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QUESTION: Discuss the relevance of Passing off as a form of Economic Tort in 21st century Nigeria.

**INTRODUCTION**

Economic tort, which is also known as Business tort, mainly offers protection for a person’s trade or business from acts which the law considers to be unacceptable. It is a tort which mainly occurs in the business or economic sector of life. It is clear that the main reason behind the emergence of Tort law was to protect the interest of people, both as people and equally their property. However, due to the dynamic nature of society, the whims of Tort law have expanded to now include liability for negligent and intentional acts against a person’s business or livelihood.

Hence, the essence of Economic tort is the protection of a person from infliction of financial harm to his business. Simply put, it prevents injury to the personal earnings of a person. Thus, creating the opportunity for persons that suffer business, financial or economic loss to bring an action for the recovery of the respective loss.

A major fundamental principle that grounded the law of Economic tort was laid down first[[1]](#footnote-1) in *Mogul* *Steamship* *Co* *Ltd* v. *McGregor*[[2]](#footnote-2) by the House of Lords when it held that the plaintiffs had no action against the defendant because the latter had not committed any unlawful act against the former. This principle was mentioned and applied for the second time in *Allen* v. *Flood,[[3]](#footnote-3)* which centered on a dispute between two trade unions. The principle laid down in *Mogul* was applied and the plaintiffs were held to have no cause of action, for the reason that the plaintiffs contracts were not unlawfully interfered with. The defendants has committed no unlawful act. For the third time, this principle, although mentioned in *Quinn* v. *Leatham,[[4]](#footnote-4)* was however not applied. The House of Lords instead took the view that the defendants had not committed an unlawful act against the plaintiff, yet, the defendants had unjustifiably conspired to inflict loss on the plaintiff and were therein liable. Their action was based on malice. The justification for the diversion from *Allen’s case* is that in the latter case, there was one defendant while, in the former, the were multiple and they conspired to inflict harm on the plaintiff. This simply means that collective pressure is greater than single pressure.

Two major points can be deciphered from the prior paragraph. One is that: unless an unlawful act occurs, no economic tort will have occurred.[[5]](#footnote-5) The second is that malice or intention to act unlawfully is is sufficient to give rise to an economic tort.[[6]](#footnote-6) This two points have formed part of the elements of economic tort as it evolved over the years. Thus, economic tort cannot be discussed without it. This writer, after laying a succinct explanation of Economic tort will now proceed to discuss its types. They include:

* Interference with contract;
* Breach of intellectual property;
* Passing off; and many others

Nonetheless, Passing off shall be the fulcrum of this discussion and accordingly, this writer shall begin a complete and well- rounded discussion on the topic that is Passing off.

**PASSING** **OFF**

It is a common law tort that involves the false representation of one’s product or business as that of another person, thereby deceiving lawyers to patronize it.[[7]](#footnote-7) It involves selling one’s product under the umbrella of another for the sole purpose of securing patronages. Simply, the tort of passing off entails a person deceiving purchasers, mainly on the trademark of his business to entice them into buying his product. In the tort of passing off, a person carries on his business or sells his goods under a name, or trademark, description or imitation of another person’s product in order to deceive the public to patronize it.[[8]](#footnote-8) Fundamentally, passing off is a form of misrepresentation to customers by a person about his goods in order to secure purchase of the goods from the customers.

The element of deceit in the act of passing off, is a major reason why the court developed the tort. To protect traders whose goods were being represented as other’s goods. Essentially, the purpose of the tort of passing off is to protect peoples business interests from from unfair trade practices and sharp practices of other persons.[[9]](#footnote-9) This tort is quintessential for traders in today’s commercial world. It serves to safeguard traders from damage or loss to their business by ensuing liability on persons who substitute their goods for the trader’s.[[10]](#footnote-10) Hence, with all credits to the court, there will be liability for any such person that commits the tort of passing off, whether or not he acts intentionally or innocently.

For this reason, *Lord Kingsdown* said in *Leather Cloth Co* v. *American Leather Cloth Co,[[11]](#footnote-11)* “*The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader*.” Summarily, the tort of passing off was outlined to prevent unfair practices in trade whereby one person reaps the benefit of another’s success in business through the false representation of goods.[[12]](#footnote-12)

After establishing that the tort of passing off is aimed at protecting a trader’s business, this writer deems it necessary to indicate what about the business it seeks to protect. The object of the tort of passing off lies in protecting the goodwill, reputation, patronage and as many good qualities of the business as they are. Hence, the tort of passing off is usually committed against a successful and reputable business in the society and when the tort feasor commits this tort, he uses the goodwill of the successful and reputable business to his advantage.

Even so, it is worthy of note that passing off is actionable per se. This means that the plaintiff need not show proof of damage to be successful in an action for passing off. As said above, liability will ensue whether or not a defendant acted intentionally, negligently or innocently. As far as this tort is concerned, once a given sets of facts occur, the defendant will be held liable. The sets of facts that will make the defendant liable was laid down in *Warnink BV* v. *Townsend & Sons* by *Lord Diplock[[13]](#footnote-13)*

**ELEMENTS OF PASSING OFF**

The elements are the key ingredients a plaintiff must prove in order to succeed in an action for passing off. Seeing that the consideration of the court in an action for passing off is whether or not there is a risk of confusion or deception, the key ingredient a plaintiff needs to assert is that the defendant’s action was calculated to mislead patronizers and increase the rate of the purchase of his goods.[[14]](#footnote-14) In proving this, the plaintiff does not need to show that he has suffered damage because passing off is actionable per se. It is also a strict liability tort, reason being that the defendant acting innocently will not be a bar for liability to ensue on him.[[15]](#footnote-15) This means that , even when the defendant acts innocently or honestly, he will still be held liable.

Equally, it is paramount to take cognizance of the fact that it is not necessary for the customers or patronizers to be deceived. What is necessary is that there’s a likelihood or chance that they will be deceived if the defendant carries out his activities. Palmer J.,[[16]](#footnote-16) when he summarily said that, the likelihood or chance of deceit and confusion is what must be avoided. As a consequence, if it is deciphered by the court that there’s a likely risk of confusion, the court will restrain the defendant from continuing with such act.

A concise analysis of the tort of passing off has been provided. Thus, this writer will herein begin to discuss the relevance of passing off in 21st century Nigeria.

**RELEVANCE**

The relevance of passing off in modern business world or 21st century lies in the protection of a trademark or a name which a business built for itself from unfair practices. It became more relevant over time, particularly in the nineteenth century where the mode of businesses gravitated towards the production of intangible property. It therefore became necessary to expand the law of tort to protect not only personal and proprietary interests but also intangible properties interests. The following paragraphs will outline the relevance of passing off in 21st century.

The tort of passing off has prevented unfair and sharp practices in trade.[[17]](#footnote-17) This applies both to manufacturers and customers. For manufacturers, it prevents them from the exploitation and manipulation of their goodwill and reputation of the business which they built by another. It protects the image and profits which the business has made for itself from misuse and abuse by others.

Equally, it protects the benefits and advantage of the good name of the business, as well as its reputation, profits, patronage and quality of its business. Essentially, it protects the attractive force of the business that brings customers to it by preventing another trader from representing his goods as those of another. In more direct words, it protects a person’s business from a misleading falsehood of his business, aimed at his customers, to confuse them and enable them make an erroneous decision.

On the other hand, for the customers, it prevents situations where they make wrong purchases and thus strengthening their loyalty in the manufacturer. Take for installation this scenery: where Funke wants to buy ‘Extract’ soap of a specific brand but is misled to buy the wrong one which description is closely similar and the name is identical with that of the specific brand. Funke finds out, that it is fake when she develops a rash. She is dissatisfied and confused about which product is the original.

In addition, it helps customers make educated choices about their about the safety, reliability and effectiveness of their products.[[18]](#footnote-18) Hence, whenever the court rules that the tort of passing off has occurred, it is simply enabling customers to rely more on the effectiveness of products as well as their safety. In other words customers can purchase products with the confidence that the products are safe and will be effective for their purposes. Fundamentally, it fosters the confidence and ease of mind that consumers demand and markets rely on.

The tort of passing off ensures that products are original, authentic, and of high-quality that customers recognize and expect. Correspondingly, it helps to protect a situation like the scenery above, where the soap Funke purchased was not authentic neither was it of high-quality and so did not live up to the expectations of Funke, from happening.

Finally, it encourages innovation by encouraging entrepreneurs to keep pushing for new advances in the face of adversity. The tort of passing off has helped entrepreneurs tremendously by encouraging creativity and innovativeness in their various line of businesses. It promotes the confidence and ease of mind that entrepreneurs rely on. This alludes that entrepreneurs and manufacturers can produce their respective goods safely without the fear of being cheated, or their goods being misrepresented.

**CONCLUSION**

In closing, this writer affirms that passing off is relevant in 21st century Nigeria. It’s existence has operated to protect manufacturers and entrepreneurs from the false representation of their products thereby loosing goodwill, profit and a remarkable reputation. Equally, it has prevented customers from making erroneous purchases and enabling them with the confidence and reliance in the products they utilize. It is therefore this writer’s concluding opinion that the tort of passing off is extremely instrumental to the functioning of modern commerce world.

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1. D. G Cracknell “Obligations: The Law of Tort” (4th Ed) [↑](#footnote-ref-1)
2. (1889) LR 23 QBD 598 [↑](#footnote-ref-2)
3. (1898) AC 1 [↑](#footnote-ref-3)
4. (1901) AC 495 [↑](#footnote-ref-4)
5. From the first two cases in the third paragraph [↑](#footnote-ref-5)
6. From the last case in the third paragraph [↑](#footnote-ref-6)
7. E. M “Law of Torts” [↑](#footnote-ref-7)
8. E. M “Law of Torts” [↑](#footnote-ref-8)
9. E. M “Law of Torts” [↑](#footnote-ref-9)
10. Winfield and Jolowicz “Winfield and Jolowicz on Tort” [↑](#footnote-ref-10)
11. (1842) 49 ER 749 at 725 [↑](#footnote-ref-11)
12. Salmond J. “Law of Torts” [↑](#footnote-ref-12)
13. (1979) All ER 927 at 932 [↑](#footnote-ref-13)
14. E. M “Law of Torts” [↑](#footnote-ref-14)
15. Kodilinye and Aluko “Nigerian Law of Torts” [↑](#footnote-ref-15)
16. Niger Chemists Ltd v. Nigeria Chemists (Supra) [↑](#footnote-ref-16)
17. E. M “Law of Torts” [↑](#footnote-ref-17)
18. Global Innovation Policy Center “Why Are Intellectual Property Rights Important” published 28th of December, 2009 <theglobalipcenter.com> accessed 29th of April, 2020 [↑](#footnote-ref-18)