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

We will start off with explaining the essence of passing off. It can said to be 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 what the law has to say about this is that the 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.

According to Lord Kingdown, in the case of ***Leather Cloth Co v. American Leather Cloth Co.***he said that “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”.

Where passing off is proved by the plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong, also he can claim damages for any loss he has incurred thereby and to an account of the profits made by the defendant in consequence of the tort, that is the passing off. Passing off takes various forms, the most common of which are the following:

MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff, when the truth and the fact of the matter is that the goods are not. For example, it would be passing off for *X* , a manufacturer of tyres, to advertise and sell his tyres as ‘*Dunlop’* or ‘*Michelin’* tyres or A, a marketer of cosmetics, markets their products and sells as products as ‘*M.A.C’ or ‘MaryKay’* or Mr. C markets his new detergent as ‘*Sunlight’ or ‘Omo’*, because obviously it would be an attempt to profit from the good will and reputation established by the rival businesses.

Similarly, it is also actionable for a book publisher to advertise and put on sale a book with poems and use the name Shakespeare on the title page when Shakespeare had nothing to do with the poems or the authorship.

TRADING UNDER A NAME SO CLOSELY RESEMBLING THAT OF THE PLAINTIFF AS TO BE LIKELY TO MISLEAD THE PUBLIC INTO BELIEVING THAT THE DEFENDANT’S BUSINESS AND THAT OF THE PLAINTIFF ARE ONE AND THE SAME.

A popular example of this type of passing off is ***Hendriks v. Montagu,*** where the universal Life Assurance Society were granted an injunction restraining the defendant’s company, which was incorporated subsequently, from carrying on business under the name”Universe Life Assurance Association”. James L.J asked if their was a similarity between the two names that would ordinarily course human affairs to be confounded with others? He also asked if people who heard the Universal would be misled into going to the Universe? He then said that speaking for himself he would most likely indeed be misled. This is because many people do not care to bear in mind exactly the very letters of everything they have heard of.

The principle in ***Hendriks v. Montagu*** was applied in ***Niger Chemists Ltd v. Nigeria Chemists.*** In this case the plaintiff had carried on business as chemists and druggists for several years and had several branches in Onitsha and other towns in what was then Eastern Nigeria. The defendants later founded a firm carrying on exactly the same type of business in Onitsha under the name “ Nigeria Chemists “. The plaintiffs contended that the defendants’ use of a name very similar to their own was actionable passing off and they sought an injunction to restrain it’s further use. Palmer J. granted the injunction, based on the fact of the name’ Nigerian Chemists ‘ he said it was calculated to deceive people who know of and intend to deal with Niger Chemists.

Similarly, in the case of ***Ogunlende v. Babayemi,*** the plaintiffs carried on business as civil engineering contractors and plumbers under the name ‘Mercury Builders’, Taylor C.J granted an injunction restraining the defendant from conducting a similar business under the name ‘Mercury Builders (Nigeria) Ltd’ on the bases that since “there can be doubt at all that the name of the defendant company is calculated to deceive due to it’s similarity with the name of the plaintiff association”.

3. MARKETING GOODS UNDER A TRADE NAME ALREADY APPROPRIATED FOR GOODS OF THAT KIND BY THE PLAINTIFF, OR UNDER A NAME SO SIMILAR TO THE PLAINTIFF’S TRADE NAME AS TO BE MISTAKEN FOR IT.

A trade name is one under which goods are sold and which by established usage has become known to the public as indicating that those goods are the goods of that person. So the defendant knowing that the plaintiff’s trade name is a big name and really sells would then also start advertising or marketing his own goods with the trade name of the already known name and people would buy it because in their own opinion the product is trusted seeing that it is being sold under a trusted trade name. For example, Mr. X has a new cereal he wants to put in the markets called Milky Stars since it is new and no one knows it the product might not sale, so Mr. X decides to sale Milky stars as a product under the trade new Kellogg’s because he knows that everyone knows this brand name and trusts it. What Mr. X has done is passing off because Kellogg’s had no hand in the production of Milky Star.

4. MARKETING GOODS WITH THE TRADE MARK OF THE PLAINTIFF OR WITH ANY DECEPTIVE IMITATION OF SUCH MARK.

A trade mark is any design, picture, mark or other arrangement affixed to goods which identifies those goods with the plaintiff or manufacturer or seller. Trademarks receive protection not only under the law of passing off but also, if registered, under the Trade Marks Act 1965, under which most actions are brought. So if the defendant uses any picture, design or mark that has already been designated to a particular brand or product on his own product this act will be seen as passing off.

In the case of ***Erven Warnink v. Townend*** 3, Lord Diplock gave the elements of the passing off action. They are as follows:-

1. Misrepresentation
2. It is made by a trader in the course of trade
3. To prospective customers of his or ultimate consumers of goods and services supplied by him.
4. It is also calculated or likely to injure the business or goodwill of another trader.
5. It causes actual damage to a business or goodwill of the trader by whom the action is brought.

In the case of ***Reckitt & Colman Ltd V. Borden inc***. It was stated that the three fundamental elements of passing off are Reputation, Misrepresentation and Damage to goodwill. These three elements are also known as the CLASSICAL TRINITY, as restated by the House of Lords. They 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. Lastly, he must demonstrate that he has suffered a loss due to the belief that the defendant’s goods and services are those of the plaintiff’s. This was back in day but the modern elements are stated above this paragraph.

For every problem or in law ‘tort’ there must be some remedies put together and in the case of passing off the remedies include;

1. Injunction: this may be made in a qualified form that is restraining the defendant from disposing of his goods without sufficiently distinguishing them from the plaintiff’s
2. Damages: may be granted in respect of losses to the plaintiff.
3. Interim injunction if you need to act quickly
4. An enquiry to establish loss

 To discuss Passing Off as a relevant Economic tort, we would have to dwell a bit on what exactly Economic tort deals with. It offers protection to a person’s trade or business from acts which the law considers to be unacceptable or unlawful. Economic tort seeks to ensure that businesses are protected from acts of unacceptable interference. They are torts which administer to financial losses or injury.

In the 21st century Nigeria the number of cases concerning this tort has increased over the years and has created awareness to the lawful nature of this tort thereby increasing awareness to the act of passing off seeing as it is an economic tort. In the case of ***Trebor Nigeria Limited v. Associated Industries Limited,*** Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Association industries Limited the makers of Minta Super mint claiming that the wrapper used to package the product by the Defendant was the 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. 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 relevance of passing off as an economic tort in the 21st century is that is enforces honesty in the conduct of business dealings in Nigeria. Because before the increase of awareness of the economic tort a lot of business dealers thought that they could steal other peoples business ideas and get away with it but the economic tort has but in place remedies for those that their businesses have suffered any financial injury or the act has in any way confused or deceived consumers causing them loss. We can see this in the case of ***Continental Pharmaceutical Ltd v. Sterling Products Nigeria Plc and SmithKline Beecham Plc.*** The plaintiff and defendant was a in a legal battle for 16 years, the plaintiff who were the manufacturers of a registered trademark comprising the eclipse logo with blue and white package design with the words ‘Conphamol’, brought an action against the defendants for allegedly infringing on the salient features in the packaging of Conphamol substituting only the words ‘Panadol’ and ‘Panadol Extra’ in the same style and font.

The plaintiff provided evidence that showed they had registered Conphamol in Nigeria following prior search for conflicting marks at the Trademarks registry. The 1st defendant filed a counterclaim alleging that it was licensed by the 2nd defendant, Smithkline Beecham, owners of the world known eclipse device with the words ‘Panadol’ inscribed on it.

At the end of it all, Justice James Tsoho of the Federal High Court, awarded N500 million against the defendants as damages for passing off and for infringing on the plaintiff’s registered trademark Conphamol.

Generally, we can see from the above cases that the breach of Economic tort is unlawful and causes financial injury to the companies that suffer from this act but because the economic tort has been introduced in the 21st century the companies that suffer loss can be compensated by damages. Damages can be either compensating or punitive. Compensatory is the sense that they pay for the injuries caused to the company and Punitive meaning that they are punished for the act that they have done. Because the economic tort has increased awareness people are prone to staying away from engaging in this act because of the remedies that have been put in place.

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.

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