevance of Passing Off in 21st century Nigeria**

In the case of ***Reddaway v. Banhaml*** Lord Halsbury blatantly expressed the view that at common law no man has the right to represent his goods as the goods of somebody else. Twenty years after the statement was made, Lord Parker, speaking for the House of Lords in ***A. G. Spalding v. A. W. Carnage Ltd***[[8]](#footnote-8)., accepted this as the general principle upon which passing off actions are founded showing that the main aim and the relevance of the tort of passing off is to protect the reputation and goodwill of a business and to protect ones business advantage, quality and patronage etc. therefore, the relevance of the tort of passing off in 21st century Nigeria is to protect businesses and their interests and goodwill. This tort aims to help well established businesses maintain the integrity of their products and protect their goodwill as well as help upcoming businesses find footing in their market by protecting their interests and making a safe and friendly business environment where their unique ideas cannot be easily imitated without any consequences. It also provides a means of compensation for business who have suffered some form of loss as a result of the passing off of their goods.

**Conclusion**

In conclusion, the tort of passing off is very relevant in modern day Nigerian society as the purpose of an action for Passing off is to deter a business from damaging or exploiting the goodwill and reputation built up by another. The principle is that no person is entitled to display his goods or his business as that of another.

Therefore, this writer recommends that the legal framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses. And that the dangers of the tort of passing off should be more pronounced.

1. [1979] AC 731 [↑](#footnote-ref-1)
2. Infra n. 6. [↑](#footnote-ref-2)
3. [1990] 1 All ER 873 [↑](#footnote-ref-3)
4. Mosawi, Anthony (24 March 1995). "The fire line between trademarks". New Law Journal. 145 (6688): 410 – via Lexis. [↑](#footnote-ref-4)
5. P Narayanan- “Law of Trade Marks and Passing off’ p.687 (2004,6th Edition). [↑](#footnote-ref-5)
6. Johnson (1816) 2 Mer 29 [↑](#footnote-ref-6)
7. Nwabachili, Chudi C, Intellectual Property and Law in Nigeria [↑](#footnote-ref-7)
8. (1915) 32 R.P.C. 273 at 283. [↑](#footnote-ref-8)