

INTRODUCTION

An economic tort may arise from actions which may have caused loss in the commercial transaction of a plaintiff. Economic torts have become more complex that the Courts had to respond with positive judicial discretion so as to protect the interests of businessmen.¹In the case of Keeble v Hickeringill² Holt, CJ, made a broad statement on the question of economic interest when he stated thus: “He that hinders another in his trade or livelihood is liable to an action for so hindering him.” This statement suggests an action in tort may be sustained where any act interferes with economic interest. In simple terms, economic torts are torts which causes in its entirety, economic loss. It could also be taken to mean torts that occasion financial damages or financial injury or losses on the business reputation of another. Economic torts are committed within the curb of economic, commercial or business environment. These torts may be categorized into: the tort of passing off, deceit, injurious falsehood, unlawful interference with contract and civil conspiracy etc. The aim of economic tort is to provide remedies to aggrieved parties whose business reputations have been interfered with unlawfully. These torts are essential to preventing a trader from acquiring for himself by means of and a misleading device; the benefit of reputation achieved by rival traders.

³Any personality who attempts to cause deception by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable in the tort of passing off. This is because, the tort of passing off entails where a person passes off somebody’s business or goodwill as though he owns it. Hence, it is ideal to state that the essence of this tort is to avoid confusion in the minds of the public as to economic activities. t it is part of a much wider canvas of legal remedies controlling unfair competitive practices.

¹ Olusegun Yerokun: Casebook on Law of Tort: [Princeton Publishing Co. Ltd.] p.787.

² (1706) 103 Eng. Rep. KB.

³ Winfield & Jolowicz on Torts (2006): 17th ed. [London: Sweet & Maxwell]

THE TORT OF PASSING OFF

Definition and Nature of the Tort of Passing Off

The tort of passing off is a civil wrong that is committed by a person where he passes off somebody else's business or goodwill as though it were his. The tort of passing off means also, the selling of goods or the 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. Passing off is a common law tort which protects the goodwill of a trader 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. The law on this tort 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 benefits of the reputation already achieved by a rival trader. Where this tort is successfully established, the aggrieved party will be entitled to damages for any loss he has incurred therefrom.⁴ it could be illustrated

hypothetically that a tort of passing off is committed where A who is a rice producer produces bags of rice weighing 10kg each for the purpose of sale but rebrand each bag with a tag that is associated with B's business name to mislead the public into believing the bags of rice sold are B's. To add to the former, in the famous case of *N. R. Dongre v Whirlpool Corporation*⁵ it was held that a man may not sell his own goods under the pretense that they are the goods of another man.

Furthermore, legally classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. So basically it is an intangible asset. It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favorable location, reputation of the brand in the community.

⁴ k. Aluko: The Nigerian Law of Torts: Revised Edition [Ibadan: Spectrum Books Ltd] p.221.

⁵(1996) 2 ARBLR 488 SC.

FORMS OF THE TORT PASSING OFF

Passing off takes different or various forms, the common of which are the following:

1. Marketing a product as that of the plaintiff.
2. Imitating the appearance of the plaintiff's goods.
3. Trading with a name resembling that of the plaintiff.
4. Marketing goods with the trademark of the plaintiff or its imitation.

We shall consider some of these forms below.

Marketing a product as that of the plaintiff

It is actionable passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not. Thus, the tort of passing off is committed where X, a manufacturer of tyres advertise and sell his tyres as "Dunlop" or "Michelin" tyres, since this would be an obvious attempt to profit from the goodwill and reputation established by rival businesses.⁶ in Byron v. Johnston⁷: it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

Imitating the appearance of the plaintiff's good

It is passing off for the defendant to do anything, which makes his goods appear like the plaintiff's goods. This passing off includes any copying of the likeness or appearance of the plaintiff's goods, in a manner to confuse the public e.g. general appearance, package, label, or design of the goods. In the case of U.K Tobacco Co. Ltd v Carreras Ltd.⁸ The facts of the case were that the defendants marketed cigarettes called "Barrister" in packets on which appeared a white man in a barrister's wig and gown. This was held to be an actionable imitation of the appearance of the plaintiff's cigarettes called "Bandmaster", whose packets featured a white man in bandmaster's uniform. Also an advertisement by the defendant which copies, or imitates the plaintiff's advertisement of his products, may amount to passing off, where such advertisement so resembles that of the plaintiff, as to be capable of misleading the buyers to patronize the defendant's goods as those of the plaintiff.

⁶.Aluko: The Nigerian Law of Torts: loc cit. p.221

⁷(1816) 35 ER 851.

⁸(1931) 16 NLR 1. 9 Cadbury Schweppes Pty Ltd v. Pub Squash Co. Pty Ltd (1981)

Trading with a name resembling that of the plaintiff

This is where the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant's product/business and that of the plaintiff are one and the same. In the case of Hendriks v Montagu⁹ James L.J held thus:

Now, is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with other? Are persons who have heard of the Universal likely to be misled into going to the Universe? I should think, speaking for myself very likely indeed. Many people do not care to bear in mind exactly the very letters of everything they have heard of.

A similar decision is obtained in Niger Chemists Ltd. v Nigeria.

Marketing goods with the trademark of the plaintiff or its imitation

A trade mark is any design, picture, mark, name or other arrangement fixed to goods which identifies those goods with the plaintiff manufacturer or seller.¹⁰ Trade marks receive protection not only under the law of passing off, but also, if registered, under the Trade Marks Act 1965 under which most actions are brought.¹¹ Therefore, it is actionable in passing off for a defendant to market his goods using the plaintiff's trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff. In the notable case of Perry v. Truefit¹² he plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of 'Medicated Mexican Balm' or other similar designations.

¹⁰ (1881) 50 L.J. Ch. 456 at 456

¹¹ Milington v Fox (1838) 40 ER 956.

¹² K. Aluko: The Nigerian Law of Torts: loc cit. p.224. 25Supra.

Elements

a person who alleges that the tort of passing off was committed against him must establish:

1. That he possesses a reputation or goodwill in his goods, name, mark, or other identifying feature that associates the public with those particular goods, and distinguishes them from others;
2. There must be misrepresentation by the other party which has led others to believe the goods are actually those of the claimant. Confusion will not be sufficient to prove misrepresentation, and;
3. That the Public is likely to be confused by the act of the tortfeasor: In the determination of this ingredient, the plaintiff must certify that likelihood of the public to be confused and misled by the activities of the defendant. The court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer.

REMEDIES AVAILABLE IN THE TORT OF PASSING OFF

In successful passing off claims, the following remedies are available:

- i. Damages or an account of the defendant's profits;
- ii. An order for the delivery up or the destruction of the infringing articles or products;
- iii. An injunction to prevent further actions that amount to passing off;
- iv. Interim injunction if you need to act quickly;
- v. An enquiry to establish loss.

DEFENSES AVAILABLE IN THE TORT OF PASSING OFF

In a claim for the tort of passing off, a defendant may plead a number of defences. The below are some of these defences:

1. Consent, such as licence given to him by the plaintiff to produce and or market the product.

2. Innocent passing off: Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.

3. The mere descriptive name of the product: An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.

Conclusion

The tort of passing off as an economic tort is also a complex, dynamic and an ever increasing aspect of the law of tort because it relates to economic activities of citizens of a given state.

In an environment like the one applicable in Nigeria where the government employs less than a quarter of its own population the remaining three quarter of the population are free to be engaged in businesses which are not watertight with legal regulation. In this kind of environment, it is expected that the high level and complexities of passing off will be expected.

In Nigeria today, even the war against unhygienic bread eaten by almost everybody is on the losing side by government agencies responsible for that sector of the economy. Variation of the same product by different companies and marketing and advertising agencies has brought the incidence of passing off to a high level. There are a lot of deceptions and remedies to stem the tide of the increase in the level of passing off.

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