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COURSE: LAW OF TORT

COURSE CODE: LPB 302

QUESTION: Discuss the relevance of passing off as a form of economic tort in the 21st century in Nigeria. Use NALT guideline for footnotes, you should also include a bibliography at the end.

[[1]](#footnote-1)

**Answers**

The tort of passing off is very important in the life of a society. Individual person in a society has the right to life and the right to engage in any legal kind of economic activity to sustain the kind of life style that the individual has chosen. The law of tort especially protects the individual in whatever economic activity one is engaged in. It protects business names, names of product, trademarks among others. Anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable for the tort of passing off. The various forms of passing off and their consequences are the focus of this unit. The tort of passing off is committed in various forms. Francis Day & Hunter Ltd v. Twentieth Century Fox Co. Ltd (1939) 4 ALL ER 192 at 199 P.C. The common forms of passing off which are easily noticed are as follows:

1) Trading with a name resembling that of the plaintiff.

2) Marketing a fake product as that of the plaintiff by using the plaintiff’s

label or design.

3) Marketing a product with a name resembling that of the plaintiff’s goods.

4) Marketing products with the plaintiff trademark or its imitation.

5) Imitating the appearance of the plaintiff’s product.

6) Selling inferior or expired goods of the plaintiff as current stock.

7) False advertisement by copying the plaintiff’s advertisement.

**ELEMENTS OF PASSING OFF**

To succeed in a claim for passing off, the plaintiff must be able to prove the

following:

1) The Effect of Fraud by the Defendant: Where fraud is proved on the part of the defendant, it helps the plaintiff to prove the likelihood of damage, and it makes it easier for the court to award aggravated or punitive damage.

2) Whether the Public is Likely to be Confused: In order to determine whether the public is to be confused and misled by the activities of the defendant, the court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer – UK Tobacco Co Ltd v. Carreras (1931) 16 NLR I at p. 4.

3) The Likelihood of Deception: To succeed in a claim of 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, and once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction. Niger Chemists Ltd v. Nigeria Chemists (1961) ALL NLR 180 at 182 and De facto Works Ltd v. Odumotun Trading Co. (1959) LLR 33.

**REMEDIES FOR PASSING OFF**

The remedies for the tort of passing off include the following:

1) Damages;

2) Account for profit or loss of sales;

3) Injunction – John Walker & Son Ltd v. Henry Ost & Co. Ltd (1970) 2

ALL ER 106.

4) Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

**DEFENCES TO PASSING OFF**

In a claim for the tort of passing off, a defendant may plead a number of defences

by saying that the passing off complained of is a;

1. Functional design or package – Draper v. Trist 91939) 3 ALL ER 513 at p. 518, 525, 528 C.A

2) The mere descriptive name of the product – British Vacuum Cleaner Co v. New Vacuum Cleaner Co (1907) 2 Ch 312. An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.

3) Consent, such as licence given to him by the plaintiff to produce and or market the product. Lee v. Haley (1869) 5 Ch App 155.

4) Innocent passing off.

Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.The tort of passing off is a complex, dynamic and an ever increasing aspect of the law of tort because it relates to economic activities of citizens of a given state. In an environment like the one applicable in Nigeria where the government employs less than a quarter of its own population the remaining three quarter of the population are free to be engaged in businesses which are not watertight with legal regulation. In this kind of environment, it is expected that the high level and complexities of passing off will be expected.

In Nigeria today, even the war against unhygienic bread eaten by almost everybody is on the losing side by government agencies responsible for that sector of the economy. Variation of the same product by different companies and marketing and advertising agencies has brought the incidence of passing off to a high level. In the health sector of the Nigerian economy, the problem of adulterated drugs is the bane of that sector either in the estimation of individuals or in the estimation of experts in the government hospitals and even experts in the medical manufacturing sector. There are a lot of deceptions and remedies to stem the tide of the increase in the level of passing off.

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 defendants product or business is that of the plaintiff and the law on this matter is designed to protect traders against that[[2]](#footnote-2) form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefits of the reputation already achieved by rival traders.

**Marketing a product as that if 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 in fact they are not. Example, it would be passing off for X , a manufacturer of tyres, to advertise and sell his tyres as “ Dunlop" or “ Michelin” tyres, since thus would be an obvious attempt to profit from the goodwill and reputation established by viral business.

Another form of misrepresentation concerning a man’s business is the tort of passing off. This tort which is an example per excellence of unfair competition consist of deliberate acting so as to mislead the general public into believing that defendants goods are those of the plaintiff and thereby secure an unfair advantage of the reputation of that other, thus infringing his right of property in the goodwill of his trade or business.

In conclusion It is hereby shown that the tort of passing off appears to be simple but in actual fact, it is an all encompassing and ever increasing and expanding concept. The society is developing with the appearance of new technologies, the tort of passing off is becoming more dynamic and posing new challenge.

**IMITATING THE APPEARANCE OF THE PLAINTIFF’S PRODUCT AND ITS ADVERTISEMENT**

It is passing off for the defendant to do anything, which makes his product appear like the plaintiff’s product. This passing off includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public e.g. general appearance, package, label, or design of the product. De facto Works Ltd v. Odumotun Trading Co Ltd. (1959) LLR 33 and Hudson & Co. v. Asian (1964) I WLR 466 PC.

Also an advertisement 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. See Cadbury Schweppes pty Ltd v. Pub Squash Co. pty Ltd (1981) I ALL ER 213

**MARKETING PRODUCTS WITH THE PLAINTIFF’S TRADEMARK OR ITS IMITATION**

It is actionable in passing off for a defendant to market his goods using the plaintiff’s trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff. Trademarks are usually registered and also protected under the Merchandise Marks Act 2004.

Also in Perry v. Truefitt (1842) 49 ET 749 – 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. Reckitt & Colman Ltd v. Borden (1990) I WLR 491 HL .

**References**

* Fleming, J. (1992), The Law of Tort (8th ed.) Sydney: The Law Book Company Limited.
* Gardiner, D. (1991), Outline of Torts. Sydney, Butterworth’s.
* Gillies, P. (1993), Business Law (5thed.), Federation Press.
* Holmes, D. (1984), Butterworth’s Student Companion-Torts. Sydney: Butterworth’s.[[3]](#footnote-3)
1. Per Lord Kingsdown in Leather cloth co. V. American leather cloth co. (1865) 11 H.L Cas 523/538. [↑](#footnote-ref-1)
2. Ogunlende v. Babayemi (1971) 1 U. I. L. R 417. [↑](#footnote-ref-2)
3. * Latiner, P. (1995), Australian Business Law, North Ryde: CCH. [↑](#footnote-ref-3)