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ECONOMIC TORTS

Economic Torts, as their name suggests, have as their primary function, the protection of a claimant's economic interests. They include the torts of; breach of intellectual property rights, conspiracy to interfere, civil conspiracy, unlawful interference with trade/contracts, deceit, injurious falsehood and malicious falsehood. They also include passing off, one of the most useful of the economic torts, which though in practice normally involving deliberate harm, is in fact a tort of strict liability. In this paper, the writer will examine and discuss the relevance of 'passing off' as a form of economic torts in the 21st century in Nigeria and also a brief but detailed study of the elements a plaintiff needs to prove to succeed in action for passing off .

THE TORT OF PASSING OFF

'Passing Off' is a cause of action that is primarily founded in tort and is historically rooted in common law. The tort of passing off applies where there is a representation that a person's goods or services are those of someone else.[1] This tort occurs where, for instance, X presents his business or services out to the world as that of Y, for which the latter(Y) has consequentially occasioned or is likely to occasion damage. In the case of ***Leather Cloth Co. v American Leather Cloth Co***.[2], **Lord Kingsdown** noted the underlying principle for the tort of passing off as "*…one man has no right to put off his goods for sale as the goods of a rival trader*." Here, the intention of the defendant in respect to liability in this tort is immaterial, seeing this tort of passing off, is a strict liability one. However, to succeed in an action on tort of passing off, the plaintiff must prove certain elements that are discussed below.

ELEMENTS OF THE TORT OF PASSING OFF.

For a plaintiff to succeed in an action on tort of passing off there are three essential elements that he must prove. The House of Lords in ***Reckitt and Coleman Products Ltd v Borden Inc,***[3] adopted the '***Trinity Test'*** in establishing the ingredients of 'passing-off', and explained same as follow: **i.** The plaintiff must establish a goodwill attached to the goods or service in question and the identifying 'get up' under which the goods and services are offered to consumers. **ii.** The plaintiff must also establish that there has been a misrepresentation by the defendant which has caused or has the potential of causing the members of the public to believe that goods or service emanate from the plaintiff;

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[1] Black's Law Dictionary (9th ed.)
[2] (1865) 11 HL Cas. 523 at 53
[3] 5 (1990) 1AER 873

iii. Finally, the plaintiff must demonstrate that he has suffered or is likely to suffer loss by the reason of the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff. It is imperative to note that in every situation where an infringement has been alleged by a party, all the ingredients of passing-off already identified above are to be construed conjunctively and not otherwise.

The first requirement is that there is an existing goodwill in the goods or service in question. In the case of ***IRC v. Muller Margarine***[4] the House of Lords, in part, described 'goodwill' in relation to 'passing off', as '***the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom***.' A plaintiff in an action for passing off cannot succeed where he cannot show that he has an existing goodwill known to the public. Thus, where a plaintiff has no distinct goodwill, he cannot, *prima facie* be heard of, to say that the defendant has infringed upon his trade-mark or name or converting his goodwill.[5]

The second requirement that a plaintiff needs to establish to succeed in an action for passing off is that there was a misrepresentation against that very goodwill by the defendant. This means that the defendants conduct is calculated to deceive the public in to believing that the defendants' goods are those of the plaintiff. For instance, in the case of ***Niger Chemists Limited v. Nigeria Chemists***[6], the plaintiff sold drugs as Chemists in Onitsha, Eastern Nigeria and the defendant opened shop on the same street and started the same line of business of dispensing drugs. On being sued, the court granted an injunction against the defendant on the basis that their use of the name Nigeria Chemists was intended to deceive the members of the public to believe that they had a relationship of some sort with Niger Chemists. This was also seen in the case of ***U.K. Tobacco Co. Ltd v. Carreras Ltd.***[7] It is also important to note that where the alleged act of infringement is declared to be calculated to deceive the members of the public, it is not required of the plaintiff to prove that the act has actually deceived some people[8]. It is enough that under the circumstance(s), there was a possibility that potential consumers would be confused or deceived.

The third requirement is that that he suffered or is likely to suffer consequential damages. The last element to succeed in the tort of passing off, in which the plaintiff must prove, is that he

[4] (1901) 217 AC 223 et seq
[5] The Tort of Passing off: An Overview, Triumph P.A.
[6] (1961) ANLR 180
[7] (1931) 16 NLR 1
[8] See the Niger Chemist's case above at 173.

suffered or that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation. Where he merely establishes the foregoing two elements, but fails in this last element, he may have no or at least nominal damages. Thus, the plaintiff may establish that he has suffered or he is likely to suffer loss of profit; damage to reputation in certain circumstances; and loss of an opportunity to expand[9].

THE RELEVANCE OF THE TORT OF PASSING OFF IN THE 21ST CENTURY NIGERIA.

The importance of the tort of passing off cannot be denied even though it is not a statutory right. Its roots are in an age when customers patronised local speciality shops but today it operates in a world of e-commerce operating across national boundaries.

The 17th century case of ***Southern v How***[10] which is the earliest documented case where there was an indication of passing off. . This case was originated in the tort of deceit, but the principle of passing-off clearly started its journey from this case. In this case, the mark of a significant brand was used to deceive a customer, who bought the defendants low grade clothing thinking it was the plaintiffs' brand. The defendant was held liable.

Later in the 18th century, all cases of passing-off were classified as cases of deceit, however, unlike deceit, it gives the trade rival, rather than the deceived customers, the right to sue. ***Blanchard v Hill***[11].

In the 19th century, in the case ***Millington v Fox***[12], it was decided that proof of fraud was not necessary in such a wrong and it was from here that the actual tort of passing off began building its own definition. The tort of passing off seeks to protect the right of property that exists goodwill and also protect traders from this form of unfair competition.

In Nigeria, as elsewhere, the major purpose underlying the tort of 'passing-off' is the protection of an established goodwill already acquired by a trade mark or trade name. It presupposes therefore, that such goodwill must be established by the party alleging infringement. .The growth and importance of intellectual property rights and law in Nigeria cannot be underemphasized. In a country such as Nigeria where there is high competition among goods and services, the tort of passing-off arises commonly and a good number of individuals have

[9] The Tort of Passing off; An Overview, Triumph P.A.
[10] (1618); it was categorised as more of deceit or defamation
[11] (1742) 2 Atk 484, 26 Eng Rep 692 Ch; The decision of Lord Hardwicke LC in Blanchard v Hill in 1742 is the earliest reported case on the equitable jurisdiction to grant injunctive relief against trade mark piracy.
[12] (1838) 40 ER 956

fallen victim to this tort as one persons' good or service imitates that of another either by trade name or trademark. The study of the law of passing-off and its application in Nigeria is necessary because there is a high rate of infringement regarding trademark and products in Nigeria.

Some common forms of passing off in Nigeria include: trading under a name which is closely related to that of the plaintiff[13], trading under the trademark of the plaintiff or any deceptive imitation of the plaintiff's mark, imitating the get up or appearance of the plaintiffs good, selling the plaintiff's expired or inferior products thereby causing an injury to the plaintiff's reputation and so forth.

Legal protection of products in Nigeria is regulated by the ***Copyright Act 1988 as amended in 1992 and 1999***, ***Trademarks Act of 1965*** and ***the Patent of Designs Act of 1970***. In the case of ***Continental Pharmaceutical Ltd. V Sterling Products Nig. Plc and Smith Kline Beckham Plc***[14], the plaintiff who were 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 only substituting the words Conphamol for 'Panadol'. It was held that passing off had occurred due to the infringement of the plaintiff's registered trademark.

It is important for individuals in Nigeria to know how to protect their goods or ensure that they get the right remedy when such infringement on their right occurs.

REMEDIES OF THE TORT OF PASSING OFF

The tort of passing-off grants appropriate remedies to those whose products or business have been infringed upon whether there is a proof of actual damage or not (actionable per se), so long as the ingredient of what constitutes an infringement is satisfied. These remedies include: injunction and monetary damages.

INJUNCTION: An injunction under the context of the tort of passing off, has been defined by the courts in several cases; for instance, the Supreme Court of Nigeria in the case of ***ADENUGA V. ODUMERU***[15], defined it to mean: "An equitable order restraining the person

[13] A business name indicates what a business stands for. The Companies and Allied Matters Act (CAMA) in S30(a) and S79(d)(e) requires individuals, firms or business in Nigeria to register itself with the Corporate Affairs Commission within 28 days of the commencement of such a business.

[14] (1995) FHC/L/CS/460/95

[15] (2001)FWLR Pt. 3 1056 at 1068, paras. C-D

to whom is directed from doing the things specified in the order, or requiring in exceptional situations the performance of a specified act. A claim for an injunction is a claim in equity". When an application for an injunction is granted, the legal effect is dependent on the nature of the prayer contained and so granted in the application.

Monetary Damages: If the plaintiff succeeds, and has pleaded for monetary damages, he will be entitled to an award of damages or an account of profits. Damages are often difficult to assess; but are likely to involve quantifications such as: loss of sales and or damage to goodwill and reputation. The plaintiff in addition, has the option of seeking an account of the defendant's profits, rather than an award of damages. However, this approach is rarely pursued as it is usually difficult to prove the proportion of the profits that were attributable to the passing off.

CONCLUSION

In conclusion, the tort of passing off, as an economic tort, seeks to protect the plaintiff, the owner of a goodwill, from the deceptive and unlawful conduct of the defendant, the result of which is the damage caused to the business of the plaintiff. It is therefore important for individuals in Nigeria, as elsewhere, to know how to protect their goods or ensure that they get the right remedy when such infringement on their right occurs.

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