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THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA.

Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life. Economic torts include:

• Passing off;

• Breach of intellectual property rights;

• Injurious falsehood;

• Interference with contracts;

• Conspiracy to interfere, that, civil conspiracy and much more.

For this essay, the main focus is passing off.

Passing off is described as an unfair competition by **misrepresentation** or literally speaking **"the cause of confusion or deception"**[[1]](#footnote-2)**.** Generally, an action for Passing off arises where the deception is made in the course of trade, which could lead to **confusion** amongst customers. 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. So, passing off is said to be a false representation of one's product as that of another person which deceive the general public into patronizing that product. Where a person uses another person’s name, trademark, and description or uses any other form to take advantage of another person’s goodwill and reputation by making the general public believe that the product belongs to that other person, he is said to have committed the tort of passing off. Passing off is in consonance with the fundamental maxim of **‘ubi jus ubi remedium’** which means when there is a wrong, there is a remedy. In the sense that an unregistered owner of certain goods and services is not without remedy when there is an infringement on his products, trademark, trade name and so on.Lord Parker in the case of **Spalding & Bros v. A.N Gamage LTD** held that the basis of passing off is a false representation of the defendant and it must be proved in every case that a false representation has been made.

Aims of the Tort of Passing Off

The following are what the tort of passing off seeks to achieve in every common law legal system;

1. To enable businesses continue to earn profit and;

2. To protect the right of property that exists in goodwill (i.e. business value).[[2]](#footnote-3)

Elements of the Tort of Passing Off

A claimant needs to establish the following in order to succeed in an action of passing off;

1. Goodwill: The claimant must show the court that there is business value (Goodwill i.e. the attractive force that brings customers) which is attached to the goods and services he produces in a suit for passing off.

2. Misrepresentation: The claimant or plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully (whether intentionally or not) are actually the goods and services of the claimant.[[3]](#footnote-4)

3. Damage: The claimant/ plaintiff needs to show or prove to the court that damage has been suffered due to the belief that the goods and services of the defendant are those of the plaintiff/ claimant. (The Claimant or plaintiff needs to show that the defendant’s activities are intended to deceive the public).[[4]](#footnote-5)

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. The grounds for passing off includes trading with a name resembling that of the plaintiff, marketing a product as that of a the plaintiff, marketing goods with a name resembling that of the plaintiff’s goods, marketing products with the plaintiff’s trademark or imitating the get up of the plaintiff’s product, 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.’[[5]](#footnote-6)

The purpose or relevance of an action for passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as another person’s own. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.[[6]](#footnote-7)

The body responsible for registration of business names in Nigeria is the Corporate Affairs Commission (CAC) and the Companies and Allied Matters Act 2004 (CAMA) is the law that provide the guidelines.

Under Section 579(1) (d) CAMA, a name is prohibited and restricted where it is identical with or similar to a name by which any firm, company or individual is registered under the Act. Additionally, Section 30(1)(a) (d) CAMA, a name is prohibited and restricted where it is identical with that by which a company in existence is already registered, or so nearly resembles that name as to be calculated to deceive or in the opinion of the commission would violate any existing trade mark or business name registered in Nigeria. Where a name is found to be prohibited or restricted in line with the sections discussed above, the remedy available to the aggrieved company/business name owner is to apply to the CAC to compel the defaulting company to change its name. However, under Section 31(1) CAMA, the time limit within which CAC can compel a company to change its name is 6 months from the date the offending name was registered.

CONCLUSION

The law of passing off was created under the common law to protect individuals who own businesses. Passing off protects the plaintiffs business reputation. There are bodies under the Nigerian law that protect brands or trademarks. As mentioned in the essay, Section 30 (1) (a)(b) of the Companies and Allied Matters Act 2004 (CAMA) which provides that a name is prohibited where it is identical or similar to any firm or individual registered under it. This act protects duplication. Although these bodies were created to prevent passing off, there are scenarios and cases where a person uses a very similar name to that of an already existing business as noted in the cases for examples the likes of adadis instead of addidas, Vans of the win, Nika instead of Nike and so on. Passing off is relevant in Nigeria. Passing off applies to both tangible and intellectual property as established in this essay.

Bibliography

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