NAME: OGUNBANWO OLUWASETAN MOWAFOLUWA

MATRIC NUMBER: 17/LAW01/208

COURSE TITLE:LAW OF TORTS II

COURSE CODE: LPB 302

**ECONOMIC TORT**

Economic torts, which are also called business torts, are torts that provide the common law rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss. Economic torts are tortious interference actions designed to protect trade or business. The area includes the doctrine of restraint of trade and, particularly in the United Kingdom, has largely been submerged in the twentieth century by statutory interventions on collective labour law and modern competition law, and certain laws governing intellectual property, particularly unfair competition law. The "absence of any unifying principle drawing together the different heads of economic tort liability has often been remarked upon. Justice Poyner of the US Court of Appeals, in a 2006 article, wrote:"I define economic torts to mean tort claims that do not allege physical contact with the victim or his property or harm to such non-financial, or at least noncommercial, goods as business reputation and personal privacy."

Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another and therefore to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.

The three categories of economic torts are:

**1.procuring a breach of contract (ie, interference with contractual relations) which is also referred to as ‘inducing a breach of contract’:** Procuring a breach of contract exists where a person knowingly and intentionally causes damage to another by interfering with their contractual relations or rights. The tort is useful where a contract breaker is difficult to sue or lacks sufficient funds to satisfy a judgment.

2**.causing loss by unlawful means, sometime referred to as unlawful interference with economic interests (commonly known as ‘unlawful interference’):** A claim for unlawful interference, ie causing loss by unlawful means, exists where there is an interference with an economic interest of the claimant by unlawful means, the object and intention of which is to cause loss to the claimant and loss is caused to him.

3.conspiracy, an agreement between two or more persons and this includes either

* to use means, whether lawful or otherwise, the predominant or real purpose of which is to injure the claimant (ie ‘lawful means conspiracy’ also sometimes known as ‘conspiracy to injure’)
* to use unlawful means to damage the claimant (ie ‘unlawful means conspiracy’)

The leading authority on economic torts is the House of Lords case of ***OBG v Allen*** which deals with three separate appeals.

**PASSING OFF**

The essence of passing off is rhe selling of goods or carrying of 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 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". [[1]](#footnote-1) In the words of Lord Kingsdown, “the fundamental rule is that one man has no right to put off his goods for the as the goods of a rival trader”.[[2]](#footnote-2) Where passing off is proved, the plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong, to damages for any loss he has incurred thereby,[[3]](#footnote-3)and to an account of the profits made by the defendant in consequence of the tort.

**THE RELEVANCE OF PASSING OFF IN NIGERIA**

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. The situation in Nigeria has become one that the majority of the population do not even know what constitutes passing off and what does not constitute passing off.The law of passing off is of great importance to trademark and copyright protection in Nigeria and we need to:

* Identify the law of passing off and its importance to the growing business sector in Nigeria.
* Identify the instances where the law of passing off is said to have occurred in Nigeria.
* Highlight the problems encountered as a result of the law of passing off and provide appropriate solutions
* Analyse the existing laws laid down for the law of passing off and its application in Nigeria.
* Allow for a more comprehensive understanding of passing off laws in Nigeria

Typical forms of passing off in Nigeria

Everyone has a right to enjoy the benefits of what they create, be it monetary benefit 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 plaintiffs products, producing fake products using the plaintiffs trademark, copying the plaintiff’s 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 fulfill the other ingredients required for the Tort of passing off.

**Elements of passing off**: The elements of passing off are the requirements that a person must prove in order to succeed in a claim of passing off. There are three elements of passing off known as the ‘classic trinity’. These three elements were reduced by Lord Oliver from Lord Diplock’s five elements as laid down in the case of ***Erven Warnink v. Townend & Sons Ltd .*** This is also known as the ‘advocate case.’

They are:

1. **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.
2. **Misrepresentation:** The plaintiff has the burden to prove that there had been a misrepresentation, whether intentional or otherwise, capable of misleading the public. There must be a likelihood, actual deception or confusion by the public. It is the court’s duty to decide the similarity or identity of the goods or services. The criteria used in measuring this are usually; visual, aural and conceptual .**.**
3. **Damage** **to goodwill:** It is not enough to prove that there is an existence of goodwill or misrepresentation; it is necessary to show that damage had occurred as regards to that misrepresentation. He must show that he had suffered or is likely to suffer loss from that misrepresentation. The plaintiff does not need to prove actual or special damage; real or tangible probability of such damage will suffice. However, the damage must be reasonably foreseeable. In such instances, the court must use common sense in determining the case based on the evidence provided and judicial discretion in opposition to witnesses.

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. Unfortunately, Passing off is not a criminal offence . Passing off is something that needs to be taken seriously in this country because a lot of people have fallen victims to lack of knowledge on how to protect their goods or ensure that they get the right remedy when such infringement occurs.

BIBLOGRAPHY

* Posner, Richard A., Common-Law Economic Torts: An Economic and Legal Analysis, 48 Ariz. L. Rev. 735 (2006)
* Kodilinye and Aluko: The Nigerian Law of Torts; pg 221. Ch. 11
* T&A Legal; Nigeria: An appraisal of passing off actions under Nigerian Law
1. Salmond op.cit.para 149. [↑](#footnote-ref-1)
2. *Leather Cloth Co. V. American Leather Cloth Co.* (1865) 11 H.L. Cas 523 at p.538; *De Facto Works Ltd. V.* *Odumotun Trading Co.*[1959] L.L.R 33 at p.39 *Trebor (Nigeria) Ltd. V. Associated Industries Ltd*. [1972] N.N.L.R. 60 at p. 63 [↑](#footnote-ref-2)
3. The plaintiff will recover damages for the loss of profits he has suffered as a result of customers being diverted from him to the defendant. He may also recover for loss of business reputation and goodwill : *spalding v. Gamage* (1918) 35 R.P.C. 101 [↑](#footnote-ref-3)