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COURSE TITLE: Law of Torts II

LECTURER: Mrs Aparia

LEVEL: 300 Level

ASSIGNMENT QUESTION: Discuss the relevance of passing off as an economic Tort in the 21st century Nigeria

DATE: Friday, 1st May, 2020.

Abstract:

Economic tort is the tort that offers protection for a person's trade or business from acts which the law considers to be unacceptable. The economic torts seek to ensure that businesses are protected from acts of unacceptable interference. One of this economic torts is passing off. It is passing off that this work is concerned with.

Key words: Economic Tort, Passing off, Reputation

Introduction:

Economic torts is the tort that provides the rules on liability which arise out of business transactions such as interference with economic or business relationships They are torts which inflict financial losses or financial injury.

Economic tort is defined by **Duhaime's Law Dictionary** as

*"Intentional tort wherein a defendant uses an unlawful means to cause a plaintiff some economic loss."*¹

Economic torts include:

- Passing off;
- Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
- Injurious falsehood/Malicious falsehood
- Interference with contracts
- Conspiracy to interfere, that, civil conspiracy and so forth.

It is however passing off that this writer is concerned with.

¹ Duhaime's Law Dictionary

Passing Off

Passing off can be defined as an economic tort that deals with the false representation by an individual of his business as that of another person, such that, buyers are deceived into patronising him.² The tort of passing off is committed when the plaintiff's goods are passed off by the defendant as being his.³ It is deceit of the public in order to get patronage. The essence of this tort is the carrying on of a business or the sale of goods in such a manner as to mislead the public into believing that the products or business of the defendant is that of the plaintiff.⁴

In this tort, an individual carries out their business with the name, trade mark of another's business in order to deceive the public into patronising them. Passing off could be classified as part of the economic torts because the subject matter of the tort is the protection of the plaintiff's financial interest in his property.

The Elements of the Tort of Passing off

In the classic case of **Warnink BV V. Townsend & sons**⁵, Lord Diplock in the House of Lords stated the five guidelines for determining when the action lies in passing off. These Characteristics include:

1. A misrepresentation
2. Made by a defendant in course of trade
3. To prospective customers
4. Which is calculated to injure the business and good will of another person
5. Which causes damage to that person's business and good will or is likely to do so

The tort of passing off is actionable per se. This means that on its occurrence, a plaintiff does not have to prove actual damage in order to succeed in his action. The right of action lies even though no damage has been suffered nor proved. The probability of damage occurring is enough for a plaintiff to succeed. Some common forms of passing off include:

1. Trading with name resembling that of the plaintiff

² E. Malemi, Law of Tort (Princeton Publishing Co.2013) 631

³ E. Smaranda Olarinde, Clement Chigbo, Nnamdi Ikpeze, The Modern Law of Torts: A Kaleidoscopic Perspective (2018 Afe Babalola University Press, Ado-Ekiti.) P. 333

⁴ Kodinleye and O. Aluko, Nigeria law of Tort (Spectrum Books Ltd, 1999) 221

⁵ (1979) All ER 927 at 932 (1979) AC 731 at 472 HL

2. Marketing false products as that of the plaintiffs by using the plaintiffs label or design
3. Marketing a product with a name resembling that of a plaintiffs

The purpose of the tort of passing off

The law of passing off is common in a competitive business community economy because this tort protects a person's business interests from some unlawful and unfair trade practices by rivals. The objective of this tort is to protect the reputation of businesses have built. It protects the benefits and advantage of the good name, quality, patronage, of another's business. It protects the attractive force of the business which brings customers to it. This tort, protects a business from misrepresentation of businesses directed at its customers and calculated to damage the reputation and good will of the business.⁶

Sir John Salmon in his book title "*law of torts*" stated the reason for this tort of passing off:

*"The law... is designed to protect traders against unfair competition... Which consists in acquiring of ones sold by means of false, misleading devices, the benefit of the reputation already achieved by rival"*⁷

In the words of **Lord Kingsdown** in **Leather Cloth Co. V. American Leather Cloth Co.**⁸

"The fundamental rule is that no man has the right to put off his goods for sale as the goods of his rival trader"

Lord Langdale M.R explaining the law in **Perry V. Truefitt**⁹ 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 mean which contribute to that end"

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

⁶ E. Malemi, Law of Tort (Princeton Publishing Co.2013) 631

⁷ Salmon op cit. para 149

⁸ (1865) 11 HLCas 523 at 538; (1865) 11 ER 1435

⁹ (1842) 49 ER 749 at 725.

The Relevance of Passing off as an Economic Tort in the 21st century Nigeria

The tort of passing off is one that is important for the protection of the reputation of an individual's business. This tort is more so relevant in modern day Nigeria. With the advent of the internet and its current rate of accessibility, a lot more businesses are online and also make use of advertisements. These businesses thrive on reputation because customers are more likely to purchase a good or make use of a service that has a trusted brand name. Where a person leverages on the reputation or name of another business to make sales, then this adversely causes issues for the owner of the business.

In the opinion of this writer, there is a dire need for passing off as an economic tort in Nigeria today for the following reasons:

1. The tort protects the reputation of businesses:

The repute and good will of a business is very crucial to its success. Customers more likely than not, rely on the reputation of a business and their trust for its ability to delivery to patronise. Where the reputation of a business is destroyed, then the attractive force of that business is equally ruined. The tort of passing of is relevant because its very objective, is to protect the reputation of businesses have built. It protects the benefits and advantage of the good name, quality, patronage, of another's business.

2. Passing off protects the intellectual property of inventors:

Intellectual property can be defined as creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce¹⁰. As much as there is a law that protects intellectual property, this also serves as a means to ensure that the ideas of people are not protected from theft.

3. Prevents production of substandard goods

Apart from protecting intellectual property, a major concern with these goods is that they may be substandard and they might adversely cause harm to consumers. With this tort, people are protected from the production of goods that are below standard.

¹⁰ <https://www.wipo.int/about-ip/en/> accessed 7th May, 2020

4. This tort helps to deter companies from passing off

This simply means that where the tort of passing off is enforced, a lot more companies would rethink exploiting the goodwill and reputation built up by another. This serves as a means of protecting individuals businesses.

In conclusion, the tort of passing off is relevant in Nigeria as it 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. It is therefore a good idea that the frame work of passing off is strengthened to defend the goodwill and reputation of businesses, trade name and profits.

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