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**ASSIGNMENT TITLE: ECONOMIC TORTS**

**QUESTION**

Discuss the relevance of passing off as a form of Economic torts in the 21st  century Nigeria.

Use NALT guidelines for footnotes, you should also include a bibliography at the end.

Times New Roman font size 12, 1.5 spacing, maximum five pages

Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life. Economic torts are of different types and they are:

* Passing off
* Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
* Injurious falsehood/ malicious falsehood.
* Interference with contracts
* Conspiracy to interfere, that, civil conspiracy and so forth.

**PASSING OFF**

In legal terms, passing off may be defined as a misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so.

It is actionable in tort under the law of unfair competition. The Duhaime’s legal dictionary defines passing off as making some false representation likely to induce a person to believe that the goods or services are those of another.

Passing off can also be:

* Extended passing off – where a misrepresentation as to the particular quality of a product or service causes harm to another’s goodwill.
* Reverse passing off – where a trader markets another business’ goods or services as being his own.

Raising an action off can help you to prevent other people from using the goodwill associated with your business for their own benefit.

***Elements of passing off***

To establish a claim for passing off, you must meet three key requirements:

* Goodwill - you must prove that you own a ‘reputation’ in the mark that the public associates with your specific product or service.
* Misrepresentation – you must show that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours.
* Damage - you must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputation loss.

Rights relating to passing off are established gradually with use. Goodwill in a mark can be particularly difficult to define. Reputation and goodwill of a business is generally considered as something that provides an identity to a business and its goods or services, and distinguishes them from those of their competitors.

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 especially in a society like Nigeria where the poverty level is on a rise everyday with a population of over 200 million people, there are so many businesses and so many people looking for easy ways to make money even if it means ‘impersonating’ another business. For example, in the case of **Niger chemists ltd v Nigeria chemists and D.K Brown** the plaintiff (Niger chemists) had carried on business as chemists since 1952 and had several branches in Onitsha and other towns in Eastern Nigeria. In June of 1957, the second defendant and his partners founded a firm carrying on exactly the same business in Onitsha under the name of ‘Nigeria chemists’ and their only premises was on the same street as one of the plaintiff’s business. Both companies were registered with the corporate affairs commission (CAC) in Nigeria. The plaintiff sued.

The court granted an injunction against the defendant on the grounds that their use of the name ‘Nigeria chemists’ was intended to deceive the members of the public into believing that there was a relationship between Nigeria chemists and Niger chemists.

**Components to prove passing off**

Aside from the key component of deception, Justice Nnaemeka Agu, in the 1977 case of *The boots company limited V United Niger imports limited* carefully listed what he considered to be the ingredients of a successful passing off action as follows:

* Proof that the name, mark, sign which the plaintiff claims ownership has become distinctive of his goods and is regarded by a substantial number of the public or persons involved in a trade in the relevant market as coming from particular source;
* That the defendants who are engaged in a common field have used a name, mark, sign so resembling to the plaintiff’s that it is likely or calculated to deceive or cause confusion in the minds of the common customer; and
* That the use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiff’s business.

**Remedies in a passing off *action***

The following remedies/reliefs can be claimed in a passing off action:

* Injunction: this is an order of the court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of the mark pending the outcome of the case and a perpetual injunction when the case has been concluded to totally stop the use of the mark.
* Damages: it has been established through decided cases that a successful litigant in a passing off action is entitled to damages. Damages here could be general, special or punitive. These usually emanate from losses which are presumed to have been suffered by plaintiff in a passing off action
* Delivery up for destruction of infringing goods: this is usually claimed where physical goods are involved. This occurs where goods are produced in breach of the trademark of another identical product. Thus, the plaintiff usually claims for the goods to be delivered up especially so that it can be destroyed.
* Anton piller orders: this is an order for inspection and delivery up of infringing materials in the possession or control of an infringer. *Ferodo limited & Anor. V. Ibeto industries limited.*
* Account of profit: here the plaintiff is entitled to profit on goods wrongly sold by the infringer.

**Defences available to a defendant in a *passing* off action**

* Consent of the plaintiff to the use of the name, mark, sign or slogan.
* Indistinct name, mark, sign and slogan of the plaintiff
* That the plaintiff’s name, mark, sign and slogan has become generic.
* Dissimilarities in the mark of the plaintiff and defendant.
* Innocent usage of the plaintiff’s name.

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 the businesses. With such a large population as that of Nigeria, it is almost impossible for some citizens not to pass off the goods of others as theirs which is why there are laws to prevent and control this economic tort with the federal high court having jurisdiction in accordance with **section 251 (f) of the 1999 Nigerian constitution.**

Although, passing off is not a crime, victims of passing off may first make a report to the manufacturers of the products one intended to purchase to make them aware that similar product(s) is being reproduced by another person passing it off as theirs. Furthermore, small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on passing off and take advantage of the remedies available to protect their goodwill, trade name and profits.

If business owners, traders and the likes of them are educated about passing off and what they can do to avoid serious injury to their business, they would be able to take advantage of the remedies in a passing off action and protect their goodwill and businesses in the process as the 1999 constitution of Nigeria provides for laws as well as remedies to protect the goodwill of businesses and business owners in Nigeria today. The trademarks act should however be amended to reflect the times, changes and happenings in Nigeria as the trademark registry has witnessed a serious backlog in the successful completion of the registration of marks and this has the resultant effect of limiting the rights of most product owners to passing off as opposed to the action on the infringement of a trademark.

**Footnotes**

CAP T13 LFN, 2004

Section 251(F) 1999 constitution

(2007) 15 NWLR (Pt 1058) 576

(1988) 5 NWLR (Pt 93)138

Nwabachili, Chudi C, Intellectual Property and Law in Nigeria

(1977) 1 ANSLR 144

Black’s Law Dictionary Ninth Edition