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DEPARTMENT: COLLEGE OF LAW

COURSE CODE: LPB 302

COURSE TITLE: LAW OF TORTS

LEVEL: 300 LEVEL

ASSIGNMENT

Discuss the relevance of passing off as a form of economic torts in the 21st century Nigeria.

OUTLINE

- Discuss economic torts.
- Broadly discuss passing off.
- Explain the relevance of passing off in the 21st century.

INTRODUCTION

This writer will examine the general understanding of economic torts and passing off as a form of it.

Economic Tort: Economic torts gives the protection for an individual business from certain behaviors' which is considered by the law to be wrong and intolerant. Economic torts, which are also called business torts, are torts that provide the common law rules on liability which arises out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss. Economic tort recognizes the personal integrity or property of one's business. An Economic tort is a tort that protects the current economic circumstances of a client or of a business it helps the finances of such business and prevents fraudulent misrepresentation of a person's business from running into financial crisis. Economic torts therefore protect people from interference with their trade or business. In the case of mogul **Steamship co ltd v McGregor, Gow& CO**¹ the plaintiffs argued they had been driven from the Chinese tea market by a shipping conference that had acted together to under price them. But this cartel was ruled lawful and nothing more than a war of competition waged in the interest of their own trade. Economic torts include

1. Passing off
2. Breach of intellectual property rights such as breach of copy right, patents trademarks and other merchandise marks.
3. Conspiracy
4. Injurious falsehood/malicious falsehood

¹ Steamship co ltd v mcgregor, Gow& co

5. Interference with contracts

PASSING OFF: The economic torts of passing off is committed when in a competitive business environment, a person adversely affects the plaintiffs business interest by marketing his goods as that of the plaintiffs business.² The tort of passing off recognizes and protects the proprietary right in business. Passing off is described as an unfair competition by misrepresentation or literally speaking the cause of confusion or deception. Generally, an action of passing off arises where the deception is made in the course of trade which could lead to confusion amongst customers. Passing off is the act or an instance of falsely representing ones own product as that of another in an attempt to **deceive potential buyers**³. Passing off is actionable in tort under the law of unfair competition. The **Duhaime 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.

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/service have a distinctive features. We can therefore say that passing off is a common law and statutory remedy in Nigeria as it is statutorily supported by **Section 3 of the Trademarks Act**⁴ 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.’

² B.A. Susu, supra note 5 at 317. David Baker, supra note 3 at 278

³ Black’s Law Dictionary Ninth Edition

⁴ Trademark Act (1999)

The above connotes that a passing off action instituted when a mark is not registered is both supported by common law and statutorily 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**⁵, Trebor Nigeria limited the makers of Trebor peppermint brought an action against associated industries limited the makers of Minta 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 defendant raised dissimilarities in the two products as a defense to the action, the judge however found the defendant liable for passing off their products as that of the plaintiff.

However, the reasoning and opinion of Nnamani J.S.C, Uwais J.S.C the chief justice of Nigeria at the time and Mohammed J.S.C in the 2003 case of **Ayman Enterprises Limited V Akuma Industries Limited &Ors**⁶ was that, a passing off action for an unregistered trade mark should not be instituted in the federal high court but a state high court as the right of action in a passing off did not arise from the infringement of any federal enactment and so may only be a common law right but that the federal high court has jurisdiction over passing off claim arising from the infringement of a trade mark only if the trademark allegedly infringed was registered. Also in the dictum of SANYAOLU J. in **Ayman Enterprises Limited V Akuma Industries Limited &Ors** it was held that “the rights upon passing off accrue to one who can show goodwill or reputation linked to his mark and that misrepresentation and damage usually flow from a finding of an assault on the plaintiff goodwill”.

A proper illustration for this is that when the unlawful act of passing off occurs when X misrepresents that his goods or services are the same as Y’s. To be successful in a passing off claim, Y must show that (1) he has a reputation in the goods or services, (2) that X has misrepresented to the public that it’s goods or services are the same as his

⁵ (1972) NNLR 60
Trebor (Nig) Ltd v. Associated Industries Ltd

⁶ (2003) LPELR-SC.116/1999
Ayaman Enterprises Limited V. Akuma Industries limited &Ors

and that (3) due to this misrepresentation, Y has suffered damages. The tort of passing off is embedded in the world of commerce.

ELEMENTS OF PASSING OFF

The three fundamental elements of passing off are Reputation, Misrepresentation and Damage to goodwill. These three elements are also known as **classical trinity**, as restated by the House of Lords in the case **RECKITT&COLMAN LTD V BORDEN INC**⁷. It was stated in this case that in a suit for passing off the plaintiff must establish firstly, goodwill or reputation attached to his goods or services. Secondly he must prove a misrepresentation by the defendant to the public i.e. leading or likely to lead the public to believe that the goods and services offered by him are that of the plaintiff. Etc.

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

The relevance of an action for passing off in the 21st century today will be explained accordingly. It's relevance can be said 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 business as that of another. The relevance of passing off actions can be said to strengthen to defend the goodwill and reputation of businesses. Its roots are in an age when customers patronized local specialty shops. In the 21st century today it's operates in a world of ecommerce operating across national boundaries. The relevance of the law of passing off cannot be over emphasized as it is seen as a way to prevent one person from misrepresenting his or her goods or services as being the goods and services of the claimant and it is relevant because it prevents

⁷ Rockitt& Coleman products Ltd V. Borden Inc (supra)

one person from holding out his or her goods or services as having some association with the plaintiff when it is not true. In Nigeria passing off can be said to be useful to assert at the outset that, the preeminence of the tort of passing off is the protection of both consumers and the business concern of the claimant from the activity of the offending trader from the effect of confusion on the goodwill in trade. 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 trademark or trade name.

Finally, it is clear that in Nigeria due to lack of adequate codification of the principles relating to passing off the common law provision on passing off are wider than the protection endowed under the trademark act.

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