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¹The tort of passing off is very important in the life of a society. Individual person in a society has the right to life and the right to engage in any legal kind of economic activity to sustain the kind of life style that the individual has chosen. The law of tort especially protects the individual in whatever economic activity one is engaged in. It protects business names, names of product, trademarks among others. Anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable for the tort of passing off.

The various forms of passing off and their consequences are the focus of this

The major relevance of the tort of passing off are as follows

1. Protect ones goods or business from losing its reputation
2. Protect the plaintiff goods from being used for the wrong idea

Examples of passing off are as follows

1. TRADING WITH THE NAME RESEMBLING THAT OF THE PLAINTIFF

This is where the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant's product/business and that of the plaintiff are one and the same. In *Hendricks v. Montague* (1881) 50 LJ Ch 456 – it was held that 'Universal Life Assurance Society' and

¹ *Niger chemist Ltd V Nigeria chemist*(1961) All NLR. *Ferodo Ltd V ibeto lend* (2004) 5 NWLR pt 866. *Bollinger V Costa Brava wine co* (1991) 1WLR ch 262. *Niger chemist V Nigeria chemist* (1961) All NLR 180

'Universe Life Assurance Association' are very likely. Also in *Niger Chemist Ltd v. Nigeria Chemist* (1961) ALL NLR 180 at 182; it was held that;

“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”

See also *Ogunlende v. Babayemi* (1971) 1 UILR 417.

2. MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not. In *Byron v. Johnston* (1816) 35 ER 851 – it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Byron on the title page, when in fact that famous poet had nothing to do with its authorship

3. MARKETING GOODS WITH A NAME RESEMBLING THAT OF THE PLAINTIFF'S GOODS

It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiff's goods, with the result that the customers are confused, and the defendant's products are mistaken as made by the plaintiff and are bought as the product of the plaintiff. In *Hines v. Winnick* (1947) Ch 707 at pg 13, the plaintiff musician and band leader who used to broadcast his radio programme under the name 'Dr. Crock and his crack pots' obtained an injunction to restrain the defendant from featuring another band on the programme using the same name. VAISEY J granting the injunction was of the view that a musician gets known by a particular name and this becomes inevitably part of his stock-in-trade.

4. MARKETING PRODUCTS WITH THE PLAINTIFF'S TRADEMARK OR ITS IMITATION

It is actionable in passing off for a defendant to market his goods using the plaintiff's trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff. Trademarks are usually registered and also protected under the Merchandise

Marks Act 2004. Also in *Perry v. Truefitt* (1842) 49 ET 749 – the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of 'Medicated Mexican Balm' or other similar designations

ELEMENTS OF PASSING OFF

To succeed in a claim for passing off, the plaintiff must be able to prove the following:

- 1) The Effect of Fraud by the Defendant: Where fraud is proved on the part of the defendant, it helps the plaintiff to prove the likelihood of damage, and it makes it easier for the court to award aggravated or punitive damage.
- 2) Whether the Public is Likely to be Confused: In order to determine whether the public is to be confused and misled by the activities of the defendant, the court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer – *UK Tobacco Co Ltd v. Carreras* (1931) 16 NLR I at p. 4.²

² *Uk Tobacco Co Ltd V carreras* (1931) 16 NLRI at p 4. *Perry V Truefitt*(1842) 49 ET 749

Hines V winick (1947) ch 707 PGA 13

3) The Likelihood of Deception: To succeed in a claim of passing off, all that a plaintiff has to prove is that the activity of the defendant is calculated to deceive the public. Liability in the tort of passing off is strict. Therefore, innocent passing off is not a defence, and once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction. *Niger Chemists Ltd v. Nigeria Chemists* (1961) ALL NLR 180 at 182 and *De facto Works Ltd v. Odumotun Trading Co.* (1959) LLR 33.³

Purpose of the law of passing off

The tort of passing off is common in a competitive business community or economy. People resort to every strategy to market their product and services. To survive and to expand their business. The tort of passing off is designed to protect a person's business interest from the unfair trade practices and sharp practices of other persons. Its object is to protect the reputation and goodwill a business has built up for itself. It protects the benefit and advantage of the good name, quality, reputation, patronage and customs of the business. It protects that attractive force of the business which brings customers to it. The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business. SIR JOHN SALMOND in his book *Law of Tort* stated the reason for the Tort of passing off this

“ The law...is designed to protect traders against....unfair competition which consists in acquiring for oneself, by means of false, misleading devices, the benefit of reputation already achieved by rival traders

REMEDIES TO PASSING OFF

When someone's good or business is damaged through passing off, it is advised that the person gets some remedies for the damaged reputation. The following are the remedies to passing off:

1. Damages
2. Account for profit; or for loss of sales
3. Injunction
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth

DEFENCES TO PASSING OFF

1. Functional design or package
2. The mere description of name of the product
3. Consent, such as licences given to him by the plaintiff to produce and/or market the product
4. Innocent passing off, and so forth

Generally, where a defendant pleads innocent passing off, he will still be held liable for the tort of passing off, but he will most likely get off with a nominal or a reduced award of damages. This is so because the plea, in the absence of aggravating circumstances, has a mitigating effect on the amount of damages that may be awarded by court.

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⁴ *J.B. Williams's Co v Brownley and Co Ltd* supra *Canadian Shredded Wheat Co v Kellogg Co* (1938) 1 All ER 618 PC

Lee B Haley (1996) 5 Ch App 155

