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Law of Tort

It is important to start by clearly explaining the term ‘Economic Tort’. Economic torts in English law refer to a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business. Proving compensation for pure economic loss, examples of economic tort include interference with economic or business relationships. Economic torts protect people from interference with their trade or business. Economic torts are tortious interference actions designed to protect trade/ business.

Principal economic torts are:

Passing off

Injurious falsehood and trade libel

Conspiracy

Inducement of breach of contract

Tortious interference (such as interference with economic relations or unlawful interference with trade)

Negligent misrepresentation and

Watching and besetting.

The focus in answering the question is put on Passing off as a form of economic tort in the 21st century Nigeria. it is important to define the term ‘Passing Off’ and its purposes and relevance. Passing off is defined as an unfair competition by misrepresentation or literally speaking “the cause of confusion or deception”.

Passing off occurs when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person of business or business, causing financial or reputational damages. 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. It can also be said that Passing off is a wrong, a common law tort which protects the goodwill of a trade from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is wrong and is known as the tort of “passing off”.

"…the fundamental rule is that one man has no right to put off his goods for sale as goods of a rival trader" – Per Lord Kingsdown in ***Leather Co v American Leather Cloth Co***[1].

There are various types of Passing Off such as,

1. Marketing a product as that of the plaintiff: for example you market your insecticide as Mobil or Mortein, market your tyres as Dunlop or Michelin, etc

2. 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.

This can be seen the case of ***Niger Chemists Limited and Nigeria Chemists***[2]. , 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.

"… It seems to me as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself 'Niger Chemists' and the other 'Nigeria Chemists', there must be a grave risk of confusion and deception" – Per Palmer, J.

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.

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 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.

5. Imitating the get-up or appearance of the plaintiff's goods.

An example of passing off is seen in In the case of Trebor Nigeria Limited v. Associated Industries Limited, 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 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

[1] (1865) 11 H.L Cas 523/538
[2] (1961) All N.L.R 171

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.

The purpose of the tort of passing off is to protect the commercial goodwill and to ensure that people's business reputations are not exploited. Since 'goodwill' in business is an asset, and therefore, a species of property, the law protects it against encroachment.

In a passing off action, the plaintiff must prove that there is a similarity in the trade names or marks and that the defendant is passing off his goods as those of the plaintiff's . Remedies could include injunction or damages or both. Damage or likelihood of damage form the core all passing off actions. The concepts of reverse passing off and extended passing off also hold significance.

Extended passing off consists of those cases where misrepresentation of a particular quality of a product or services causes harm to the plaintiff's goodwill. A famous case example would be Diageo North America Inc v Intercontinental Brands (ICB) Ltd where the defendant marketed a drink named "Vodkat", which was actually not vodka, but the marketing did not actually make it clear that it wasn't so. The plaintiffs were the biggest manufacturers of vodka and they filed a suit against the defendants for passing off and it was held so.

If a defendant markets the products made by the plaintiff as the products of the defendant, the tort committed is known as reverse passing off.

In Nigeria, the right of action of passing off relating to the infringement of registered trade is statutory and can be found only in Section 3 of Trade Marks Act 1965.

Conclusively 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 my recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses. In a country where a considerable percentage of the population lives in rural areas such as Nigeria, it is very easy to pass off goods. Thousands of instances of passing off can be found out throughout Nigeria. Right from clothing materials to beverages to toothpaste to pencils to pens, you name it, you find it. Therefore passing off is very much relevant as a form of economic tort in 21st century Nigeria.