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QUESTION: Discuss the relevance of Passing Off as a form of economic torts in the 21st century Nigeria

Abstract

Passing off is the tort of falsely representing one's product or business as that of another person, thereby deceiving buyers to patronize it. This tort when committed, can cause damage to the owner of the real product or business which was copied. In this paper, this writer will critically examine economic torts, focusing narrowly on the nature and the scope of the tort of passing off and its relevance in this 21st century when business are springing up everywhere and everyone is trying to amass wealth for themselves.

Introduction

Passing-off is a cause of action that is primarily founded in torts law under economic torts and is historically rooted in common law. The history of passing off can be traced back to as early as seventeenth century in United Kingdom and nineteenth century in United States of America and India. When trade grew after industrial revolution, trademarks became popular and dishonest traders wanted to reap advantage of the fruits of another's labour. The tort was developed to pass out the message that nobody has a right to represent his goods as that of somebody else's.¹ The law of passing off is a law that protects both the consumer and the trader from an unhealthy competition and grants reliefs and injunction to the trader whose goods or services have been passed off once it is proved.

Generally, what are Economic Torts?

Tort law provides a framework for dealing with negligent or intentional acts done against a person's business or livelihood, these are economic torts². Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic torts offer protection for a person's trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one

¹T and A Legal, 'Nigeria: An Appraisal Of Passing Off Actions Under Nigerian Law' (2018) <https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law> accessed 11:00am 1 May 2020.

² UKEssays, 'Economic Torts Lecture' (2018) <<https://www.lawteacher.net/modules/tort-law/economic-torts/lecture.php?vref=1>> Accessed 2 May 2020

another and therefore to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.

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, unlawful Interference with contracts, conspiracy to interfere, that is, civil conspiracy and so forth. All these torts protect some of a person's intangible interests (those which may loosely be called his business interests) from unlawful interference. However, our focus in this paper will be placed on the tort of passing off.

Definition and Nature of Passing Off

Whenever a person sells his goods, 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.³ Usually, passing off involves one form of misrepresentation, or the other to make the public patronise one's goods or business.⁴ In other words, passing off means presenting to customers of one's products, services or businesses as that of another person whose reputation and goodwill one thereby enjoys.⁵ In the words of Lord Kingsdown, "the fundamental rule is that one man has no right to put up his goods for sale as the goods of a rival trader"⁶.

Elements of Passing Off

There are three fundamental elements of passing off which are also known as the "classical trinity", as restated by the House of Lords in the case of **Reckitt & Colman Ltd V Borden Inc** ⁷. It was stated in this case that in a suit for passing off the plaintiff must establish:

1. Firstly, goodwill or reputation attached to his goods or services.

³ *Bollinger v Costa Brava Wine Co* (1960) Ch 262. *Niger Chemists Ltd v Nigerian Chemists* (1961) All NLR 171.

⁴ E. Malemi, *Law of Tort* (Princeton Publishing Co. 2013) 631-633

⁵ *Ibid*

⁶ *Leather Cloth Co. v American Leather Cloth Co.* (1865) 11 H.L. Case. 523 at p. 538; *De Facto Works Ltd. v Odumotun Trading Co.* (1959) L.L.R 33 at p. 39 and *Trebor (Nigeria) Ltd v Associated Industries Ltd.* (1972) N.N.L.R 60 at p. 63

⁷ [1990] 1 All ER 873

2. A misrepresentation by the defendant to the public i.e. leading or likely to lead the public to believe that the goods and services offered by him are that of the plaintiff's.

3. That he has suffered a loss due to the belief that the defendant's goods and services are those of the plaintiff's.

1. Goodwill

The plaintiff has the burden of proving goodwill in its goods or services, get-up of goods, brand, mark or the thing standing for itself.

2. Misrepresentation

The plaintiff also has the burden of proof to show false representation (intentional or otherwise) to the public to have them believe that goods/services of the defendant are that of the Plaintiff. There must be some connection between the plaintiff's and defendant's goods, services or trade which were intended to deceive the public. Deception or confusion, however, does not consider a "moron in a hurry".⁸

3. Damage to Goodwill

The plaintiff may have suffered a loss or diversion of trade or dilution of goodwill. He need not prove actual or special damage; real and tangible probability of damage is sufficient. This damage should however be reasonably foreseeable. It is not enough just to show likelihood or actual deception or confusion.

In the case of **Warnink BV v Townsend & Sons**,⁹ Lord Diplock stated the five guidelines for determining when an action lies in passing off. They are whether there is:

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

⁸ Peter, Groves 'Morning Star Cooperative Society v Express Newspapers Limited' (2011) A Dictionary of Intellectual Property Law. Edward Elgar Publishing. p. 202.

⁹ (1979) All ER 927 at 932, (1979) AC 731 at 472 HL

Some Common Forms of Passing Off

The tort of passing off is committed in various forms, as businesses resort to different strategies in imitating the products and business of their rivals. The common forms of passing off which are easily noticed in the market are:¹⁰ Trading with a name resembling that of the plaintiff, marketing fake products as that of the plaintiff by using the plaintiff's label or design, marketing a product with a name resembling that of the plaintiff's goods, marketing products with the plaintiff's trademark or its imitation, imitating the appearance of the plaintiff's product, selling inferior or expired goods of the plaintiff as current stock, false advertisement by copying the plaintiff's advertisement; and so forth.

Relevance of the Tort of Passing Off in the 21st Century

The tort of passing off is an economic tort which involves the selling of goods or 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".¹¹

The tort of passing off is very relevant in this 21st century because businesses are springing up everywhere and people are resorting to every strategy to market their products and services to survive and expand their business. The object of the tort is to protect the reputation and goodwill a business has built up for itself and the benefits and advantage of the good name, quality, reputation, patronage and customers of the business. The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business.¹²

Sir John Salmond in his book *Law of Tort* stated the reason for the tort of passing off thus: "*The law... is designed to protect traders against... 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*"¹³ In the Words of Lord Kingsdown in *Leather Cloth Co v American Leather Cloth*

¹⁰ Francis Day & Hunter Ltd v Twentieth Century Fox Co. Ltd. (1939) 4 All ER at 199 PC

¹¹ Kodilinye and O. Aluko, Nigeria Law of Tort (Spectrum Books Ltd, 1999) 136

¹² E. Malemi, *Law of Tort* (Princeton Publishing Co. 2013) 631-633

¹³ Salmond op cit. para 149

*Co: “The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”.¹⁴ Lord Langdale Mr. Explaining the law in **Perry v Truefit** stated that: “A man is not to sell his own goods under the pretence that they are not goods of another person; he cannot be permitted to practice such a deception, nor use the means which contribute to that end”.¹⁵*

Not only does the tort protect the goodwill of businesses, it also tries curb the menace of substandard goods. In Nigeria today, we see products with brand names like Guggi, Puka, Addibas, Ron Bon and the likes, those products are all an imitation of some foreign brand’s but the point here is that they are all always substandard. Some of them even cause some injuries to the consumers of such goods, especially when they are edibles. It is having products like this in the market that the tort seeks to avoid. Also, where such substandard goods cause some damage to the consumers, the tort provides a means for genuine companies to recover the amount of damages which they had to pay to the injured customer when they realise the goods did not actually come from them. The tort also preserves the authenticity and standard of goods and provides a healthy business environment.

Conclusion and Recommendations

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. It is for all these reasons mentioned above that the tort of passing off is very relevant in this 21st century. However, this writer has some recommendations as to how the tort can achieve more in Nigeria. First of all, the necessary framework for passing off actions should be strengthened to defend the goodwill and reputation of businesses. Furthermore, small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on Passing off and take advantage of the remedies available to protect their goodwill, trade name and profits. It is also suggested that the Trademarks Act of Nigeria be further amended to reflect the times, happenings and changes of this 21st Century.¹⁶

¹⁴ Supra

¹⁵ (1842) 49 ER 749 at 725. Draper v Trist (1939) 3All ER 513 at 526

¹⁶ T and A Legal, ‘Nigeria: An Appraisal Of Passing Off Actions Under Nigerian Law’ (2018) <https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law> accessed 11:00am 1 May 2020.

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