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Law of Tort assignment

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

Abstract

The paper aims to point out what passing off is as well as the elements needed to establish it also tackles the importance and relevance of passing off as an economic tort in today's society

What is passing off?

Passing off is the false representation of one's product or business as that of another person. Passing off a person attempting to sell his own product and increase patronage to his own services or product by packing it or conducting himself in such a way that the customers are most likely to confuse the product for a more notable and popular product. At desktop level it seems to be simply leeching off the popularity of another brand in order to make sales. Anytime a person sells his goods or carries out business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby taking advantage of that person's reputation and goodwill he is committing the tort of passing off.

The purpose of this tort is to protect a person's business interest from unfair trade practices and sharp practices of others, the main focus to protect the reputation and goodwill built by a business for itself. According to Sir John Salmond in his book Law of Tort stated the reason for the tort of passing off thus:

*"The law... is designed to protect traders against... unfair competition which consist of acquiring for oneself, by means of false, or misleading devices, the benefit of the reputation already achieved by rival traders"*¹

Passing of is actionable per se on its occurrence, a plaintiff need not prove damage to be successful. The probability of damage occurring is sufficient for a plaintiff to be successful. Consequently, once the tort of passing off has been committed the plaintiff is entitled to sue and receive remedies regardless of damage.

In the case of ***Trebor Nigeria Limited v. Associated Industries Limited***², Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Supermint 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

¹ Salmond op cit. para 149

² (1972) NNLR 60

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

There are different forms of passing off they include trading with a name resembling that of the plaintiff, marketing a fake product as that of the plaintiff by using the plaintiff's label or design, marketing a product with a name resembling that of the plaintiff's goods, marketing products with the plaintiff's trademark or its imitation, imitating the appearance of a plaintiff's product, selling inferior or expired goods of the plaintiff as current stock ;and false advertisement by copying the plaintiff's advertisement; and so forth.

Ogunlende vs Babeyemi³:

The plaintiffs who were building and civil engineering contractors carrying on business as "Mercury Builders" were granted an injunction to restrain the defendants, from carrying on similar business under the name "Mercury Builders Nigeria Limited".

Lord Byron vs Johnston⁴:

The defendant publishers were restrained from advertising and selling a book of poems with the name of Lord Bryon written on the cover and title page, when in fact the famous poet was not its author.

U.K Tobacco Co. Ltd vs Carreras Ltd⁵:

The defendants who were marketing cigarettes called "Barrister", on which packet was a white man wearing a barrister's wig and gown were restrained from imitating the appearance of the plaintiff's cigarettes called "Band Master" on which packet was a man in a band master's uniform.

Element of Passing Off

In order for an action in the tort of passing off to succeed the plaintiff need only prove that the action of the defendant was calculated to deceive the public. Putting it plainly, the defendant's action was likely to deceive the public. Liability in this tort is strict, so innocent passing off is not a defense, once the plaintiff proves that the actions of the defendant possesses the likelihood to deceive the public once he does this sufficiently his claim succeed. He does not need to prove

³ (1971) 1 UILR 417

⁴ (1816) 35 ER 851

⁵ (1931) 16 NLR

intentionality to deceive on the part of the defendant. PER Palmer J in Niger Chemical Ltd v. Nigeria Chemists⁶:

“It is not necessary to prove, that there was any intention to deceive: this has been held in a long series of cases, and is not disputed”

In this case 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.

In view that the fact the liability in this tort is strict, the tort may succeed without fault form the defendant.

When fraud is proved on the part of the defendant, it is not totally irrelevant as it helps the plaintiff prove the likely hood of damage and it makes it easier for the court to award punitive or aggravated damages.

Factors for determining whether the public is likely to be confused

In the process of determining the likelihood of the public being deceived the court takes into cognizance a number of factors and they include

1. The experience of the buyers
2. The level of perception of the buyers
3. The level of literacy or awareness of the buyers

The standard of awareness that is presumed of potential buyers by the law varies for educated and literate. The law presumes that educated persons are generally observant persons therefore more likely to make informed decision while illiterate persons are presumed to be casual observers, making an unwary choice and relying mainly on recollections of the product they want to purchase. Furthermore, and in the case of an expert in a particular trade, a much higher level of awareness is presumed. It is that of a person making a careful examination before buying

The Relevance of Passing Off in The 21 Century: An Analysis Of Passing Off And Trademark Infringement

Trademark infringement simply means an unauthorized of a trademark or service mark. This concept is very similar to passing of but there are still some variants between the two. One is that passing off is an action concerning unregistered names, symbols and marks that is widely

⁶ (1961) All NLR 180 at 182

associated with a person, brand, business or company while trademark infringement usually involves a violation against the rights of a registered trademark.

The need for passing off in this century is to ensure that there are no gaps in the system and create a room for remedy in the case where a person takes advantage of the reputation built by a rival trader even if he has no registered right. That a person is not taken advantage because of some technicality of the law.

Another thing to consider is the difficulty and backlog witnessed by the Trademark Registry in the successful completion of registration of marks thereby limiting the rights of product owners and this gap is one of the areas which passing off hopes to provide a remedy.

Jurisdiction

An action in this aspect of law should always be instituted in the Federal High court because although it may be a common law doctrine it is also covered by a Federal enactment which is the Trademark Act⁷

Remedies for Passing Off

The Remedies for the tort includes the following:

1. Damages
2. Account for profit; or for loss of sales
3. Injunction
4. Intervention by the relevant regulatory agencies like NAFDAC, SON, Intellectual Property Commission and so forth.

Defenses for passing off

1. Functional design or package
2. The mere descriptive name of the product
3. Consent such as a license given to him by the plaintiff to produce and or market the product
4. Innocent passing off and so forth

Bibliography

Malemi, E. (2015). *Law of Tort* (2nd ed.). Ikeja, Lagos, Nigeria: Princeton Publishing Co. .

Salmond, J. W. (1990). *Torts*. London: R.F.V Heuston, Sweet & Maxwell, London.

⁷Section 3 of the Trademarks Act CAP T13 Laws of the Federation of Nigeria, 2004.

*"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**".*

