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**LAW OF TORT**

**QUESTION: WHAT IS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY?**

**Outline:**

* **Introduction**
* **What is passing off**
* **Elements of passing of passing**
* **Damages and Remedies of passing off**
* **Relevance of passing off**
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**INTRODUCTION**

Economic torts are torts which inflict mainly economic losses. In other words economic torts are torts which inflict financial losses or financial injury. They basically protect the economic interest of traders or any individual in the economic sector or field. However they do not prevent competitions, but competitions or other acts damaging a man in his business are tortuous only if the act causing the damage is deemed “unlawful”. The law of tort relating to interference with economic interest are a lot, such as; ***Conspiracy, Interference with existing contract, Deceit, Injurious falsehood, Intentionally causing damage to business interests by unlawful means, especially by threats of unlawful acts, Passing Off and other unlawful trade practices.***

**What is passing off?**

The original tort was designed to protect a businessman from the consequences of the diversion of his trade to a business rival, by reason of the latter’s marketing his goods in such a way as to represent that his goods were those of the plaintiff. The victim of this tort, to which the name “passing off” came to be assigned, had the remedies of both damages and injunction. Passing off is governed by the civil law, and usually takes place in the business world where a misrepresentation is made by one party which damages the goodwill of another party, sometimes causing financial and or reputational damages.

Passing off is a common law remedy, which is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it, and enjoying the owners reputation and goodwill. Passing off is a deceit of the public to patronize ones business, product or services. Passing off is an unfair and unconscionable competition. The purpose of the law of passing off is to protect the goodwill of a business of person from other traders. Also, passing off is not affected by the defendant’s state of mind.

By virtue of section 4(3)[[1]](#footnote-2), passing off is provided for the protection of unregistered trade mark as not provided for in the Act. However this is different from Trademark Infringement, such as Trademark infringement is a statutory remedy whereas passing off is a common law remedy, while trademark infringement, the mark or sign has been registered in accordance with the Trademarks Act, passing off involves a mark, sign or goods and services not registered in accordance with the Trademarks Act

Five characteristics must now be present in order to create a valid action for passing off***: (1)a misrepresentation (2) made by a trader in the course of trade (3) to prospective customer of his or ultimate consumer of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader (in the sense that is a reasonably foreseeable consequences) and (5) which causes actual damages to a business or goodwill of the trader by whom the action is brought or will probably do so.***

1. **THE MISREPRESENTATION**: It takes the following forms:
2. Marketing a Product as that of the Plaintiff

A defendant must not market a commodity with a statement that it is the product of the plaintiff when it is not so, without agreement between the parties or license given to the defendant. The case of **Lord Byron v Johnston**[[2]](#footnote-3), the publisher were restrained from selling a book with the name of another written on the cover, when the famous poet was not the author.

1. Using Plaintiff’s Name

To engage in the same line of business as the plaintiff and to use a similar name may be passing off.[[3]](#footnote-4) If the defendant carries on business in his own name then he does not commit this tort unless there are further special circumstances showing dishonesty. The case of **Niger Chemist Ltd v Nigeria Chemist**[[4]](#footnote-5), the plaintiff’s chemist obtained an injunction to stop the defendant chemists from trading as Nigeria Chemists.

1. Using Plaintiff’s Trade Name

To use the plaintiff’s trade name, i.e. the designation adopted by the plaintiff to identify goods which he markets or services which he renders, may constitute the tort. If the trade name merely describes the goods or their characteristics then ordinarily the plaintiff cannot prevent others from using it. In **Reddaway v Banham**[[5]](#footnote-6)**,** Lord Herschell, held that the words had acquired a secondary meaning through its broad notoriety and that the public clearly associated the name “Camel Hair Belting” with the exact product produced by Reddaway.

1. Using Plaintiff’s Trade Mark

It may be tortuous to use the plaintiff’s trade mark, i.e. a design, picture or other arrangement affixed by him to goods which he markets so as to identify them with him the manufacture[[6]](#footnote-7). In **Perry v Truefitt**[[7]](#footnote-8)**,** 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.

1. Imitating Appearance of Plaintiff’s Goods

To imitate the appearance of the plaintiff’s goods (especially one with a similar name[[8]](#footnote-9)) may passing off. If the appearance complained of it’s dictated by functional consideration the court will be reluctant to interfere. In **J.B. Williams Co v Bronnley & Co Ltd**[[9]](#footnote-10), an action brought by the plaintiff company to restrain the defendant company from using the normal shape of a shaving stick container, to package his brand of shaving stick failed.

1. Selling Inferior Goods of Plaintiff, Thereby Misleading Purchasers

A defendant must not sell goods which are in fact, and which are described as, the goods of the plaintiff, but which are of a quality inferior to that of the normal new and current product of the plaintiff, in such a way as to cause prospective purchasers to believe that the goods are the normal new and current product of the plaintiff. Thus the manufactures of Gillette razor blades obtained an injunction restraining the defendant from selling used Gillette blades as “genuine” ones**[[10]](#footnote-11).**

1. False Advertisement: Imitating the Plaintiff’s Advertisement

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. As in case of, **Masson Seeley & Co.,Ltd v Embossotype Manufacturing Co**[[11]](#footnote-12).

1. **IN THE COURSE OF TRADE**

The representation must be made by a trader in the course of his trade. It is sufficient if the defendant’s conduct is in the course of carrying on his profession**[[12]](#footnote-13).**

1. **A REPRESENTATION TO CUSTOMERS OR ULTIMATE CONSUMERS**

The representation must be made either to prospective customers of the plaintiff or to ultimate consumers of goods or services supplied by him[[13]](#footnote-14). A bank was held able to restrain a money lender from setting up in trade under the same name on the ground that it would endanger its reputation if it were thought also to be a moneylender**[[14]](#footnote-15).**

1. **CALCULATED TO INJURE GOODWILL**

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. It is unnecessary (though desirable) to prove that any members of the public were deceived[[15]](#footnote-16). The defendant is liable although his conduct was honest and innocent[[16]](#footnote-17).

1. **DAMAGE**

Damage is essential to passing off in that for a misrepresentation to be actionable it must be one calculated to cause damage to the claimant’s goodwill. Also probability of damage is enough[[17]](#footnote-18).

**DEFENCES AND REMEDIES**

The Defences available are; Innocent usage of the plaintiff’s name, Dissimilarities in the mark of the plaintiff and Defendant[[18]](#footnote-19), The plaintiff’s name, mark sign hand slogan has become generic/common place and Also consent is the most important[[19]](#footnote-20).

The Remedies available are; Damages:: he may recover for loss of profit and for loss of business reputation[[20]](#footnote-21)and goodwill[[21]](#footnote-22), Injunction: it is the more important and first relief sought to suspend the use of the mark and is used to prevent the apprehended wrong.

**RELEVANCE OF PASSING OFF**

The principle is that no man is entitled to represent his goods or his business as that of another. 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. Also, it is Relevant in that it to enables businesses to continue to make profits against any disruptions by a misrepresentation. The main significance of passing off actions as a form of Economic Tort is to defend the Goodwill and Reputation of his business. Goodwill is a legal right of property associated with every business, which passing off solely protects. The tort of passing off is relevant as a form of Economic Tort in that it is designed and established to protect a person’s business interests from unfair trade practices and sharp practices of other person, which is not protected by the other forms of Economic tort. Also it is relevant as a form of economic tort in this 21st century because it protects the property rights of individuals that exist in goodwill.

**CONCLUSION**

Passing off is a common law concept which prevents the unlawful usage of man’s mark, sign or goods and services. The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader[[22]](#footnote-23). I hereby recommend that frameworks for passing off actions should be strengthened to help defend the goodwill and reputation of businesses in the 21st century economy. And also help enforce its relevance as a form of Economic Tort.

BIBLOGRAPHY

Books

--Black law dictionary 8th Edition

Kodinlinye G. and Aluko O, Nigeria Law of Torts (Spectrum books limited 1999)

Malemi E, Law of tort (princeton Publishing co 2017)

Street H, Street on Tort, 7th ed. (London Butterworths 1983)

Winfield P.H. & Jolowicz, Tort, 12th ed. (W.V.H/ Rogers, sweet & Maxwell, London,2002)

Online article

Modak k, The Tort of passing off

Ibekwe-Allagoa F, The Tort of Passing Off in Nigeria

1. Trade Mark Act 1999 [↑](#footnote-ref-2)
2. (1816) 35 ER 851 [↑](#footnote-ref-3)
3. Tussaud v. Tussaud (1890),44 Ch.D678 [↑](#footnote-ref-4)
4. (1961) ALL NLR 180 at 182 [↑](#footnote-ref-5)
5. (1896) AC 199 [↑](#footnote-ref-6)
6. Millington v. Fox (1838), 3 My & Cr. 338 [↑](#footnote-ref-7)
7. (1842) 49 ER 749 [↑](#footnote-ref-8)
8. Massam V Thorley’s Cattle Food co. (1880), 14 Ch. D. 748, C.A. [↑](#footnote-ref-9)
9. (1909) 26 RPC 765 CA [↑](#footnote-ref-10)
10. Gillette Safety Razor Co & Anor v Franks (1924) 40 TLR 606 [↑](#footnote-ref-11)
11. (1924), 41 R.P.C. 160; cf. Purefoy Eng co Ltd v Boxall & Co Ltd (1995) 72 RPC 89 CA [↑](#footnote-ref-12)
12. Society of Incorporated Accountants v Vincent (1954), 71 R.P.C. 325 [↑](#footnote-ref-13)
13. Erven Warnink B.V. V J.Townend & sons (Hull) Ltd., (1979) A.C. 731 at 742; (1979) 2 ALL E.R. 927 at 932-3 (per Lord Diplock), H.L. [↑](#footnote-ref-14)
14. Harrods, Ltd. V. R. Harrod, Ltd. (1923), 40 T.L.R. 195, C.A. [↑](#footnote-ref-15)
15. Draper v. Trist, (1939) 3 ALL E.R. 513, C.A. [↑](#footnote-ref-16)
16. Baume & co., Ltd. V. A.H.Moore, Ltd., (1958) Ch. 907; (1958) 2 ALL E.R. 113, C.A [↑](#footnote-ref-17)
17. Bulmer (H. P.) Ltd. and Showerings Ltd. v. J. Bollinger S.A., (1978) R.P.C. 79, C.A. Only want of damage prevented an action for this tort from being available in McCullouch v. Lewis A. May (produce Distributor), Ltd., (1947) 2 ALL E.R. 845, p. 382, ante. [↑](#footnote-ref-18)
18. Trebor Nigeria Limited v. Associated Industries Limited (1972) NNLR 60 [↑](#footnote-ref-19)
19. Ex turpi causa is a defence; Lee v. Haley (1869), 5 Ch. App. 155; Ford v. Foster (1872), 7 Ch. App. 611, at pp. 630-1 (per MELLISH, L.J.) [↑](#footnote-ref-20)
20. Spalding (A. G.) and Brothers v. Gamage (A. W.), Ltd. (1918), 35 R.P.C. 101; Treasure Cot Co., Ltd v. Hamley Brother, supra. [↑](#footnote-ref-21)
21. Aktiebolaget Manus v. R. J. Fullwood and Bland Ltd. (1954), 71 R.P.C 243 [↑](#footnote-ref-22)
22. In the words of LORD KINGSDOWN in Leather Cloth Co v American Leather Clothes Co:(1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435 [↑](#footnote-ref-23)