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***Abstract***

*The tort of passing off seeks to protect the goodwill of persons in business and their trademarks however the enactment of Trade Marks Act 1994 has been seen to significantly reduce the relevance of passing off in the 21st century. This paper considers passing off, its elements, and the relevance of passing off in 21st century tort and finally the conclusion.*

**Introduction**

Passing off refers to the misrepresentation of one’s product or business as that of another person thereby deceiving purchasers or potential purchasers. It is a tort where goods are passed off by the defendant as being his own goods.

Whenever a person sells his goods, or carries on his business under a name, trademark, and 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.

It should be noted that the plaintiff in an action for passing off is not a member of the public that was deceived but the person whose goods have been passed off.

**Methods of Passing Off**

The methods of passing off include:

1. Marketing a product as that of the plaintiff
2. Imitating the appearance of the plaintiff’s goods
3. Using a name similar to the plaintiff’s goods
4. Using the plaintiff’s name
5. Selling inferior or expired goods of the plaintiff as current stock

**Elements of Passing Off**

Lord Diplock in *Erven Warnick BV v J Townsend &Sons (Hull) Ltd[[1]](#footnote-1)* identified the five essential elements of the tort when he said that it is:

‘…possible to identify characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and(5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so.

In proving passing off, the defendant must show that the acts of the defendant were ‘calculated to deceive’. A defendant may be liable for passing off although his conduct was entirely honest and innocent in the sense that he had no intention to deceive but calculated here means ‘likely to’ deceive the public*. In the case of Niger Chemists Ltd v Nigeria Chemists[[2]](#footnote-2)*, it was held that it is not necessary to prove that the defendant had an intention to deceive.

It is not necessary to prove that deception has actually taken place. It is sufficient for the plaintiff to show that deception is likely to occur in the future and if he can show this the court may award a *quia timet[[3]](#footnote-3)* injunction. However, where evidence exists that the public has actually been deceived, the plaintiff may give such evidence. Where there is no likelihood of the public being confused, there is no passing off. The factors for determining if the public is likely to be confused include: the experience of the buyers; the level of perception of the buyers and the level of literacy of each buyer.

The presence or absence of fraud on the defendant’s part is not entirely irrelevant because where there is fraud, it helps the plaintiff to prove the likelihood of damage and it makes it easier for the court to award punitive damages.

Passing off is actionable per se. In essence, a person does not need to prove damage for action in passing off to succeed.[[4]](#footnote-4)

**Relevance of Passing off in Torts in the 21st Century**

The tort of passing off is common in the business and commercial sector of a society as people try to expand their businesses. The tort of passing off is therefore designed to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The tort of passing off protects a person’s business interest from unfair trade practices of other persons.

Sir John Salmond, in his book, “Law of Torts”, stated that the tort of passing off is:

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

In the law of passing off, the basis of the legal action is that the passing off by the defendant of his goods as that of the plaintiff is injuring the right of property, product, services and business of the plaintiff.

The importance of the law of passing off was reduced by the Trade Marks Act 1994, particularly in so far as the Act allowed a trade mark to be registered in respect of a container or the goods. Nevertheless, even where there appears to be a strong case of trade mark infringement it remains common to run a parallel claim for passing off and it will be the only remedy where the law of trademarks is inapplicable or the registration is invalid or, of course, where there has been no attempt at registration.

Passing off and law on infringement although quite similar are significantly different because passing off also covers unregistered trademarks and herein lies the relevance of passing off in the 21st century. Although many companies have been encouraged to register their trademark to ensure protection of their designs and work, passing off still comes in handy. One can say that it is gradually losing it relevance however it is not completely outdated and irrelevant.

**Conclusion**

The tort of passing off is essential and relevant even in the present society because even those that have unregistered trademarks can seek redress in court and remedies will be made available to them.

**Bibliography**

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1. [1979] AC p731 [↑](#footnote-ref-1)
2. [1961] All NLR 171 [↑](#footnote-ref-2)
3. Injunctions to restrain wrongful acts that are imminent [↑](#footnote-ref-3)
4. McCulloch v May Produce Distributors Ltd [1947] 2All ER 845 [↑](#footnote-ref-4)