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LAW OF TORTS II-LPB 302

**ECONOMIC TORTS- Discussing the relevance of passing off as a form of economic torts in the 21st century Nigeria**

In modern Nigeria, businesses try to mislead the public by selling their goods or carrying their businesses in such a way that it resembles a rival business or company. These businesses do this in order to sell their products to the general public. They would replicate a rival business’ style of product or brand name with barely noticeable distinctive features and in doing so, the consumer would hardly tell any difference at first glance unless proper examination of such item is carried out.

The tort committed by these businesses is the tort of passing off. Passing off is the tort of selling goods or carrying on a business in a manner that would delude the public that such product or business which belongs to the defendant is that of the plaintiffs.

 Black’s law dictionary explains that deception used by these companies is achieved by "...imitating or counterfeiting the name, title, size, color scheme, patterns, shape or distinctive peculiarities of an article. It can also occur by imitating the shape, color, label, wrapper or general appearance of the package in such a way as to mislead the general public or deceive an unwary purchaser."

For instance, going into a shop to buy seasoning cubes that you are used to which is normally labeled “Maggi” and you see cubes what have the same style with the ones you buy usually but it is labeled “Majji” That was an attempt from that company to impersonate the original brand. Such attempts are frustrating to the original companies so the tort protects the goodwill of these from misrepresentation.1[[1]](#footnote-1). This tort is actionable under the law of unfair competition which applies to wrongful and fraudulent rivalry in commerce.

Passing off takes place in various forms. The first is when the defendant attempts to market their product as that of the plaintiff’s. Giving an instance, if a person is marketing their product as another product that does not belong to them. An example is trying to sell your toothpaste as “Close Up” toothpaste which is a popular brand. Passing off your product as that brand would make the public want to buy it thereby misleading them.

Another form of passing off is operating under a trade name that closely resembles that of a rival company in order to delude the general public into buying that product[[2]](#footnote-2)  This will not be recognized unless there is precise examination of the product that is being passed off. The reason companies do this is to make the public think that both products are the same. In that case of **Ogunlende v. Babayemi**, Taylor C.J. granted an injunction restraining the defendant from operating under a trade name that was similar to the plaintiffs.

Marketing goods under a trade name already appropriated for goods of that kind is another form of passing off.

Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such a mark. Trade marks protect intellectual property rights to protect counterfeiting and infringement[[3]](#footnote-3). Registered trademarks receive protection under the Trade Marks Act 1965, s4[[4]](#footnote-4).

Imitating the appearance of a rival’s goods in order to confuse the consumers buying that product.

In order for one to bring an action for passing off, there are elements that should exist. These elements are

1. Goodwill
2. Misrepresentation
3. Damage.

GOODWILL:

The plaintiff should be able to prove to the court that they have a reputation acquired from that product or business that needs protecting that is the goodwill of the owner. “The benefits and advantages of a good name, reputation, and connection of a business. It is the attractive force which brings in customers”[[5]](#footnote-5)

MISREPRESENTATION:

The plaintiff has the burden to prove that the defendant deluded the public and caused confusion with their product. It should be shown that there was misrepresentation done by the defendant to pass off their product or business as the plaintiff’s. It is not necessary to prove that there was an intention to mislead[[6]](#footnote-6).The court will be left to decide if the products are similar in nature or not

DAMAGE:

Merely proving the existence of goodwill and misrepresentation is not enough in order for this action to ensue. After proving the elements mentioned above, the plaintiff has to prove that the misrepresentation caused damage to his reputation. They must be able to show the court that they have suffered a loss from that misrepresentation. It must have caused suitable harm to their business. The plaintiff does not need to prove actual or special damage; real or tangible probability of such damage will suffice. However, the damage must be reasonably foreseeable. In such instances, the court must use common sense in determining the case based on the evidence provided and judicial discretion in opposition to witnesses.[[7]](#footnote-7)

Once these three elements have been successfully proven by the plaintiff and considered by the court to be reasonable then an action of passing of can ensue. The defendant will be liable for the tort.

After the success of the claim, the plaintiff is entitled to remedies;

1. The plaintiff can apply for an injunction that will be given to the defendant restricting them from using the goodwill of the plaintiff.
2. Damages will be awarded to the plaintiff due to the loss suffered by them. The defendant will acquire liability and will have to give lost profit.

However, the defendant may have a few defenses against this action brought by the plaintiff. Consent can be used as a defense. If the defendant is able to prove that the plaintiff gave them the permission to use their design or any element that relates to their work, he will be absconded from liability.

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