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Economic torts may arise from actions which may have caused loss in the commercial transaction of the plaintiff. Economic torts have become more complex that the Courts had to respond with positive judicial discretion – to protect the interests of businessmen.1 In the case of Keeble v Hickeringill2 Holt, CJ, made a broad statement on the question of economic interest when he stated thus: “He that hinders another in his trade or livelihood is liable to an action for so hindering him.” This statement suggests an action in tort may be sustained where any act interferes with economic interest. In simple terms, economic torts are torts which causes in its entirety, economic loss. It could also be taken to mean torts that occasion financial damages or financial injury or losses on the business reputation of another. Economic torts are committed within the curb of economic, commercial or business environment. These torts may be categorised into: the tort of passing off, deceit, injurious falsehood, unlawful interference with contract and civil conspiracy etc. The aim of economic tort is to provide remedies to aggrieved parties whose business reputations have been interfered with unlawfully. These torts are essential to preventing a trader from acquiring for himself by means of and a misleading device; the benefit of reputation achieved by rival traders.3

In respect of the tort of passing off, it is ideal to say that it is part of a much wider canvas of legal remedies controlling unfair competitive practices.4 Any personality who attempts to cause deception by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable in the tort of passing off. This is because, the tort of passing off entails where a person passes off somebody’s business or goodwill as though he owns it. Hence, it is ideal to state that the essence of this tort is to avoid confusion in the minds of the public as to economic activities. In the case of Perry v Truefitt5 Lord Langdale MR explaining the tort of passing off stated thus: “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 which

1 Olusegun Yerokun: Casebook on Law of Tort: [Princeton Publishing Co. Ltd.] p.787. 2 (1706) 103 Eng. Rep. KB.

3 A. Omotesho: The Law of Tort in Nigeria: [Lagos: Malthouse Press Ltd] p

contribute to that end.”

The tort of deceit as an economic tort was developed in order to curb fraud that will in most cases cause damage on another’s business venture or enterprise. The tort of deceit frowns at representations directed to a victim’s business venture by the person making the assertion, knowing it to be false and with the intent to defraud. The essential ingredient of the tort of deceit is fraud and that is why it is referred to as fraudulent misrepresentation in the Law of Contract. The tort is sustained against the tortfeasor whether it is evident that intent with which the tortfeasor acted upon was accompanied by fraud. This distinguishes negligent mis-statement from the tort of deceit as in the case of Hedley Byrne & Co. Ltd v Heller & Partners Ltd6 where a cause of action is sustained where a statement is made carelessly to another who relies on it and has suffered loss therefrom.

The tort of injurious falsehood occurs where a person with malicious intent discredits another person’s goodwill or business enterprise. The importance of this tort is worthy of admission. This is a tort that survives the victim even after death and this is anchored on the fact that it is committed against the person’s business venture and not necessarily the natural personality who owns the business enterprise. The prerequisite for this tort is where such an injurious statement is communicated or published. In the case of Ratcliffe v Evans7, BOWEN LJ explained the nature of injurious falsehood to wit: “An action will lie for written or oral falsehood... where they are maliciously published; where they are calculated in the ordinary course of things to produce, and where they do produce actual damage.”

Unlawful interference with contract is also actionable in tort as an economic tort, because the basis of liability arises where a person without legal justification interferes with the contractual relationship between two or more parties privy to the contract. Such unlawful interference by a third party may make another who is privy to the contract to breach his obligation(s) that is relative to the contract. On this basis, an aggrieved party will have the locus standi in tort to sue the third party who interfered with the contract and against the other who breaches the

6(1964) A.C.

7(1869) LR 4 QB 730.

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agreement in contract. The tort of unlawful interference with contract has existed for well over a century. It dates back to the decision in the case of Lumley v Gye8. The facts shall be discussed proper in the body of the work.

The tort of civil conspiracy is defined by LORD CAVE LC in Sorell v Smith9 to wit: “a combination of two or more persons willfully to injure a man in his trade unlawfully, and if it results in damage to him is actionable.” Civil conspiracy as a tort may be referred to as a tort where two or more persons illegally agree to cause injury to a person’s trade, occupation, profession or business. Hence, the tort of civil conspiracy will be sustained where it is established that there was an illegal agreement between two or more persons to cause injury to a person’s trade, occupation, profession or business.

8(1853) 118 ER 749, 1083. 9(1925) AC 700 at 711 HL.

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THE TORT OF PASSING OFF

Definition and Nature of the Tort of Passing Off

The tort of passing off is a civil wrong that is committed by a person where he passes off somebody else’s business or goodwill as though it were his. The tort of passing off means also, 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. Passing off is 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. The law on this tort 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 benefits of the reputation already achieved by a rival trader. Where this tort is successfully established, the aggrieved party will be entitled to damages for any loss he has incurred therefrom.10 It could be illustrated hypothetically that a tort of passing off is committed where A who is a rice producer produces bags of rice weighing 10kg each for the purpose of sale but rebrand each bag with a tag that is associated with B’s business name to mislead the public into believing the bags of rice sold are B’s. To add to the former, in the famous case of N. R. Dongre v Whirlpool Corporation11 it was held that a man may not sell his own goods under the pretence that they are the goods of another man.

Furthermore, legally classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. So basically it is an intangible asset. It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favourable location, reputation of the brand in the community, or the quality of its employer and employees. The value of goodwill of a brand can be calculated by a number of methods, like subtracting the value of all

tangible assets from the total value to establish the value of the intangible assets the amount of earnings that are in excess of those normally earned by a similar business averaging the past five years net income and subtracting a reasonable expected rate of return for tangible assets

10K. Aluko: The Nigerian Law of Torts: Revised Edition [Ibadan: Spectrum Books Ltd] p.221.

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and salary requirements capitalising the resulting value. Goodwill can be classified into two zones, viz. institutional goodwill and professional practice goodwill. While institutional goodwill associates itself with business houses, their market position, professional practice goodwill, as is quite obvious from the name, associates itself with professional practices like law, medicine, architecture, engineering and many others.12

A BRIEF ANALYSIS OF PASSING OFF AND TRADEMARKS

Passing off is often relied upon when a product is unregistered as a trademark. For example, a slogan or a name may not be registered as a trademark, but it has sufficient goodwill attached to it to be protected by passing off laws. This is why it will be true to say it is a common law doctrine.

Unfortunately, passing off claims can be much more time consuming and less straightforward than claims for trade mark infringement. If your name, slogan or similar feature is capable of being registered as a trade mark, then it strongly recommended you take legal advice in relation to registering it as a trade mark rather than risk having to rely on the common law of passing off in future.

Whether a person may rely on passing off if he has already registered his trademark

The answer seems to be in the affirmative. A passing off claim as well as a case for trade mark infringement may be sustained concurrently. A claim for trade mark infringement could fail but a passing off claim succeeds. So if there is doubt as to whether a claim for trademark infringement would succeed, making a passing off claim could prove highly beneficial. In practice, both claims would be made.13

12<https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law- essays.php>.

FORMS OF THE TORT PASSING OFF

Passing off takes different or various forms, the common of which are the following:

1. Marketing a product as that of the plaintiff.

2. Imitating the appearance of the plaintiff’s goods.

3. Trading with a name resembling that of the plaintiff.

4. Marketing goods with the trademark of the plaintiff or its imitation.

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

6. False advertisement by copying the plaintiff’s advertisement.

Marketing a product as that of the plaintiff

It is actionable passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not. Thus, the tort of passing off is committed where X, a manufacturer of tyres advertise and sell his tyres as “Dunlop” or “Michelin” tyres, since this would be an obvious attempt to profit from the goodwill and reputation established by rival businesses.14Similarly in Byron v. Johnston15it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

Imitating the appearance of the plaintiff’s goods

It is passing off for the defendant to do anything, which makes his goods appear like the plaintiff’s goods. This passing off includes any copying of the likeness or appearance of the plaintiff’s goods, in a manner to confuse the public e.g. general appearance, package, label, or design of the goods. In the case of U.K Tobacco Co. Ltd v Carreras Ltd.16 The facts of the case were that the defendants marketed cigarettes called “Barrister” in packets on which appeared a white man in a barrister’s wig and gown. This was held to be an actionable

14K. Aluko: The Nigerian Law of Torts: loc cit. p.221. 15(1816) 35 ER 851.

16(1931) 16 NLR 1.

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imitation of the appearance of the plaintiff’s cigarettes called “Bandmaster”, whose packets featured a white man in bandmaster’s uniform.

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.17An important limitation to this form of passing off is that an action will not succeed where the appearance complained of is necessary for the better performance of the defendant’s goods or for greater efficiency in handling or processing them; that is where the appearance is purely functional.18 Thus, for example, a defendant who manufactured shaving sticks could not be prevented from marketing a standard type of container already used by the plaintiff, since the appearance of the container was dictated primarily by functional considerations.19

Trading with a name resembling that of the plaintiff

This is where the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant’s product/business and that of the plaintiff are one and the same. In the case of Hendriks v Montagu20James L.J held thus:

Now, is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with 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. Many people do not care to bear in mind exactly the very letters of everything they have head of.

More so, the ratio of the above case was applied in the case of Niger Chemists Ltd. v Nigeria

17Cadbury Schweppes pty Ltd v. Pub Squash Co. pty Ltd (1981) I ALL ER 213 PC.

18K. Aluko: The Nigerian Law of Torts: op. cit. p.224.

19Trebor (Nigeria) Ltd. v Associated Industries Ltd. (1972) NNLR 60 at pp. 71-72. 20(1881) 50 L.J. Ch. 456 at 456.

7rKodilinye and Aluko (2005), The Nigerian Law of Torts, Revised Edition, Spectrum. Ese Malemi (2008), Law of Tort, Ikeja, Lagos: Princeton Publishing Co.

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