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MATRIC: 17/LAW01/209

COURSE: LAW OF TORT

TOPIC: ECONOMIC TORTS

Question: Discuss the relevance of Passing off as a form of economic tort in the 21st century Nigeria.

Answer: Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic Torts are torts that provide the common law rules on liability which arises out of business transactions such as interference Economic torts occur mainly in the economic, commercial or business sector of life. Economic torts includes:¹

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 being projected was the same as a well known brand is a wrong and is known as the tort of “passing off”.

Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage. The Duhaime'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.

It was held in the famous case of *N. R. Dongre v Whirlpool Corporation*

“A man may not sell his own goods under the pretence that they are the goods of another man.”

Law aims to protect traders from this form of unfair competition.

The tort of passing off covers those cases where one trader falsely misrepresents his goods as those of another trader/brand, which has a good reputation/goodwill in the market and thus leads to damaging his goodwill. In a passing off action, the plaintiff

¹ N.R DONGRE v Whirlpool Corporation

must prove that there is a similarity in the trade names or marks and that the defendant is passing off his goods as those of the plaintiff's.

Passing off is incredibly important as an activity of encroachment under Trademark gives insurance just or enrolled products and enterprises, however in the event of going off activity, assurance is accommodated unregistered merchandise and ventures. It is a statutory solution for distortion of enrolled products and enterprises and harms emerging out of that. In an activity for encroachment of an exchange mark, title of the offended party over the trademark is set up by giving proof of enrollment of the title while under a going off activity, title is set up by the proof of altruism and notoriety of the business carried on by the utilization of an identification, mark or another image.

As the fundamental point of the case of going off under torts is to keep up the reasonable challenge in the market and anticipate any harm to the altruism or notoriety of a business because of distortion, it gets critical to check whether any business is directed so that it causes profound disarray inside the brains of its customers.

Hendricks v. Montagu²

The plaintiffs, the "Universal Life Assurance Society" brought an action against the defendants to stop them from carrying on business with the trade name "Universal Life Assurance Association". The injunction sought was granted and it was mentioned that since the names were too similar for differentiation, the tort of passing off was indeed committed.

J Bollinger v Costa Brava Wine Co. Ltd.

Popularly known as the Spanish Champagne case, this particular case saw an action being brought by twelve biggest champagne manufacturers of France, on behalf of every champagne manufacturer in their country, seeking injunctions on use of the word "champagne" while describing Spanish wine, and passing it off as champagne.

An injunction was granted.³

There are two types of passing off, which are:

1. extended passing off – where a misrepresentation as to the particular quality of a product or service causes harm to another's goodwill.

² Hendricks v Montagu

³ J Bollinger v Costa Brava Wine and co

2. reverse passing off - where a trader markets another business' goods or services as being his own.

Elements of passing off are:

To establish a claim for passing off, you must meet three key requirements:

1. Goodwill - you must prove that you own a 'reputation' in the mark that the public associates with your specific product or service.
2. Misrepresentation- you must show that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours.
3. Damage - you must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss.

Remedies for passing off

If you are successful in a passing off claim, there are several remedies available. You can:

1. Apply for an injunction to prevent the business from using your trade mark or goodwill
2. Apply to have the infringing goods destroyed
3. Sue for damages or seek account for lost profit
4. Request an inquiry to establish loss

Passing off and Trademark Infringement:

It is necessary to state that Passing off and trademarks infringement go hand in hand and are very similar in nature. Whilst, Passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark. This means that a mark, brand, design, name must be registered as a trade mark before one can make a claim on trade mark infringement.

Another distinction is, whilst an action for infringement of trade mark is a statutory remedy conferred on the owner of a registered trade mark, for the enforcement of a right to use the trade mark in relation to the goods/services for which the mark has been registered; an action for Passing off is an action against the deceit on the colourable imitation of a mark adopted by a person/company in relation to goods/services which

has acquired a distinctive reputation in the market and is known as belonging to or produced by that person/company only.

An action for Passing off is a common law remedy and the claimant need not establish title for same but must show that the goods/services have distinctive features.

It is arguable to state that Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by **Section 3 of the Trademarks Act** 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 the goods of another person or the remedies in respect thereof”.

The above connotes that a Passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim “There is no law without a remedy”.

In the case of *Trebor Nigeria Limited v Associated Industries Limited*, Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Mint Super mint claiming that the wrapper used to package the product by the Defendant was similar to that of the Plaintiff and that they were guilty of Passing off their products like that of the Defendant. The Defendants raised dissimilarities in the two products as a defence to the action, the Judge however found the Defendants liable for Passing off their products as that of the Plaintiff. In this instance Passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same.⁴

Also, in the case of *Niger Chemists Limited and Nigeria Chemists*, the Plaintiff had an established chemist business using the name “Niger Chemist” while the Defendants established the same business on the same street with the Plaintiff using the name “Nigeria Chemist”.⁵ The Plaintiff sued the Defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The Court agreed with the Plaintiff and granted an injunction against the Defendant on the use of the name. In this instance Passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a

⁴ Trebor Nigeria Limited v Associated Industries Limited

⁵ Niger Chemists Limited and Nigeria Chemists

business relationship between the two.

In conclusion, the purpose 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 that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.

BIBLIOGRAPHY

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2. Samuel G, *Cases and materials*. [published by Sweet and Maxwell, 2008]
3. Black. C, *Black's Law Dictionary* [1860 - 1927]