

Name: Onomite Erutejiri Temiloluwa

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

## **What is Economic tort?**

An economic tort is injury to a person's business or business interest that results in damages. Economic torts are tort which inflict mainly economic losses or financial injury. Economic tort occur mainly in the economic, commercial or business sector of life. Economic torts, which are also called business torts, are torts that provide the common law rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss. Economic torts protect people from interference with their trade or business. The area includes the doctrine of restraint of trade and has largely been submerged in the twentieth century by statutory interventions on collective labour law, modern antitrust or competition law, and certain laws governing intellectual property, particularly unfair competition law. The "absence of any unifying principle drawing together the different heads of economic tort liability has often been remarked upon."<sup>1</sup>The aim of economic tort law is to protect the wealth of individuals who conduct a trade. Plaintiffs often file these tort claims as secondary claims, and the primary claims are often based on tort, contract, or other laws. Economic torts include:

- Passing off,
- Injurious falsehood and trade libel (see also Food libel laws),
- Conspiracy to interfere; that, conspiracy and so forth
- Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks
- Tortious interference with contract (such as interference with economic relations or unlawful interference with trade),

## **What is Passing off?**

Passing off is a 'civil wrong' or tort connected to intellectual property, which sometimes involves one trader misrepresenting the goods or services they're selling as being those of another trader, or vice versa. Also, the selling of goods or carrying on of business under a name, description or mark in such a way as to mislead the public or consumers into believing that the goods or business is that of another person is passing off<sup>2</sup>. Passing off can cost your business dearly and enforcing

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<sup>1</sup> p 509 Markesinis and Deakin's Tort Law (2003 5th Ed.) OUP)

<sup>2</sup> R. F. V. Heuston, Salmond on the Law of Torts (16th edition, Sweet & Maxwell London, 1973) 408.

against an infringer can be difficult if you don't have formal intellectual property protection. The essence of passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant's product or business is that of the plaintiff, and the "law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders"<sup>3</sup>. Another way to put it is, whenever a person sells his goods, or carries on his business under a name, trademark, and 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.<sup>4</sup>

Passing off is governed by the civil law, and usually takes place in the business world where a misrepresentation is made by one party which damages the goodwill of another party, sometimes causing financial and or reputational damage. Passing off applies to both tangible and intellectual property.

## **Elements of the Tort of Passing Off**

To succeed in a claim for passing off, a plaintiff needs to establish the following;

- Goodwill
- Misrepresentation
- Damage

## **GOODWILL**

Goodwill is described in the case law as "the attractive force that brings in the custom". It is in effect, the ability of a particular brand to persuade customers to purchase goods or services by identifying them as originating from a particular business. The plaintiff must first prove that they have established the necessary **goodwill**. The claimant must show the court that there is business

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<sup>3</sup> Salmond op. cit. para 149

<sup>4</sup> Niger Chemists Ltd v Nigerian Chemists (1961) All NLR 171. Bollinger v Costa Brava Wine Co (1960) Ch 262. Reckitt & Coleman v Borden (1990) 1 All Er 873.

value which is attached to the goods and services he produces in a suit for passing off. Passing off claims often concern misuse by the defendant of a name, mark or get-up.

### **MISREPRESENTATION**

The 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<sup>5</sup>. The plaintiff must show that the trader misled the customers into believing that their goods and services are actually yours. The plaintiff must prove that in the course of trade, the defendant made a representation that confuses, deceives or is likely to confuse or deceive the public.

### **DAMAGE**

To succeed in a passing off claim, the claimant has to show that the misrepresentation by the defendant caused damage to their goodwill or that damage to the claimant's goodwill is reasonably foreseeable. The first and most obvious instance is where the claimant has lost sales as a result of the Defendant's misrepresentation.

### **Relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria.**

21st century Nigeria in a global internet age has witnessed considerable internet commercial activities and all its appurtenance such as the ownership, creation, and operation of important names and trademarks. The tort of passing off is very important in the life of a society, individual person in a society has the right to life and the right to engage in any legal kind of economic activity to sustain the kind of life style that the individual has chosen.

In 21<sup>st</sup> century Nigeria, the tort of passing off protects business names, names of product, and trademarks among others. It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business. Anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable for the tort of passing off. In Nigeria we have Trade Mark Act and Merchandise Marks Act which governs business in Nigeria and ensures that an individual's business is not misrepresented or passed off, the law is that where there is a wrong, there is a remedy.

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<sup>5</sup> Michael Carter, 'How to prove "Passing Off"', (Mondaq 13 December 2017)

No individual likes to buy a trusted product and then realize it is an identical brand made to look exactly like what you originally wanted, The worst part of this problem is that the difference is not obvious and might not be noticed immediately, especially when it is of the same specification and supposedly does the same function for what was requested for. This is a big issue especially in Nigeria where goods on the store shelves are not properly labelled.

A case under this is **Trebor Nigeria Limited v. Associated Industries Limited**<sup>6</sup>, Trebor Nigeria Limited who are the makers of Trebor Peppermint, brought an action against Associated Industries Limited, the makers of Minta Supermint. They claimed 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.

Another case is **Niger Chemists Limited v Nigeria Chemists**<sup>7</sup>, 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". 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 business relationship between the two.

## **Conclusion**

The main relevance and purpose of the tort of passing off is to protect a person's business interests from the unfair trade practices and sharp practices of other persons. It is also to protect the

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<sup>6</sup> (1972) NNLR 60

<sup>7</sup> (1961) ANLR 180

reputation and goodwill a business has built up for itself. In Nigeria, the tort of passing off also protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business.

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