

GOODNESS CHINECHEREM ESOM

17/LAW01/114

LAW OF TORTS

TOPIC: DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY NIGERIA.

INTRODUCTION

The tort of passing off is part of a vast canvas of legal remedies known as economic tort controlling unfair competitive practices. Economic torts are torts which cause economic losses. They are torts which inflict financial injury on businesses or companies. Economic torts are many but not restricted to the following; passing off, breach of intellectual property rights, injurious falsehoods, interference with contracts and Conspiracy.

It is paramount to state that where there appears to be a strong case of trademark infringement, it is custom that a claim for passing off is filed *pari passu* and it will be the only remedy where the law of trademarks is inapplicable or the registration is invalid or of course, where there has been no attempt at registration.

Passing off is the false representation of one's product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one's product or the carrying on of one's business as if it were that of another person whose reputation and goodwill one thereby enjoys. This may be committed by using someone else's trademark, name, or the imitation of that person's product in order to deceive the public to patronize it.

It is an unfair and unconscionable competition. Thus whenever a person sells or carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person's reputation and goodwill, he commits the tort of passing off.

The tort of passing off is **actionable per se**. A plaintiff need not prove that he has suffered economic damage or injury before he can succeed in his claim. Thus there is a *locus standi* even though no damage has been suffered nor proved. The fact that the damage is likely or a probable consequence is enough for the plaintiff to succeed. In other words, once passing off has been committed, the plaintiff has right to sue and is entitled to remedy.

THE PURPOSE OF THE LAW OF PASSING OFF

The tort of passing off is designed to protect a person's business interests from the unfair trade practices and sharp practices of other persons. The purpose is to protect the reputation and goodwill a business has built up for itself. Thus it protects the good name, the quality of products, reputation

and patronage that comes with the business. It protects the brand of a business, the goodwill for which a company is known for from the unfair practices of competitors. **Lord Langdale** in *Perry V. Truefit*¹ stated that:

‘A man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception, nor to use the means to contribute to that end.’

In the Law of passing off, the basis of the legal action is that the passing off by the defendant of his goods and or business as that of the plaintiff, is injuring the right of property, product, services and business of the plaintiff.

THE COMMON FORMS OF PASSING OFF

The common forms of passing off include the following;

1. Trading with a name resembling that of the plaintiff.
2. Marketing fake products as those of the plaintiff by using the plaintiffs label or design.
3. Marketing a product with a name resembling that of the plaintiff’s goods.
4. Marketing products with the plaintiff’s 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 and
7. False advertisement by copying the plaintiffs advertisement and so forth.

However, I would be discussing just four (3) of these forms.

TRADING WITH A NAME RESEMBLING THAT OF THE PLAINTIFF

In this type of passing off, the defendant and the plaintiff are both involved in the same type of business and the defendant uses the plaintiffs name or a name closely resembling that of the plaintiff, as a result the public is confused and misled into believing that they are the same business

¹ (1842) 49 ER 749 at 725

or that it is the extension of the other. The consumers or customers as the case may be are thus confused and misled to patronize either of them thinking that they are patronizing their usual business outfit. His innocence or bona fide honesty of the defendant in his choice of the name, without notice is not a defence.

In *Hendriks v Montagne*², the plaintiffs obtained an injunction to restrain the defendants from trading as “Universe Life Assurance Association”. In this case, **James LJ** said:

“Now is there such a similarity between those names that the one is in the ordinary course Of human affairs likely to be confounded with the other? Are persons who have heard of the universal likely to be misled into going to the Universe? I should think, speaking for myself , very likely indeed...”

Also in *Niger Chemists Ltd v Nigeria Chemists*³, the plaintiffs chemists obtained an injunction to stop the defendant chemists from trading as Nigerian Chemists.

MARKETING PRODUCT AS THAT OF THE PLAINTIFF

The tort of passing off is committed when a defendant sells the plaintiff's goods to people stating that the goods are produced by the plaintiff, whereas they are not. The defendant by advertising and selling the goods by falsely stating that they are manufactured by the plaintiffs, directly but wrongfully benefits and profits from the good will and reputation of the already built by the plaintiff's business.

Thus it is wrong to sell or advertise goods with the name, label or design of the plaintiff when in fact there is no agreement between the parties, nor license given to the defendant to so produce and market his goods with the name of the plaintiff. This could damage the plaintiff's reputation because inferior goods may then be sold which would lead to low patronage. This is also followed by series of complaints to the plaintiff about the quality and performance of his goods.

² (1881) 50 LJ Ch 456

³ (1961) ALL NLR 180 at 182

In *Lord Bryon v Johnston*,⁴ the defendant publishers were restrained from advertising and selling a book of poems with the name of Lord Bryon written on the cover and title page, when in fact the famous poet was not its author.

MARKETING GOODS WITH A NAME RESEMBLING THAT OF THE PLAINTIFF'S GOOD

It is a tort of passing off for a defendant to market his goods with the name closely related or resembling that of the plaintiff's goods, with the results that the customers are confused and the defendant's goods are mistaken as made by the plaintiff and are bought as the products of the plaintiff.

The court ruled in the plaintiff's favour in *Hines v Winnick*⁵ granting an injunction restraining the defendant from featuring another band using the plaintiff's program name.

RELEVANCE OF THE TORT OF PASSING OFF IN THE 21ST CENTURY

Passing off is relevant in diverse ways and the importance of this tort is seen as it prevents greedy business owners from using the reputation of other competing businesses for their own private gain. Many people resort to many ways to make sales and their business grow; thus by the creation of this branch of tortious liability, the unfair practices of other business owners and companies are inhibited and curtailed.

In *U.K. Tobacco co. ltd v Carreras Ltd*⁶ the defendant was prevented from using the image expression (a white man wearing a barristers Wig and gown) of the plaintiff to market their cigarettes.

It also protects the brand and reputation of a business from being tarnished. In *Defacto Works Ltd v Odumotun Trading Co ltd*,⁷ the bakers who sold bread wrapped in a yellow and brown paper with the name de facto written in large chocolate colour, obtained an injunction to restrain the

⁴ (1816) 35 ER 851

⁵ (1947) Ch 708

⁶ (1931) 16 NLR 1

⁷ (1959) LLR 33

defendants from marketing their bread wrapped in yellow and brown paper with the name “Odus” written in large chocolate colour

The tort of passing off brings security, trust and assurance to our economy such that potential investors in Nigeria have faith that their businesses will thrive because there are torts of this nature that are in place to protect them.

Furthermore, it also brings more reliability and confidence to the Nigerian legal system that our laws will be able to remedy and protect businesses who fall to the whims and caprices of the unfair trade practices of other competing business owners. In the 21st century, several businesses will be glad to have investments and business covered by an effective civil law system in the event of such unforeseen eventualities.

In addition the tort of passing off provides a medium through which persons who pass off their products as those of another’s are severely dealt with serious legal remedies. The victim companies of such tort can claim damages as compensation to losses they might have lost or have lost.

In conclusion, the tort of passing off is one of the best legal remedies that have happened to torts law and the economic space in 21st century Nigeria as it protects businesses, prevents passing off and makes liable, business that are guilty of unfair trade practices.

BIBLIOGRAPHY

Peel W.E., Goudkamp J., *Winfield and Jolowicz on Tort* (Thomson Reuters 2014)

Malemi E., *Law of Tort*(Princeton Publishing Co 2013)