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LAW OF TORTS 2

LPB 302

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

Passing off is a wrong, common law tort which protects the good will 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.

Also passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. The action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage. In addition to the straight passing off, there can also be

- 1) Extended passing off-where a misrepresentation as to the particular quality of a product or service causes harm to another goodwill
- 2) Reverse passing off- where a trader markets another business's goods or services as being his own.

As 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

Typical forms of passing off in Nigeria

Everyone has a right to enjoy the benefits of what they create, be it monetary benefits or even simply the goodwill and reputation that comes with it. In a country such as Nigeria, where people have little or no regards for the rights of other people, infringement on the trademark of many people has become of great concern to the public. It is common to see goods in the shops bearing almost the same name or trademark or even having similar packages. The most common forms of passing off in Nigeria includes : using a name that closely resembles the name of an existing product, imitating the appearance of the plaintiff's products, producing fake products using the plaintiffs trademark, copying the plaintiffs advertisement, selling the plaintiffs expired or inferior products thereby causing an injury to the plaintiffs reputation etc.

Another problem that is quite difficult to ascertain what exactly constitutes goodwill when suing for an action in passing off. Goodwill is an important element in succeeding in an action of passing off, however, the existence of goodwill alone will not be enough to fulfil the other ingredients required for the tort of passing off. The House of Lords in the case of IRC v. Muller Margarine described goodwill in relation to the tort of passing off as the benefits and advantage of the good name, the reputation and connection of a business. It is the attractive force which brings in custom. There is also the problem of jurisdiction. For the past decades an important 9'whether Federal High Court and State High court could assume exclusive or concurrent jurisdiction in passing off? And the circumstances, if any that would surround them. Even though this issue appears to be straightforward, it is a little more complicated than expected.

Grounds of passing off

The grounds for passing off includes trading with a name resembling that of the plaintiff marketing a product as that of the plaintiff, marketing goods with a name resembling that of the plaintiffs goods, marketing products with the plaintiffs trademark or its imitation, imitating the plaintiffs the get up of the plaintiffs product, imitating the plaintiffs advertisement or selling inferior or expired goods of the plaintiff as a current stock. An action for copyright will lie where a defendant is involved in business very similar as a plaintiff and adopts a name which will make the public believe that his business and that of the plaintiff are the same or connected. In the case of Beecham Group Ltd v. Esdee Food Product Nigeria Ltd it was held that the trademark glucose-aid is calculated to deceive the public in sound in consideration of the trademark Lucozade.

Elements of passing off

There are three elements of passing off known as the classic trinity. These elements as laid down by LORD OLIVER from Lord Diplock's five elements as laid down in the case of Erwin v. Townend and sons ltd. These elements are:

1. that there was a goodwill owned by the trader
2. that there was a misrepresentation
3. that there was a damage to goodwill

Goodwill owned by the trader

The plaintiff must have acquired some kind of goodwill from the product that he feels necessary to protect. The existence or otherwise of a course of action in passing off and the existence of established goodwill will then have to be decided by the court in each particular case.

Misrepresentation

The plaintiff has the burden of proof that there had been a misrepresentation, whether intentional or otherwise, capable of misleading the public. That there must be a likelihood of actual deception or confusion by the public. It is the courts' duty to decide the similarity or the identity of the goods or services. The criteria used in measuring this are usually visual, aural and conceptual similarities.

Damage to goodwill

The burden to prove that the goodwill in question was damaged lies with the plaintiff and that the resultant damage was actually caused by the false representation. It is enough to prove that there is an existence of goodwill or misrepresentation, it is necessary to show that damage had occurred as regards to misrepresentation. The plaintiff doesn't need to prove actual or special damages real or tangible probability of such damage will suffice. However, the damage must be reasonably foreseeable. Disclaimers may not be enough liability in cases of passing off.

Remedies

1. damages
2. intervention by relevant authorities

3. injunction
4. account(for profit and loss)

Defences: a defendant in the tort of passing off may plead the following as defences

1. innocent passing off
2. functional design or package
3. the meet descriptive name of a product
4. consent such as license given to him by the plaintiff to produce or market the product

Relevance of passing off

This tort off passing off gas greatly affected the commercial sector of the Nigerian economy as a whole especially in the 21st century. The false representation made on one's business has led to the loss of goodwill and reputation of some companies

Some of the importance of the tort are as follows:

- i. To protect a plaintiff's property rights: economic tort which is interwoven with passing off goes a long way to ensure that the property rights of the plaintiff are not tampered with. if there is no right in place the defendants will have full access to trample on the rights of the plaintiff thereby causing the plaintiff financial loss
- ii. Trademarks and copyrights are important for a business to prevent copying of one's idea, goodwill and reputation. Various methods have been adopted in order to address this issue and thus the relevance of passing off as form of economic tort in the 21st century Nigeria.
- iii. It prevents any form of similarity or unlawful imitation or adoption of the same business name. In the case of BEECHAM GROUP LTD v. ESDEE FOOD PRODUCT NIGERIA it was held that the trademark glucose-aid is calculated to deceive the public in sound of the trademark Lucozade.

Conclusion

Competition is not only inevitable but is necessary for an ever growing and steady development country but that is not applicable to situations of in healthy competitions where unethical means such as limitation are used in the free market economy.

As much as possible there should also be sensitization of traders and business owners about such laws which are protecting them and their ideas in order to engage in all the requirements to be favoured by these existing laws, such as registering among other requirements.

References

Kodinliye and aluko law of torts

Malami E, LAW OF TORTS 2nd edition (Princeton Publishers 2017)

Olarinde S, Clement C.C and Ikeze N the modern law of torts 2018