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ANSWER

1.0 INTRODUCTION

Passing off is an example of economic torts. For a greater degree of insight, the definition of economic tort shall be considered.

Economic torts are torts that impair some aspect of an economic interest or business relationship causing economic loss rather than property damage or bodily harm. It is a tortious interference with contractual relations, prospective advantage, unfair business practices, misappropriation of trade secret and product disparagement.¹ They occur mainly in the economic, commercial and business sector of life. An example of this tort includes:

1. Passing off (2) Breach of intellectual property rights; such as breach of copyright, patents, trademarks (3) Injurious falsehood/Malicious falsehood (4) Interference with contracts (5) Conspiracy to interfere, that, civil conspiracy and so forth. For the aim of this coursework, passing off shall be considered meticulously.

1.1 PASSING OFF

The tort of passing off began building its definition in the 19th century from the case of **MILLINGTON V FOX**². The concept of equity was largely used to realise the scope of passing off.

Passing off as making some false representation likely to induce a person to believe that the goods given or services rendered are those of another³.

Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage. It is arguable to state that passing off is both a common law and statutory remedy in Nigeria supported by Section 3 of

¹ Black's law dictionary ninth edition

² (1838) 40 ER 956

³ Duhaime legal dictionary

the TRADES MARK ACT. **TREBOR NIGERIA LTD V ASSOCIATED INDUSTRIES LTD**⁴

The liability in the torts of passing off ultimately boils down to misrepresentation. It all started in the 17th century, in the cases **SOUTHERN V HOW (1618)** and **DEAN V STEEL**. Usually, the judges categorised such torts under deceit or defamation. Later in the eighteenth century, all cases of passing off were classified as cases of deceit, where the action was usually brought not by the deceived, but by the one whose mark was used to deceive. **BLANCHARD V HILL**⁵ limiting the tort to cases where there was a proof of bad faith.

A statement of opinion considered authoritative in this tort is “... **that one man has no right to put off his goods for sale as the goods of a rival trader**” Per LORD KINGSDOWN in **LEATHER CLOTH CO V. AMERICAN LEATHER CLOTH CO.**⁶

1.2 ELEMENTS OF PASSING OFF

The Dutch Advocaat case was the first case where the basic elements of the wrong of passing off were put forth by LORD FRASER.

The (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 PER LORD OLIVER.**⁷ They are;

1. **Damage**: The plaintiff needs to show to the court that a loss has been suffered or likely to be suffered due to the confusion that the goods and services of the defendant are those of the plaintiff. (The plaintiff needs to show that the defendant’s activities are calculated to deceive the public). The plaintiff must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss.
2. **Goodwill** - The plaintiff must prove that he owns a 'reputation' in the mark that the

⁴ (1972) NNLR 60

⁵ (2003) 2 J LEGAL HIST. 111

⁶ (1865) 11 H.L Cas. 523/538

⁷ . (1990) 1 ALL ER 873

public associates with his specific product or service

3. **Misrepresentation**- The plaintiff must show that the trader has caused confusion and deceived or misled the customers into believing that their (the defendants) goods and services are actually the plaintiff's own.

1.3 TYPES OF PASSING OFF

- i. Marketing a product as that of the plaintiff for example the defendant selling his potato chips as Pringles.
- ii. 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 V.NIGERIA CHEMIST**⁸ per **PALMER, J., OGUNLENDE V BABAYEMI.**⁹
- iii. Marketing goods with the **trade mark** of the plaintiff or with any deceptive imitation of such mark; a trade mark is any design, picture, mark or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller.¹⁰
- iv. Imitating the get-up or appearance of the plaintiff's goods. **U.K TOBACCO CO.LTD V CARRERA LTD**¹¹, **DE FACTO WORKS LTD V ODUMOTUN TRADING CO. LTD.**¹²

1.4 DEFENSES TO PASSING OFF.

The law on passing off is complicated. Claims can be hard to prove and taking action can be expensive, as the evidential burden of proof is solely on the trade mark owner. When raising a claim, the defendant can argue with the following defence;

⁸ (1961) All N.L.R 171.

⁹ (1971) 1 U.I.L.R 417

¹⁰ TRADE MARKS ACT 1965

¹¹ (1931) 16 N.L.R 1

¹² (1959) L. L. R 33

- the mark in question is not distinctive: Dissimilarities in the mark of the Plaintiff and Defendant.
- the mark is generic: That the Plaintiff's name, mark, sign hand slogan has become generic/common place.
- they have used carefully and honestly their own name
- The plaintiff does not have goodwill in the mark
- the plaintiff has given consent or encouraged the use of the mark

1.5 REMEDIES TO PASSING OFF

After a successful claim in the tort of passing off, the following remedies are made available to the plaintiff;

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. **OGUNLENDE V BABAYEMI.**¹³
2. **DAMAGES:** This may be granted in respect of losses to the plaintiff.
3. **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 it can be destroyed.
4. **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.**¹⁴

¹³ SUPRA IN 9 ABOVE (The court granted an injunction restraining the defendant from conducting a similar business under the name Mercury Builders (Nigeria Ltd).)

¹⁴ (2004) LPELR – 1275(SC)

5. **Account of profit:**¹⁵ Here the Plaintiff is entitled to profit on goods wrongly sold by the infringer.

2.0 THE RELEVANCE OF PASSING OFF AS AN ECONOMIC TORT IN THE 21ST CENTURY.

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. The aim of economic tort is to offer protection for a person's trade or business from acts which the law considers to be unacceptable, and to protect businesses from unacceptable interference.

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.

The passing off law helps to protect a trader's goodwill in relation to their goods and services. This tort was designed to protect a person's business interest from unfair trade practices and sharp practices of other persons. It protects the benefits and advantages of the good name, quality, representation, patronage and customers of the business. **2.1 CONCLUSION**

Unfortunately, passing off is not a crime, however, small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on passing off and take advantages of the remedies available to protect their goodwill trade name and profit even if the case of passing off is a bit complicated and difficult to proof.

In conclusion, a defendant may be liable for passing off although his conduct was entirely honest and innocent in the sense that he had no intention to deceive. Liability is strict, and all the plaintiff needs to show is that the defendant's activities are likely to deceive the public.

¹⁵ Nwabachili, Chudi C, Intellectual Property and Law in Nigeria.