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Passing off is described as an unfair competition by misrepresentation or literally speaking “the cause of confusion or deception”. Passing off 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. **".** Generally, an action for Passing off arises where the deception is made in the course of trade, which could lead to **confusion** amongst customers. Tort of “passing off” is simply misleading the public into believing falsely, that the brand being projected was the same as a well known brand. This was upheld in the famous case of **N. R. Dongre v Whirlpool Corporation.** Passing off is the act of falsely representing one's own product as that of another in an order to deceive potential buyers and this actionable in tort. The person whose goods have been passed off in this manner may have an action in tort in respect of any losses which he has incurred.

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 populations do not even know what constitutes passing off and what does not constitute passing off. 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 of identifiable business assets. Passing off could be classified as an economic tort as a part of economic torts because the subject matter the tort of passing off is the protection of the plaintiff’s financial interest in his property. It could also be classified as part of the law relating to intellectual property.

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. The House of Lords in the case of **IRC V MULLER MARGARINE** described goodwill in relation to the tort of passing off as ‘the benefits and advantage of the good name, the reputation and connection of a business.

**GROUNDS OF PASSING OFF**

The law of passing off is designed to prevent misrepresentation in the course of trade in a business which is likely to confuse the public. Passing off does not confer monopoly rights to any names, get up, marks etc., it does not recognize them as a property in its own right unlike under trademark.

The grounds for passing off includes trading with a name resembling that of the plaintiff, marketing a product as that of a the plaintiff, marketing goods with a name resembling that of the plaintiff’s goods, marketing products with the plaintiff’s trademark or it’s imitation, imitating the get up of the plaintiff’s product, imitating the plaintiff’s advertisement or selling inferior or expired goods of the plaintiff as a current stock. An action for copyright will lie where a defendant is involved in business very similar as a plaintiff and adopts a name which will make the public believe that his business and that of the plaintiff are the same or connected.

In the case of BEECHAM ***GROUP LTD V ESDEE FOOD PRODUCT NIGERIA LTD***, it was held that the trademark ‘glucose-aid’ is calculated to deceive the public in sound in consideration of the trademark ‘Lucozade.’

Also in the case of ***NIGER CHEMIST V NIGERIAN CHEMIST***, Palmer J said that “it seems to me 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 Chemist ‘and the other “Nigerian Chemist,’ there must be a grave risk of confusion and deception.

In ***OGUNLENDE V BABAYEMI***, the plaintiffs were building and civil engineering contractors carrying on business as ‘Mercury Builders’. They were granted an injunction to refrain the defendants from carrying out a similar business name as ‘Mercury Builders Nigeria Ltd.’

**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’. In **RECKITT & COLMAN PRODUCTS LTD V BORDEN INC,** Lord Oliver reduced the five guidelines laid out by Lord Diplock in **ERVEN WARNINK V. TOWNEND & SONS LTD(**This is also known as the ‘advocate case**)** to three elements which are:

1. **Goodwill owned by the trader**

The plaintiff has the burden of proving goodwill in its goods or services, get-up of goods, brand, mark or the thing standing for itself. 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 also has the burden of proof to show false representation (intentional or otherwise) to the public to have them believe that goods/services of the defendant are that of the Plaintiff. There must be some connection between the plaintiff's and defendant's goods, services or trade and must show likelihood or actual deception or confusion by the public. It is the Court's duty to decide similarity or identity of the marks, goods or services. The criteria are often: aural, visual and conceptual similarity

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. Disclaimers may not be enough to avoid liability in cases of passing off.

**METHODS OF PASSING OFF**

**1 A direct statement that the goods belonging to the plaintiff in fact belongs to the defendant**

In **LORD BYRON V  JOHNSON** the defendant who was a publisher, advertised some poems which he had published as being written by Lord Byron when, in fact they were written by someone else. It was held that the defendant had committed the tort of passing off.

**2. Imitiating the appearance of the plaintiff’s goods**

In **WHITE HUDSON & CO LTD V ASIAN ORGANIZATION LTD ,**the plaintiffs manufactured ‘Hacks’ cough sweets in Singapore, which they sold in red cellophane wrappers and which came to be known as ‘red paper cough sweets. The plaintiffs were, at that time, the only persons who sold cough sweets in such form in Singapore

**3. Using the plaintiff’s name**

Where the defendant uses the plaintiff’s name as opposed to the name of the plaintiff’s products, the tort may be committed. This can be seen in the case of **MATINS LTD V DYE**. The plaintiff was the owner of a famous restaurant in Paris and he sought an injunction to restrain the defendant from opening a French restaurant in Norwich with the same name. Even though the restaurant in Norwich did not have the same standard as that of Paris and was not in the same country, the court granted him the injunction because the conduct of the defendant was injuring the plaintiff’s goodwill of his restaurant in Paris.

Also, the case of **J BOLLINGER V COSTA BRAVA WINE CO. LTD**, Popularly known as the Spanish Champagne case, this particular case saw an action being brought by twelve biggest champagne manufacturers of France, on behalf of every champagne manufacturer in their country, seeking injunctions on use of the word “champagne” while describing Spanish wine, and passing it off as champagne. An injunction was granted.

**4. 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**

**Just like the case of OGUNLENDE v. BABAYEMI (1971),** the plaintiffs carried on business as civil engineering contractors and plumbers under the name ‘Mercury Builders,’ Taylor, C.J. granted an injunction restraining the defendant from conducting a similar business under the name ‘Mercury Builders (Nigeria) Ltd.’ since “there can be no doubt at all that the name of the defendant company is calculated to deceive due to its similarity with the name of the plaintiff association”

**THE REMEDIES OF PASSING OFF**

**1. Injunction**

This is an order from the court to prohibit or suspend the use of a mark. This is usually the first relief sought to suspend the use of a mark.

**2. Account of profit**

Here the plaintiff is entitled to profit on goods wrongly sold by the infringer.

**3. Damages**

**4. Delivery up for destruction or infringing of goods**

**5. Intervention by relevant agencies such as NAFDAC, SON, intellectual property commission etc.**

In summary, it is appropriate to say passing off is acommon law concept which prevents the unlawful usage of a man’s mark, sign or goods and services. Passing off protects the property rights of an individual.

**BIBLIOGRAPHY**

. Kodilinye G, Nigerian law of torts (Spectrum books limited 1999)

. Heuston R, Salmond on the law of Torts (16th edition, Sweet & Maxwell London 1973)