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Assignment

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

INTRODUCTION

We can’t talk about passing off without mentioning Economic Torts. Economic torts are torts which inflicts mainly economic losses. In other words, economic torts are torts which inflict financial losses or injury. Economic torts occur mainly in the economic, commercial or business sector of life. Economic torts are many and include:

1. Passing off,
2. Breach of intellectual property rights; such as breach of copyright, patents, trademark and other merchandise marks,
3. Injurious falsehood,
4. Interference with contracts,
5. Conspiracy to interfere; that, civil conspiracy and so forth.
6. PASSING OFF

Passing off can be described as a common law tort which can be used to enforce trademark’s rights. It is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one’s products, or the carrying on of one’s business as if it were that of another person whose reputation and goodwill one thereby enjoys[[1]](#footnote-2). Whenever a person sells his goods, carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill, he commits the tort of passing off. An action lies in passing off for damages, an account, for profit and seizure of the products and an injunction to restrain the defendant from continuing to do so in the future. 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”[[2]](#footnote-3). According to Lord Diplock, the three key elements of passing off are: goodwill owned by a trader, misrepresentation and damage to goodwill.

THE COMMON FORMS OF PASSING OFF

The tort of passing off is committed in a various forms, as businesses resort to different strategies in imitating the products and business of the rivals. The common forms of passing off which are easily noticed in the market are:

1. 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 ***Hendricks v. Montague[[3]](#footnote-4),*** it was held that ‘Universal Life Assurance Society’ and ‘Universe Life Assurance Association are very likely.
2. Marketing a product as that of the plaintiff: It is actionable passing off for the defendant to sell his gods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not. ***Lord Byron v Johnston[[4]](#footnote-5)***, the defendant publishers were restrained from advertising and selling a book of poems with the name of Lord Byron written on the cover and title page, when in fact the famous poet was not its author.
3. Marketing goods with a name resembling that of the plaintiff’s goods: It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendant’s products are mistaken as made by the plaintiff and are brought as the product of the plaintiff.
4. Marketing products with the plaintiff trademark or its imitation: It is 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 products thinking that they are the products of the plaintiff. ***Perry v Truefitt[[5]](#footnote-6),*** the 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.
5. Imitating the appearance of the plaintiff’s product: It is passing off for the defendant to do anything which makes his products appear like the plaintiff’s products[[6]](#footnote-7). This includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public example, general appearance, package, label or design of the product. ***U.K Tobacco Co. Ltd v. Carreras Ltd[[7]](#footnote-8),*** the defendants who were marketing cigarettes called “Barrister” were restrained from imitating the appearance of the plaintiff’s cigarettes called “Band Master”.
6. Selling inferior or expired goods of the plaintiff as current stock: It is passing off for a defendant to sell inferior or expired goods/products of the plaintiff as current stock, where such has been discarded by the plaintiff.
7. Imitating the plaintiff’s advertisement: 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 capable of misleading the buyers to patronize the defendant’s goods as those of the plaintiff[[8]](#footnote-9).

RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN 21st CENTURY NIGERIA

The significance of passing off cannot be denied in 21st Century Nigeria. In Nigeria, a cause of action in “passing off” forms part of the several aspects of the Common Law and the doctrines of Equity that were received from England into the colony of Lagos[[9]](#footnote-10). In Nigeria, as elsewhere, the major purpose underlying the tort of “passing off” is the protection of an established trade goodwill already acquired by a trade mark or trade name. This is the main path by which an unregistered client can secure his rights. It is often used as an alternative remedy to trademark infringement. An action for passing off is a common law remedy and the claimant need to establish title for same but must show that the goods/services have distinctive features. Passing off is not only a common law origin but also has statutory basis as it is statutorily supported by ***Section 3 of the Trademarks Act***[[10]](#footnote-11) which provides that: *No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as goods of another person or the remedies in respect thereof.* The above connotes that a passing off action instituted when a mark isn’t registered is both supported by common law and statutory back up, thus giving effect to the legal maxim “There is no law without a remedy”. In ***Omnia (Nig.) v Dyktrade Ltd[[11]](#footnote-12)*** a 2007 decision, it was held that the Federal High Court has Exclusive jurisdiction to hear and determine a claim for Passing off whether the claim arises from the infringement of a registered or unregistered trade mark[[12]](#footnote-13). Passing off enables businesses continue to earn profit and also protect the right of property that exists in goodwill (business value)[[13]](#footnote-14). It is also designed to protect traders against unfair competition acquired by false or misleading information and to prevent a rival trader from benefitting from the reputation already achieved by a trader. In essence, “A man may not sell his own goods under the pretence that they are the goods of another man. Passing off is normally appropriate for the protection of unregistered trademarks or marks whose validity is questioned. It prevents one trade from damaging or exploiting the goodwill and reputation built up by another. It remains the only form of protection for themes e.g advertising which are not capable of specific representation and also descriptive words. It helps to prevent others from using the goodwill associated with your business for their own benefit. For cases involving false endorsement and things such as unauthorized images of celebrity on merchandising, the common law tort of passing off may be the only course of action. It gives a trader an opportunity to acquire protection through the use of a brand name, logo or trade name or indeed any symbol which has been used in the course of trade to indicate the origin of goods in such a way that it has achieved public recognition. It protects consumers and the business concern of the offending trader from the effect of confusion on the goodwill in trade[[14]](#footnote-15).

REMEDIES

The following reliefs/remedies can be claimed in a Passing off action as follows:

1. Injunction: This is an order of the court to prohibit or suspend the use of the mark.
2. Damages: Damages here could be general, special or punitive. It may be granted in respect of losses to the plaintiff.
3. Account to profit: Here the plaintiff is entitled to profit on goods wrongly sold by the infringer.[[15]](#footnote-16)

DEFENCES

The defences available against a claim of Passing off include the following:

1. Consent of the plaintiff to the use of the name, mark, sign or slogan.
2. That the plaintiff’s name, mark, sig has become generic/common place.
3. Dissimilarities in the mark of the plaintiff and defendant.
4. Innocent usage of the plaintiff’s name.

CONCLUSION

The tort of passing off is 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 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 complexities of passing off will be expected. The tort of passing off is common in a competitive business community or economy. The tort of passing off is designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons.[[16]](#footnote-17) Its object is to protect the reputation and goodwill a business has built for itself. It protects the attractive force of the business which brings customers to it. The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business. It is therefore my recommendation that the necessary framework for passing off actions be strengthened to defend the goodwill of business reputation. Thousands of instances of passing off can be found out throughout Nigeria right from clothing materials to beverages, toothpaste, pencils to pens, you name it, you find it. Therefore, passing off is very much relevant as a form of economic tort in 21st Century Nigeria.

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