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Assignment: Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria.

INTRODUCTION

Economic Torts is also called business torts; it is a tortious interference action designed to protect trade or business. They are torts that provide the common law rules on the liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss. The torts govern Labor law, modern competition law, and some laws governing intellectual property. The Torts under this include; Passing off, injurious falsehood and trade libel, conspiracy, interference with contract, negligent misrepresentation but for this paper, the writer will be explaining the tort of passing off in Nigeria and its relevance in 21st century Nigeria.

PASSING OFF

Passing off is the act or an instance of falsely representing one's goods as that of another in order to deceive potential buyers. It is sometimes described as an unfair competition by misrepresentation, an action will arise where the deception made in trade will cause confusion among customers; this because they will not be able to tell the difference between the two (2) products. Passing off means making false representation likely to induce a person to believe that the goods and services are those of another¹.

Passing can also be defined as selling of goods or carrying on of a business in such a manner to mislead the public into believing that the defendant's product is that of the plaintiff². Passing off and Trademarks infringement are similar in nature but passing off is an action for unregistered marks while trademark infringement is an action for registered marks. A mark means a name, symbol, or design that a company uses for its products and that cannot be used by anyone else³.

Another difference between is that in Trademarks infringement there is statutory remedy where by the owner of the trademark can bring an action against the person who uses his mark

¹ The Duhaime's Legal Dictionary

² Gilbert Kodilinye and Oluwole Aluko, *Nigerian law of Torts* (2nd ed., Spectrum Books Ltd. 2012)

³ Oxford Advanced Learner's Dictionary, (9th ed.)

however an action for passing off is action against deceit on the imitation of a mark adopted by a person/company in relation to goods and services which have a good reputation in the market.

In an action for passing of the plaintiff doesn't need to establish title for same but he must show that the goods or services has distinctive features. The tort of passing of can be in various forms, the most common in Nigeria include;

- a. Using a name that closely resembles the name of an existing product.
- b. Imitating the appearance of the plaintiff's product,
- c. Marketing goods with the trademark of the plaintiff or with any deceptive imitation of such mark

Explaining each of them briefly;

Using a name that is closely resembles the name of an existing product: This simply means trading under a name that resembles that of plaintiff which will most likely make people think the defendant and the plaintiff's business are the same. In the case of *Hendricks v. Montagu*⁴, where the Universal Life Assurance Society was granted an injunction stopping the defendant company from carrying a business under the name "Universe Life Assurance Association". This was also applied in the case of *Niger Chemists Ltd. V. Nigeria Chemists*⁵, the plaintiff had operated a chemist and druggist business for several years in Onistha and some other parts of Eastern Nigeria, the defendant also started the same business with a name similar to that the of plaintiffs, the court granted the injunction on the basis that the defendant intention was calculated to deceive person who knew of the plaintiff.

Imitating the appearance of the plaintiff's goods: where the plaintiff goods have a particular identity which differentiate it from other goods, the defendant will be liable for passing of if he imitates or copies such appearance in a manner that is likely to confuse customers. It should be noted that where the appearance of goods complained of is betterment and promotion of the defendant business, he will not be liable in passing off. An example is in the case of

⁴ (1881) 50 L.J Ch. 456

⁵ (1961) All N.L.R 171

*Williams v. Bronnley*⁶, 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 consideration. Also in **De facto Works Ltd v. Odumotun Trading Co. Ltd**⁷, the defendant sold bread wrapped in yellow and brown paper with the name “Odus” written in large scroll letters in chocolate colour, this was an imitation of the plaintiff’s bread which was previously wrapped in yellow and brown paper with the name “De Facto” written in Large chocolate scroll letters.

Marketing goods with the trademark of the plaintiff or with any deceptive imitation of such mark: A trade mark is any design, picture, mark, name or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. Trademarks receive protection under law when the mark has been registered and all actions on registered trademarks are brought under the Trade Marks Act 1965 while action for unregistered trademarks are brought under passing off.

ELEMENTS OF PASSING OFF

The elements of passing off are the requirements the plaintiff has to prove in order to succeed in a claim for passing off. The elements are also known as ‘*classical trinity*’ the elements were reduced to three (3) from five (5) by Lord Oliver, they include; (i) Good will by the trader; (ii) Misrepresentation; (iii) Damage to goodwill.

- a. **Goodwill by the trader:** the plaintiff must have acquired some kind of goodwill from the goods that he feels he has to protect. The existence of goodwill in an action of passing off will be determined by the court based on the circumstances of the case. Goodwill and reputation with respect to passing off is defined as the benefits and advantages of a good name, reputation, and connection of a business. It is the attractive force which brings in customers⁸. It is one of the key elements in proving pass off.

⁶ (1909) 26 R.P.C. 765

⁷ (1959) L.L.R. 33

⁸ ICR v. Muller Margarine

- b. **Misrepresentation:** the plaintiff has the burden to prove that there had been a misrepresentation, whether intentional or otherwise, capable the public. This means that a defendant may be liable for passing off although his conduct was entirely honest and innocent in the sense that he had no intention to deceive this is because liability is strict. There must be a likelihood, actual deception or confusion by the public. It is the court's duty to decide the similarity or identity of the goods or services. it is not necessary to prove that deception has actually taken place, it is sufficient for the plaintiff to show that deception is likely to occur in the future.
- c. **It is not enough to prove that there is an existence of goodwill or misrepresentation:** it is necessary to show that damage had occurred as regards to the misrepresentation. As explained above he must show that he had suffered or is likely to suffer loss. The plaintiff does not need to prove actual or special damage; real or tangible probability must be reasonably foreseeable.

REMEDIES AND DEFENSES TO THE TORT OF PASSING OFF

The remedies to passing off includes; Injunction, Damages, Delivery up for destruction of infringing goods, Anton piller orders and Account of profit.

The defenses include; Consent of the plaintiff to use of name, mark, sign or slogan, innocent usage of the plaintiff's name, Dissimilarities in the mark of the plaintiff and defendant

RELEVANCE OF THE TORT OF PASSING OFF IN 21ST CENTURY NIGERIA

The best thing a manufacturer can do is to protect his goods/services in a country like Nigeria where there is high rate of passing off and copyright infringement. Many products in Nigeria bare the trademark, names, and marks of a company or business which is not their products in order to market it, this does not cause only deceive or confuse the plaintiff, it also makes the plaintiff acquire loss. In *Continental Pharmaceutical Ltd. V. Sterling Products*

*Nigeria PLC and SmithKline Beecham Plc*⁹, the plaintiff were manufactures of a registered trademark designed with the word 'Conphamol' brought an action against the defendant for using the design of the plaintiff mark, the only difference was the 'conphamol' in the plaintiff mark was substituted for 'Panadol'. The court held passing off due to the infringement of the plaintiff's registered trademark. A registered trademark can bring an action under the Trademarks Act 1965

The tort of passing off in Nigeria needs more awareness, this is due to the fact that many Nigerians have become victims because they do not know their rights and do not have the knowledge to protect their goods and services. A person with an unregistered trademark may have to bring an action under passing to prevent others from selling or marketing his products or confuse the public into believing they are the ones and the same products proving the extent to which his goods are being sold.

The main relevance of the tort of passing off is to grant remedies to those whose business or products have been infringed upon and have suffered loss. It should however be noted that the plaintiff doesn't have to suffer damage before he can bring an action but the elements of passing off must be satisfied.

⁹ (1995) 38 NIPJD460 (FHC)

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