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INTRODUCTION.

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 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.

The leading authority on economic torts is the House of Lords case of *OBG v Allen* which deals with three separate appeals. The plaintiff company appointed the defendants as joint receivers. The receivers were later found to have been invalidly appointed, causing OBG to suffer loss as a result of the receivers' **wrongful interference** with their contractual relations. The judge found that but for the receivers' interference, OBG would have obtained better settlements. Allowing the appeal, the receivers' actions lacked the intention to procure a breach of contract causing loss. There had been no breach or non-performance of any contract by the receivers, thus, no wrong to which accessory liability for procuring a breach of contract could attach. The case dealt mostly with the tort of interference and inducing breach of contract. In this paper we shall be discussing each economic tort briefly, effectively touching on the elements, remedies and defences of the economic torts as well as relating the tort of passing off back to our contemporary society and its relevance in present day Nigeria.

ECONOMIC TORTS.

The main purpose of the economic torts is to ensure that in the process of competition between businesses, one may not succeed to the detriment of another.. Having pointed out the general principle which runs through all the torts this writer shall now briefly consider the separate nominate torts which have been recognised in English law;

- *Conspiracy:* Willis J. in the case of *Mulcahy v R.* defined conspiracy as a tort which "consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. There exists two types of conspiracy

namely; lawful and unlawful conspiracy. Although this tort has two distinct branches there are some factors common to both branches and these common elements shall be considered in this commentary. The first is that there must be two or more persons involved, the second is that there must be a combination between the parties (the parties combine together with a common interest) and the third is that there must be damage to the plaintiff because damage is the very essence of the tort.

- *Interference/ inducing breach of contract*: this tort is usually committed in the course of industrial conflict. It has its origins in the case of **Lumley v Gye** where a theatre owner who was the plaintiff claimed that he had entered into a contract with one Miss Wanger who was a well known opera singer to sing at his theater only for a period of time. The owner of a rival theatre procured Wagner to break her contract with the plaintiff by offering a higher pay which she did. The plaintiff brought an action against the defendant. The court held that the plaintiff was entitled to maintain an action for damages in respect of the wrong done to him by the defendant inducing Miss Wagner to break her contract with him.
 - *Passing off*: the essence of passing off is the selling of goods or carrying on of 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."¹ Where passing off is proved the plaintiff will be entitled to an injunction restraining the defendant from carrying out the wrong further. The plaintiff shall also be entitled to damages for any loss he has incurred thereby and to an account of all profits made in the consequence of the tort. The plaintiff will recover damages for the loss of profits he has suffered as a result of customers being diverted from him to the defendant. He may also recover for loss of business reputation and goodwill. ² Below this writer shall discuss the various forms of this tort while also attempting to relate it back to our contemporary society with the aid of real life examples and case law;
- I. **Marketing a product as that of the plaintiff**: where the defendant sells merchandise with a direct statement that the goods are manufactured by the plaintiff when really they are not. For instance an individual who owns a wine company

¹ Salmond op. cit. para 149.

² *Spalding v Gamage (1918) 35 RPC 101*

advertising and selling it as Eva table wine when in reality it is not would be passing off due to the fact that this is an attempt to use the brand name and goodwill to promote sales. The same principle applies in the case of book publishing.

- II. **Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public:** take for instance the case of *Hendricks v Montagu*³ where the Universal Life Assurance Society brought forward an action against the defendant company which went by the similar name of “Universe Life Assurance Association” and were granted an injunction restraining the defendant’s company which was subsequently incorporated from carrying out business under that name.
- III. **Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiffs trade name as to be mistaken for it:** According to Salmond a trade name is one “ under which goods are sold or made by certain person and which by established usage has become known to the public as indicating that those goods are the goods of that person”.
- IV. **Marketing goods with the trademark of the plaintiff or with any deceptive imitation of such mark:** trademarks receive protection not only under the law of passing off but also, if registered, under the Trade Marks Act 1965 No. 29.
- V. **Imitating the get-up or appearance of the plaintiff’s good:** where there is anything in the appearance or “get-up” of the plaintiff’s goods which particularly identifies those goods as the merchandise of the plaintiff, the defendant will be liable for passing off if, in marketing his goods, he imitates or copies such appearance or get-up in a manner likely to confuse the public.
- VI. **Defendant’s conduct must be “calculated to deceive”:** Liability is strict, and all the plaintiff needs to show is that the defendant’s activities are “calculated”, that is to say likely, to deceive the public.

It is sufficient for the plaintiff to show that deception is likely to occur in the future; and if he can show this, he may be awarded a *quia timet injunction*. In determining whether confusion is likely, the court will take into account the experience, perceptiveness and standards of literacy of the prospective purchasers of the goods.

³ [1881] 50 LJ Ch 456

THE RELEVANCE OF PASSING OFF IN 21st CENTURY NIGERIA.

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. It can therefore be said that passing off is a common law concept which prevents the unlawful usage of a man's mark, sign or goods and services. Passing off protects the property rights of individuals. With that being said, let us take for example Mrs T a Nigerian housewife as an example. She goes to the shop and hastily picks up a packet of her favorite soft drink brand 'tio' in preparation of the *Iftar* celebration. Once she has gotten home and intends to break her fast she notices that she has picked up a different brand 'teo' which only had the same packaging and similar name of her favorite brand and this makes her very uneasy and annoyed. Unfortunately, Passing off is not a criminal offence, such that Mrs. T could make a report to the Police or relevant institution. However, she can report to the manufacturers of the original well know brand that someone is mimicking their product to take the necessary legal action. This will aid manufacturers in protecting their brands and trade marks and also serve as a deterrent to others intending to carry out this same tort. A benefit like this is very useful in our contemporary society in this 21st century as many individuals are now becoming entrepreneurs and small to large scale business owners, this tort showcases its relevance in protecting the intellectual property rights of such individuals and also preserving the element of 'brand loyalty'. Furthermore it protects the consumers because some individuals who carry out this tort to use the goodwill of other brands to improve their sales may be selling substandard products which may be harmful to the consumer. This tort is designed to ensure that manufacturers get back value for whatever they have invested in the businesses in form of advertising, packaging, branding and building customer loyalty especially in times like this where almost everyone runs a business. Mrs. T may also go further to report the misrepresentation by the manufacturers of 'Tunio' seasoning powder to the Consumer Protection Council ("CPC") and seek compensation as a dissatisfied consumer. Though she may not have the locus standi to pursue a civil suit in this regard, the CPC will be happy to investigate the subject matter. Small and medium businesses should also 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. The Supreme Court should also resolve with one voice the jurisdiction of the Federal High Court in line with the Constitution to prevent unnecessary objections and delay of justice at court. In addition this writer would also suggest that the Trademarks Act be further amended to reflect the times, happenings and changes in the Nigerian society today.

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