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ASSIGNMENT TITTLE: ECONOMIC TORTS.

COURSE TITLE: LAW OF TORTS II

COURSE CODE: LPB 302.

1Economic torts are torts which inflicts mainly economic losses i.e. they inflict financial losses or financial injury. It occurs in the economic, commercial, or business sector of life. Economic torts and many and include; passing off1.

The economic torts can be split into two primary categories: procuring a breach of contract and causing loss by unlawful means. Conspiracy is also discussed below, and whilst this is a separate tort, it can generally be regarded as ancillary to the two primary torts of inducing breach and unlawful interference.

The tort of passing off is a complex, dynamic and an even 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 the 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. In the health sector of the Nigerian economy, the problem of adulterated drugs is the bane of the sector either in the estimation of individuals or in the estimation of experts in the government hospitals and even experts in the medical manufacturing sector. So therefore, there are lot of deceptions and remedies to stem the tide of the increase in the level of passing off.

1. Ese Malemi, law of Tort (2nd ed, Princeton 2017)

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Harsh business practices do not form the basis for a tort. This can be seen in *2Mogul Steamship co Ltd v Mc Gregor Gow & Co [1889] LR23 QBD 598*

**What is Passing Off?**

3Passing off is described as an unfair competition by misrepresentation or literally speaking “ the cause of confusion and deception”. Generally, An action for passing off arises where deception is made in the course of trade, which lead to confusion amongst customers. This applies to both ecommerce businesses with physical addresses.

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. Passing off is actionable in tort under the law of unfair competition.

The 4Duhaime’s Legal Dictionary, defines passing off as making some false representation likely to induce a person to believe that the goods or services are those of another.

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand is a wrong and is known as the tort of “passing off”.

**The Passing Off as a form of Economic Tort in the 21st Century.**

The tort of “passing off” in 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.

1. Mogul Steamship co. Ltd v Mc Gregor Gow & co [1889] LR 23 QBD 598.
2. Lawteacher
3. Duhamie’s Encylopedia of law [computer file, 1999].

5The essence of passing off is 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, 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. In the words of Lord **Kingsdown**:“ *the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader*”. Where passing off is proved, the plaintiff will be entitled to an injuction restraining the defendant from continuing the wrong, to damages for any loss he has incurred thereby, and to an account of the profits made by the defendant in consequences of the tort.

6This tort is committed in various forms. *Francis Day& Hunter Ltd v. Twentieth century* *Fox co. Ltd (1939) 4 ALL ER 192 at 199 P.C*. The common forms of passing off which are easily noticed are as follows

1. Trading with a name resembling that of the plaintiff: trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same: see the case of 7*Niger Chemists Ltdv Nigeria Chemists (1961) All N.L.R 171.*

It seems to me as a matter of common sense that when two firms trade in the same town, in the same street, in the same line of business, one calling itself ‘Nigeria Chemists’, there must be a grave risk of confusion and deception.

* **Per palmer j.**

The Nigerian Supreme Court held that where the names of two separate companies so nearly resemble each other, such similarity could cause confusion or deceit on members of the public.

1. Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design.
2. Marketing a product with a name resembling that of the plaintiff’s goods.

5.KODINLINYE and ALUKO, The Nigerian Law of Torts ( 3rd ed, 2018.)

*6.Francis Day& Hunter Ltd v. Twentieth century fox co.ltd (1939) all er*

7.Niger Chemists Ltd v Nigeria chemists ( 1961) ALL NLR 171

4.marketing products with the plaintiff’s products.

5.Selling inferior or expired goods of the plaintiff as current stock.

6.Imitating the appearance of the plaintiff’s product.

7.False advertisement by copying the plaintiff’s advertisement.

As held in the famous case of N.R8 *Dongre Vs. Whirlpool Corporation1*; “ a man may not sell his own goods under the pretense that they are the goods of another man.” 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 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 that is in excess of the normal basic rate of profit earned by other buisnesses of similar type. It might be due to a particularly favorable location, reputation of the brand in the community, of the quality of its employer and employees. The value of goodwill of a brand can be calculated by a number of methods, like subtracting the value of all tangible assets from the total value to establish the value of the intangible assets the amount of earning that are in excess of those normally earned by a similar business averaging the past five years net income and subtracting a reasonable expected.

**Relevance of Passing Off**

Passing off does not only highlight what constitute an infringement in that aspect, rather it grants appropriate remedies to those whose products or business has been infringed upon whether there is a proof of actual damage or not, so long the ingredients of what constitute an infringement is satisfied.

Passing off is something that needs to be taken seriously in this country because a lot of people have fallen victims to lack of knowledge on how to protect their goods or ensure that they get the right remedy when such infringement occurs.

**Typical forms of passing off in Nigeria.**

Everyone has a right to enjoy the benefits of what they create, be it monetary benefit or even simply the goodwill and reputation that comes with it. In a country such as Nigeria, where people have little or no regards for the rights of other people, infringement on the trademark of many people has become of great concern to the public. It is common to see goods in the shops bearing almost same name or trademark or even having similar packages .

The most common form of passing off in Nigeria includes: using a name that closely resembles the name of an existing product, imitating the appearance of the plaintiffs products, producing fake products using the plaintiffs trademark, copying the plaintiff’s advertisement, selling the plaintiffs expired or inferior products thereby causing an injury to the plaintiffs reputation etc.

**Elements of Passing Off.**

1. Misrepresentation
2. Made by a trader in the course of trade
3. To prospective customers of his or ultimate consumers of goods and services supplied by him.
4. Which is calculated/ likely to injure the business or goodwill of another trader.
5. Which causes actual damage to a business or goodwill of the trader by whom the action is brought.

**Remedies:**

1. Injunction: this may be made in a qualified form i.e. restraining the defendant from disposing of his goods without sufficiently distinguishing them from the plaintiff’s.
2. Damages may be granted in respect of losses to the plaintiff.

**Grounds of Passing Off**

The law of passing off is designed to prevent misrepresentation in the course of trade in a business which is likely to confuse the public. Passing off does not confer monopoly rights to any names, get up, marks etc, it does not recognize them as a property in its own right unlike under trademark.

The grounds for passing off includes trading with a name resembling that of the plaintiff, marketing a product as that of a plaintiff, marketing goods with a name resembling that of the plaintiff’s goods, marketing products with the plaintiff’s trademarks or its imitation, imitating the plaintiff’s advertisement or selling inferior or expired goods of the plaintiff as a current stock.

An action for copyright will lie where a defendant is involved in business very similar as a plaintiff and adopts a name which will make the public believe that his business and that of the plaintiff are the same or connected . In the case of *Beecham Group Ltd v. Esdee Food Product Nigeria Ltd* it was held that the trademark ‘glucose-aid’ is calculated to deceive the public in sound in consideration of the trademark ‘lucozade’.

REFERENCES:

1. ESE MALEMI: Law of Torts 2008
2. KODINLINYE and Aluko: The Nigerian Law of Tort
3. LawTeacher.