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COURSE: LAW OF TORTS

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QUESTION

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

THE CONCEPT OF PASSING OFF

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well known brand is a wrong and is known as the tort of “passing off”. As held in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation*** “A man may not sell his own goods under the pretence that they are the goods of another man.” Law aims to protect traders from this form of unfair competition.[[1]](#footnote-1)

Passing off is "A [**misrepresentation**](http://www.duhaime.org/LegalDictionary/M/Misrepresentation.aspx) made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and which causes actual damage to a business or [**goodwill**](http://www.duhaime.org/LegalDictionary/G/Goodwill.aspx) of the trader by whom the action is brought or will probably do so."[[2]](#footnote-2)

In the case of passing off, a rather long-winded definition by Lord Diplock outlines five essential requirements:

* A misrepresentation
* Made by a trader in the course of trade
* To prospective customers of his or ultimate consumers of goods or services supplied by him,
* Which is calculated to injure the business or goodwill of another trader, and
* Which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so

## ***Southern v. How***

The earliest documented case where there was an indication of passing off, this one dates back to 1618. In this case mark of an eminent clothing brand was used to dupe a customer, who bought the defendant’s low grade clothing thinking it was the plaintiff’s brand. The defendant was held liable. This though was more a case of deceit, but the principle of passing off clearly started its journey from this case.

The tort of passing off, as an economic tort, seeks to protect two classes of persons: the innocent public and an existing bona fide person or business, from the misrepresentation of another person. This tort occurs where, for instance, X presents his business or services out to the world as that of Y, for which the latter has consequentially occasioned or is likely to occasion damage. The remedies available for the plaintiff in this tort are founded under common law and statute, to wit: damages and injunction (interim and perpetual).

PASSING OFF IN NIGERIA

In Nigeria, a cause of action in ‘passing-off’ forms part of the several aspects of the Common Law and the doctrines of Equity that were received from England into the Colony of Lagos.[[3]](#footnote-3) This was done under the reception legislation, that is, Ordinance No. 3 of 1863 effective from the 4th of March 1863. This effectively introduced the British legal system into the Colony and was a lead-up to the establishment of the first Supreme Court for the Colony in 1863 that exercised civil and criminal jurisdiction. In sum, ‘passing-off’ is a cause of action that is primarily founded in tort and is historically rooted in common law. It is a cause of action that has undergone dramatic changes over the years but still potent in protecting the entrenched rights in areas to which it relates. In Nigeria, as elsewhere, the major purpose underlying the tort of ‘passing-off’ is the protection of an established trade goodwill already acquired by a trade mark or trade name. It presupposes therefore, that such goodwill must be established by the party alleging infringement.

It is doubtful whether anticipated goodwill could be protected by actions in ‘passing off’ since that could amount to protecting speculative rights that might not ultimately materialize. The crucial point to note is that it is not easy to specifically delineate or define what constitutes ‘goodwill’ in general for purposes of suing for ‘passing-off’. The existence or otherwise of a cause of action in ‘passing-off’ and the existence of an established ‘goodwill’ would then have to be decided by the court in each particular case. In the case of ***IRC v. Muller Margarine[[4]](#footnote-4)*** the House of Lords, in part, described ‘goodwill’ in relation to ‘passingoff’, as ‘*the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom*.’ While the establishment of ‘goodwill’ by the claimant is a key element in succeeding in an action for ‘passing-off’, it is important to note that the existence of that ‘goodwill’ alone, without more, does not in itself fulfil the other ingredients of the tort. In ***Reckitt******and Coleman Products v. Borden[[5]](#footnote-5)***, the House of Lords adopted the ‘Trinity Test’ in establishing the ingredients of ‘passing-off’, and explained same as follow:

i. the claimant (that is the person alleging a breach of his right) must establish the goodwill or reputation attaching to the goods or service in question and the identifying ‘get up’ under which the goods and services are offered to consumers;

ii. the claimant must also establish that there has been a misrepresentation by the defendant which has caused or has the potential of causing the members of the public to believe that goods or service emanate from the Claimant;

iii. finally, the claimant must demonstrate that he has suffered or is *really likely* to suffer losses by the reason of the defendant’s misrepresentation as to the source of defendant’s goods or services, which seems to suggest that they emanate from the claimant. It is to note that acts of infringement that could ground an action in ‘passing-off’ might relate to the misuse of trade names, trade marks or the design ‘get-up’ of the goods or business in question. For instance, in the case of ***Niger Chemists Limited v. Nigeria Chemists****[[6]](#footnote-6),* the plaintiff sold drugs as Chemists in Onitsha, Eastern Nigeria and the defendant opened shop on the same street and started the same line of business of dispensing drugs. On being sued, the court granted an injunction against the defendant on the basis that their use of the name Nigeria Chemists was intended to deceive the members of the public to believe that they had a relationship of some sort with Niger Chemists.

Where the plaintiff’s business is registered and the complained is against a registered trade name or trade mark, an action under this ambit of tort’s law is exclusively actionable at the Federal High Court, while other unregistered ones may be initiated in the High Court of any state with  jurisdiction[[7]](#footnote-7).

**REMEDIES**

Remedies are available for a successful action in the tort of passing off. The remedies are available at common law and only statutory, where the plaintiff’s trade name or trade mark is registered as required under the law. These remedies include: injunction and monetary damages.

**Injunction**

An injunction under the context in which it is herein used, has been defined by the courts in several cases; for instance, the Supreme Court of Nigeria in the case of

***ADENUGA V. ODUMERU[[8]](#footnote-8)***, defined it to mean:

“An equitable order restraining the person to whom is directed from doing the things specified in the order, or requiring in exceptional situations the performance of a specified act. A claim for an injunction is a claim in equity.”

When an application for an injunction is granted, the legal effect is dependent on the nature of the prayer contained and so granted in the application. Moreso, since an interim injunction is to maintain the status quo ante litem, it follows that, an injunction does not purport to restrain a completed act. Once an injunction has been issued, the respondent and his allies or privies are forthwith restrained from doing something, continuing or doing a thing so stated in the order, in response to the application. Going against such an order amounts to contempt of court, and leads to an order of committal.  An interim injunction is what the plaintiff would require in a case where he has or he is about to institute an action for perpetual injunction and or damages, to restrain further dealings by the defendant pending a full trial. This will prevent further damage to the goodwill of your business during the intervening period. Moreso, in some jurisdiction, if the plaintiff’s business is granted an injunction (or if the defendant voluntarily undertakes to cease dealing in the offending goods) the court may make an order requiring the goods to be either: delivered to plaintiff or his solicitors or destroyed by the defendant with the destruction verified on oath. This approach ensures that the defendant is no longer in possession of the items.

**Monetary Damages**

If the plaintiff succeeds, and has pleaded for monetary damages, he will be entitled to an award of damages or an account of profits. Damages, as it were, are often difficult to assess; but are likely to involve quantifications such as: loss of sales and or damage to goodwill and reputation. He may, in addition, have an option, seeking an account of the defendant’s profits, rather than an award of damages. However, this approach is rarely pursued as it is usually difficult to prove the proportion of the profits that were attributable to the passing off.

## CONCLUSION

In a country where a considerable percentage of the population lives in rural areas, it is very easy to pass off goods. Thousands of instances of passing off can be found out throughout Nigeria. Right from garments to food to stationery, you name it, you find it. Unfortunately, a legal solution has evaded most of these. Passing off has come a long way through the common law system and now has some well defined principles and ambit. Perhaps the time is ripe to bring in legislation and enact a statute concerning passing off.[[9]](#footnote-9)

If you want statutory protection for your exclusive rights with regards to your trade mark, registration is a must. Relying on passing off as your only protection is a gamble. Although it provides a certain level of security to your intellectual property rights, as a common law remedy, it’s much harder and very expensive to prove in court. Not only do you have to prove presumption of misrepresentation among the general public, but you also have to show deception of the public and injury to your goodwill.

# Bibliography

1. 'Tort of Passing-Off Project Assignment for Law of Torts.' <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php?vref=1> accessed 3 May 2020 [↑](#footnote-ref-1)
2. NHL v Pepsi (1992) [BCSC](http://citations.duhaime.org/B/BCSC.aspx) 42 [CPR 3d](http://citations.duhaime.org/C/CPR.aspx) 390. [↑](#footnote-ref-2)
3. AO Obilade, The Nigerian Legal System(1979) [↑](#footnote-ref-3)
4. (1901) AC 217, 223. [↑](#footnote-ref-4)
5. (1990) 1AER 873. [↑](#footnote-ref-5)
6. (1961) ANLR 180 [↑](#footnote-ref-6)
7. Nigerian Perspective. [↑](#footnote-ref-7)
8. (2001) FWLR pt3 1056 [↑](#footnote-ref-8)
9. 'Tort of Passing-Off Project Assignment for Law of Torts.' <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php?vref=1> accessed 3 May 2020 [↑](#footnote-ref-9)