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**17/LAW01/194**

**LAW OF TORTS**

**QUESTION:**

Discuss the relevance of Passing off as a form of Economic torts in the 21st Century Nigeria.

[[1]](#footnote-1)WHAT IS 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 labor 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”.

The economic torts can be split into two primary categories: procuring a breach of contract and causing loss by unlawful means. Conspiracy is also discussed below, and whilst this is a separate tort, it can generally be regarded as ancillary to the two primary torts of inducing breach and unlawful interference.

Economic tort is a tort which offers protection for a person’s trade or business from acts which the law considers to be unacceptable, they are torts which mainly inflicts economic losses so, torts that causes financial injury or losses are referred to as economic tort. Economic tort usually affects or occur in economic commercial or business sectors of life.

Examples of economic torts are passing off, breach of intellectual property rights such as breach of copyright, patents, trademarks and other merchandise marks, injurious or malicious falsehood, interference with contract and conspiracy to interfere which is also known as civil conspiracy.

The purpose of economic tort is to protect a person’s business from behaviours of unacceptable interference, it is reasonable where the competitors to a business make some beneficial changes to their products to attract, more customers whereby the loss of one company will be to the profit of the other is seen to be acceptable but it will be unacceptable whereby the other company goes through some means which are beyond normal perception to diminish or use to bring down their rivals. However, this tort seeks to ensure that business owners do not suffer financial injury or loss due to unacceptable behaviours from other competitors.

[[2]](#footnote-2)[[3]](#endnote-1)THE CONCEPT OF PASSING OFF

Passing off is described as an unfair competition by misrepresentation or literally speaking ‘the cause of confusion or deception’. Generally, an action of passing off arises where the deception is made in the course of trade, which could lead to confusion amongst customers this applies to both ecommerce businesses and businesses with physical addresses. Also, it is the act or an instance of falsely representing one’s own product as that of another in an attempt to deceive potential buyers. Passing off is actionable in tort under the law of unfair competition.

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is a wrong and is known as the tort of ‘passing off”. As held in the famous case of N.R. Dongre Vs 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. Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value identifiable business assets. So basically it is an intangible asset.

Passing off can be seen as a situation whereby the defendant sells his own goods under the plaintiff’s name that is by using the name and reputation that the plaintiff has established or set in the consumers’ environment under pretence that it’s the same product to sell his own goods and make profitable means from such perception that the consumers have towards the plaintiff’s goods and products.

It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favourable location, reputation of the brand in the community, or the quality of its employer and employees. The value of goodwill of a brand can be calculated by a number of methods like subtracting the value of all tangible assets from the total value to establish the value of the intangible assets the amount of earnings that are in excess of those normally earned by a similar business averaging the past five years’ net income and subtracting a reasonable expected rate of return for tangible assets and salary requirements capitalising the resulting value.

[[4]](#footnote-3)[[5]](#endnote-2)[[6]](#endnote-3)Goodwill can be classified into two zones, institutional goodwill and professional practice goodwill. While institutional goodwill associates itself with business houses, their market position, professional practice goodwill, as is quite obvious from the name, associates itself with professional practices like law, medicine, architecture, engineering and many others. In itself, professional practice goodwill can be divided into practitioner goodwill, where the skill and reputation of the individual practitioner comes to play and practice goodwill, which is very similar to institutional goodwill and depends on the institute reputation.

Later in the Jif Lemon case, Lord Oliver reduced these principles to three basic features which included; reputation, misrepresentation and damage to goodwill. To sum it up, the tort of passing off covers those cases where one trader falsely misrepresents his goods as those of another trader/brand, which has a good reputation/goodwill in the market and thus leads to damaging his goodwill. In 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 and extended passing off also hold significance.

Passing off is a common law tort that was established long before trademarks became registerable. It was originally intended to protect traders by allowing them to bring action against a trader attempting to ride off the back of their established reputation(goodwill) by using a similar mark or get-up as their own. However, for an action of passing off to succeed three requirements must be established; a goodwill, a misrepresentation and resulting damage.

In 1875, a statutory system of registering trademarks was introduced whereby registering a mark which acts as an indication as to identity or origin of a product, protects that mark from being used by anyone other than the proprietor of the trademark. This solved the earlier problems of having to show title to the mark by establishing goodwill as is necessary for a passing off action. The law has been subsequently amended by numerous statutes until the Trade Mark Directive was finally implemented into English Law in the form of the Trade Mark Act 1994 which is where the law stands today which states that

“The proprietor of a registered trademark has exclusive rights which are infringed by the use of the trade mark in the United Kingdom without his consent’’.

The Trade Mark Act has helped to widen the scope of trade mark infringement by allowing for the registration of ‘any sign capable of being represented graphically which is capable of distinguishing goods of services of one undertaking from those of other undertakings’.

It has been suggested that this broad definition of what constitutes a registerable mark will considerably limit the role of passing off in the future as its effect to allow registration of ‘almost anything which is capable of being distinguishing indicium for the purposes of a claim for passing off’. However, despite the extended definition, passing off actions will remain an essential feature in English Law. This is because it remains the sole course of action for those who do not register a potentially registerable trade mark and for those marks, which remain non-registerable due to limitations of the TMA.

1. ESE MALEMI; LAW OF TORTS

   BLACK LAW’S DICTIONARY

   *Mogul Steamship Co Ltd v. McGregor Gow & Co.* [↑](#footnote-ref-1)
2. Kodilinye and Aluko: Law of Torts

   Ese Malemi: Law of Tort

   *Dongre v. Whirlpool Corporation*  [↑](#footnote-ref-2)
3. Trade Mark Act [↑](#endnote-ref-1)
4. Thestudentlawyer.com

   www.Lawteacher. com [↑](#footnote-ref-3)
5. [↑](#endnote-ref-2)
6. BIBLIOGRAPHY

   Malemi E, Law of Torts (Princeton Publishing Company, 2007) (2nd Edition)

   Kodilinye and Aluko, The Nigerian Law of Tort (Spectrum Publishing, 1982)

   Deakin, Simon; Markesan’s, Basil; Angus (2003), Markesan’s and Deakin’s Tort Law (Oxford University Press) (5th Edition) [↑](#endnote-ref-3)