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ABSTRACT

Just as tort law recognises that one can negatively affect a person or their property through neither negligence nor intent, tort law also provides a frame work for dealing with negligent or intentional acts done against a person's business or livelihood. Indeed, if these were not in place, a malicious actor could satisfy themselves with destroying an individual financially, whilst leaving their person and property untouched. The business world comes with so much; the first is profit or loss, branding, trademarks, consumers, competitions, business name etc. sometimes the competitors want to use a similar business name or mark because of the success of that particular name or mark. This article looks at the meaning of economic torts; meaning of passing off, how passing off is a form of economic tort and its relevance in the 21st century Nigeria.

INTRODUCTION

Economic torts are torts that inflict economic losses. This tort seeks to ensure that businesses are protected from acts of unacceptable interference. Economic torts which are also referred to as business torts, are torts that provide the common law rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss[1]. Economic torts are tortuous interference actions designed to protect trade or business. It deals with injury to personal earnings, injury to a person's economic interest. Unless a breach of contract is induced, or an unlawful act occurs, no economic tort will have occurred, harsh business practices do not form the basis for a tort. This can be seen in **Mogul Steamship Co Ltd V McGregor Gow & Co**[2] the claimants were driven out of their market, Chinese tea shipping, by the defendants, a group of merchants who offered much more favourable terms to their Chinese contacts. The courts rejected a claim for economic tort the negative effect on the claimant was a side effect, rather than an end of the defendants' actions. The exception to this rule is conspiracy to injure, discussed below, but even this exception is rarely applied.

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[1] https://en.m.wikipedia.org/wiki/economic_torts

[2] (1889) LR 23 QBD 598

Also in a case were the claimant had contracted for the services of an opera singer. The defendant then offered to pay the opera singer a higher fee to sing at his theatre instead whilst an action existed against the singer for breach of contract, the court held that an action also existed against the defendant for the tort of inducing a breach of contract. Notably, the court discussed that under contract, the damages might be limited in a way which would mean they failed to properly reflect the claimant's harm. They thus found it just, under the principle of full compensation, to create an action against the inducer.[3]

Economic torts provide protection for a person's trade or business against acts which the law considers to be unacceptable. Although it is a principle, it is allowed in business for businesses to compete with one 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 against acts of unacceptable interference.

The principal torts are;

i. Injurious falsehood
ii. Conspiracy
iii. Passing off
iv. Inducement of breach
v. Tortuous interference such as interference with economic relations or unlawful interference with trade and;
vi. Negligent misrepresentation

These torts represent the common law's historical attempt to balance the need to protect claimants against those who inflict economic harm and the wider need to allow effective, even aggressive competition including competition between employers and their workers. These groups of torts protect some of a person's intangible interests, things which may be referred to as his business interests from unlawful interference.

Damages for breach of contract are to put the claimant in the position they would have been in if the contract had been performed. The objective of damages in torts is

[3] Lumley V Gye (1853) 2 E&B 216

to put the claimant in the position they would have been if the tort had not been committed.

In the case of **Donoghue V Stevenson**[4] the duty of care owed by the defendant was a duty of care owed by the defendant was a duty not to cause physical damage, in this case, personal injuries to the plaintiff caused by a contaminated drink. If the plaintiff had been sick over her clothes as a result of drinking the contaminated ginger beer, she would not have had a claim for damage to property. Breach of contract may lead to tortuous liability if there is damage to property. Both claim for personal injuries and the claim for property damage are status quo claims.

THE CONCEPT OF PASSING OFF

Passing off is a wrong, a common law tort which protects the goodwill of a trade 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. A man may not sell his own goods under the pretence that they are the goods of another man.[5]

The tort of passing off is an action available where a business wrongly suggests a connection, in the course of trade, with another's goods or services where there is damage, or a threat of damage to the proprietary interests in the reputation or goodwill that the wronged person has built up.[6] Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill.[7] Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage.

Another definition of passing off is the act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers.[8] It also involves making some false representation likely to induce a person to believe that the goods or services are those

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[4] (1932) AC 502
[5] Perry V Truefitt (1842) 6Beav66, 49 ER 749
[6] Vieright Pty Ltd V Myer Stores Ltd
[7] Goodwill is defined as the part of business value over and above the value of identifiable business assets.
[8] Black's Law Dictionary Ninth Edition

of another.[9] An action for passing off is a common law remedy and claimant need not establish title for same but must show that the goods/services have distinctive features.

"No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trademark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof." [10]

The above connotes that a passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim "there is no law without a remedy". In the case of **Trebor Nigeria Limited V Associated Industries Limited,[11]** Trebor Nigeria Limited the makers of Trebor peppermint brought an action against associated industries limited the makers of minta supermint claiming that the wrapper used to package the product by the defendant was similar to that of the plaintiff and that they were guilty of passing off their products like that of the defendant. The defendants raised dissimilarities in the two products as a defence to the action, the judge however found the defendant liable for passing off their products as that of the plaintiff. In this instance passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same.

Courts have variant decisions on the jurisdiction of the courts on passing off actions. These different reasoning of learned justices have in no little measure created doubts on the courts to institute an action in passing off nonetheless, the grundnorm offers a lasting solution to the jurisdictional issue.

[9] Duhaime's Legal Dictionary
[10] Section 3 Trademarks Act CAP 436 LFN 1990
[11] (1972) NNLR 60

The constitution[12] makes provisions for passing off actions;[13]

"Notwithstanding anything to the contrary contained in this constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the to the exclusion of any court in civil cases and matters of any Federal Enactment relating to copy right, patent, designs, trademarks and passing off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standard of goods and commodities and industrial standards."

RELEVANCE OF PASSING OFF

Since the tort arises when, in a competitive business environment, a person affects the plaintiff's business interest by marketing his goods as that of the other person. He creates an unfair competition by adopting the plaintiff's goodwill in a manner calculated to deceive the purchasing public that he is marketing the plaintiff's goods.

In Nigeria, the major purpose of the tort of passing off is the protection of an established trade goodwill already acquired by a trade name or trade mark. The relevance of an action for passing off is to prevent one trade from exploiting the reputation and goodwill built by another. The general principle of passing off action is to ensure that no man can represent his business or goods as that of another. Passing off protects the claimant's ownership of his reputation or goodwill.

CONCLUSION

In conclusion, the necessary framework for passing off actions should be strengthened to defend the goodwill and reputation of the businesses.

[12] Refers to the 1999 constitution which is the supreme law of the FRN
[13] Section 251(f) 1999 constitution FRN

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