Name: joseph favour oluwatofunmi

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

**What is the tort of passing off?**

The tort of passing off is an action available where a business wrongly suggests a connection, in the course of trade, with another goods or services where there is damage, or a threat of damage to the proprietary interests in the reputation or goodwill that the wronged person has built [[1]](#footnote-1). In other words, it is the passing off or presentation to customer one product, services, or business as that of another person whose reputation and goodwill one thereby enjoys. Passing off is a pretence by one person, that his goods or business are those of another person in other to capture the patronage of the customers of a rival trader and enjoy his good will. This more like imposing a rival trader because of his/ her achievements in the market sector. The tort of passing off applies where there is a representation that a person’s goods or services are those of someone else.[[2]](#footnote-2)

However, whenever a person sells his goods, or carries on his business under a name, trademark description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill , he commits the tort of passing off[[3]](#footnote-3). The tort of passing off is common in a competitive business community or economy. This tort however is designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons. Its objective is to protect the reputation and goodwill a business has built for itself.

This tort is however relevant as it protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business. It also protects that attractive force of the business which brings customers to it. Usually, passing off involves one form of misrepresentation, or other to make the public patronise one’s goods or business.

An action would be said to lie in passing off if it has these five characteristics as stated in the case of **Warnick BV v Townsend &Sons, LORD DIPLOCK** [[4]](#footnote-4):

1. A misrepresentation
2. Made by a defendant in the course of trade
3. To prospective customers
4. Which is calculated to injure the business and goodwill of another person
5. Which causes damage to that person’s business and goodwill

However, the tort of passing off is however actionable per se on its occurrence. A plaintiff does not have to prove damages in order to succeed[[5]](#footnote-5). The right of action lies even though no damage was caused or suffered for. The plaintiff therefore as the right to sue and is entitled to the remedy as the probability of a damage occurring is enough for him to succeed.[[6]](#footnote-6)

The relevance of this tort however cannot be overemphasised. This is because this tort objective is to protect the reputation and goodwill built by a business and its owner. The tort however as its elements which must be proved before an action can succeed. To succeed in a claim for passing off all that the plaintiff has to prove is that the activity of the defendant is ‘calculated’ to deceive the public. The liability however in this tort is such is strict therefore innocent passing off is not a defence [[7]](#footnote-7), 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, his claim succeeds and may obtain nominal damages and an order of injunction.

The plaintiff does not have to prove intention to deceive on the part of the defendant. In other words of PALMER J, in the case of **Niger Chemists Ltd v Nigeria Chemists:**

**‘**it’s not necessary to prove, that there was any intention to deceive: this has been held in long series of cases and it’s notdisputed’

It’s not necessary at all for the plaintiff to prove that the defendant’s conduct has actually deceived the members of the public. its sufficient if the plaintiff can prove that there is the likelihood of the public to be deceived. This will entitle the plaintiff to an award of *aquia timet injunction,* which is an injunction usually issued to prevent a future occurrence. However, where evidence exists that the public has actually been deceived, the plaintiff may give such evidences. When there is no likelihood of the public being deceived there is no passing off.

**THE RELEVANCE OF THIS TORT IN THE 21ST CENTURY**

The importance of this tort and its relevance of the tort in our world today can be seen most especially as it protects the different traders in their different scope. For example, passing off and trade mark infringement go hand in hand and are very similar in nature. This because the original works of people to avoid being used by another person. The tort is relevant because it prevents one trade from damaging or exploiting the reputation built by another.

However, in this century the tort of passing off is prominent and wildly used in some decided cases. In the case **Trebor Nigeria limited v Associated industries limited**[[8]](#footnote-8), In this instance passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same. They were therefore liable for the tort of passing off. The importance of this tort is such that has given the traders, business a legitimate right for their work to be protected and have also protected the goodwill and reputation of the business.

This however is useful as anyone found liable would be liable for the tort of passing off. This tort however renders the defendant liable for a damages and is expected to compensate the plaintiff with damages. The purpose of this tort i.e. the tort of passing off, in the case of **Perry v Truefitt** stated that ‘a man is not to sell his own goods under the pretence that they are the goods of another; he cannot be permitted to practice such a deception, nor to use the means which to that end’. This tort is to protect the right of property, product, services and business of the plaintiff. This tort protects the works of others to avoid being used by another. It could include the Intellectual property right, trademarks etc.

In our world, there are competitors, more businesses which could be similar. However, there are different businesses which are similar and have different competitors. There are different creations every day that help building the reputation of the businesses. This expands the scope of how businesses and ideas could be copied. However, for this to be controlled for this to be limited the rights of the works and businesses needed to be protected and the violators need to be punished. this is however the importance of the tort has it helps for the works to be protected and avoid being used by the different persons other than the original owner for the purpose to misleading the public as though it is their work.

An economic tort is such which affects the economic, financial sector of life. The tort of passing off as an economic tort is such which protects the losses or future losses of the people in business as they help to prevent the use of other ideas as though it was theirs. The tort of passing off retains its importance in the protection of goodwill in several circumstances. The aim of passing off is however achievable as it aims at enabling businesses continue earning profit and also to protect the right of property that exists in goodwill.

However, the tort of passing off has been appreciated in different cases in this 21st century even in Nigeria. In the case of **Ayman enterprises ltd v Akuma Industries ltd**[[9]](#footnote-9)was that passing off for an unregistered trademark should not be instituted in the federal high court but a state high court as the right of action in passing off. this case mainly focused on which court has the jurisdiction on matters of passing off. It shows that the tort has been adopted by the Nigerian courts.

In the case of **Niger Chemists Ltd v Nigeria Chemists**(supra) [[10]](#footnote-10) The plaintiff sued the defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The court agreed with the plaintiff and granted an injunction against the defendant on the use of the name. in this instance passing off occurred by the use of trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

There are however remedies for the tort of passing off they include: damages, injunction[[11]](#footnote-11) . there are also defences available for the defendant in this tort of passing off. This could be available by saying the passing off is gotten by consent [[12]](#footnote-12), that it was a mere descriptive name of the product [[13]](#footnote-13). In conclusion, its appropriate to say that the passing off is a common law concept that prevents the unlawful usage of a man’s mark, good and services. Its relevant in our society as it helps to protect the rights of individuals. This allows for individual’s business to be protected from being destroyed by rivals in the business as the unlawful use of another’s work to deceive the public as though they are the one or there is a relationship between them amounts to the tort of passing off

1. Vieright Pty ltd v Myer Stores Ltd [↑](#footnote-ref-1)
2. Black’s law dictionary 9th ed. [↑](#footnote-ref-2)
3. Niger Chemists Ltd v Nigeria Chemists 1961 All NLR 171 [↑](#footnote-ref-3)
4. 1979 ALL ER 927 @932 [↑](#footnote-ref-4)
5. Draper v trist 1939 3 All ER 513 CA [↑](#footnote-ref-5)
6. Francis Day &Hunter Ltd v Twentieth Century Fox Co Ltd 1939 4 ALL ER 845 [↑](#footnote-ref-6)
7. Baume &co ltd. v Moore ltd 1958 Ch. 907 [↑](#footnote-ref-7)
8. 1972 NNLR 60 [↑](#footnote-ref-8)
9. 2003 LPELR –SC .116/1999 [↑](#footnote-ref-9)
10. 2007 15 NWLR (PT.1058) 576 [↑](#footnote-ref-10)
11. John walker& sons ltd v Henry Ost & Co ltd 1970 2 106 [↑](#footnote-ref-11)
12. Lee v Haley 1869 5 Ch. App 155 [↑](#footnote-ref-12)
13. British vacuum cleaner co v new vacuum cleaner co 1907 2 Ch. 312

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