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**QUESTION: Discuss the relevance of Passing Off as a form of Economic Torts in the 21st century**

**INTRODUCTION**

Economic tort protects individuals in whatever economic activities they engage in. Passing off in particular protects the goodwill of a trader from representation. Passing off is misleading the public into believing falsely, that the brand being projected was the same as well-known brand which is a wrong[[1]](#footnote-1).

**THE CONCEPT OF ECONOMIC TORT**

Economic tort are torts that provide the common rules on liability which arises out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss. It provides protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with another and therefore to this extent, one business may succeed to the detriment of another, the economic tort seeks to ensure that businesses are protected from acts of unacceptable interference. Economic torts are torts which inflict economic losses. There are categories of economic torts and they include:

1. Passing Off: It is concerned with making false representation likely to induce a person to believe that the goods or services are those of another.
2. Breach of Intellectual Property rights; such as breach of copyright, patents, trademarks and other merchandise marks.
3. Injurious falsehood/ Malicious falsehood: The tort of injurious falsehood is being brought into play when lies are published to damage a business.
4. Interference with contracts: I t is concerned with the intentional inducement of contracting party to break his contract with another person, thereby causing damage to that other person.
5. Conspiracy to interfere, that, civil conspiracy, and so forth: It is when two or more persons come together without lawful justification to cause willful damage to the business of the third party which is usually the plaintiff.

**DEFINITION OF PASSING OFF**

This tort is concerned with making false representation that is likely to induce a person to believe that the goods or services are those of another[[2]](#footnote-2). Another definition by the House of Lords (England) in ***Erven v. Townend & Sons[[3]](#footnote-3)*** as “a misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and which causes damage to a business or goodwill of the trader by whom the action is brought or will probably do so”. Also, in the case of ***Consumers Distributing Co. v. Seiko Time Canada ltd[[4]](#footnote-4)*** passing off was described as “the making of some false representation to the public, or to third persons, likely to induce them to believe that the goods or services of another are those of the plaintiff”.

The concept of passing happens when a person deliberately or unintentionally misleads the public into believing that the brand being projected is the same as a well-known brand. This tort is committed or happens when someone passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, thereby causing financial or reputational damage. A cause of action for passing off is a form of intellectual property enforcement against unauthorized use of a get-up (which is the whole external appearances or look-and-feel of a product, including any marks or other indicia used) which is considered to be similar to that of another party’s product, including registered or unregistered trademarks. Passing off is of particular significance where an action for trade mark infringement based on a registered trademark is unlikely to be successful (due to the difference between the registered trademark and the unregistered mark).

Passing off can take several dimensions such as counterfeiting or imitating the plaintiff’s trademark or tradename, his wrappers, labels or containers, his vehicles, the badges or uniforms of his employees, or the appearance of his place or business. The law of passing off prevents a trader from misrepresenting goods or services as being the goods and services of another, and also prevents him from holding out his goods as having some association or connection with another when it is not true.

In addition to straight passing off, there are also other forms of passing off, and they are:

1. Extended Passing Off: This is when a misrepresentation as to the particular quality of a product or service causes harm to another’s goodwill.
2. Reverse Passing Off: This is where a trader markets another business’ goods or services as being his own.

**PASSING OFF AND TRADEMARK INFRINGEMENT**

It has been duly noticed that passing off and trademark infringement are quite similar in nature and often go hand-in-hand with each other, they are sometimes used interchangeably or to describe the same concept. However, despite how similar they may seem, there are difference that distinguish them from each other. Passing off is of particular significance where an action for trademark infringement based on a registered trade mark is unlikely to be successful (due to the differences between the registered trademark and the unregistered mark). Whilst, passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark, i.e. a mark, brand, design, name must be registered as a trade mark before one can make a claim on trade mark infringement.

Another distinction is while an action for infringement of trademark is a statutory remedy conferred on the owner of a registered trademark, for the enforcement of a right to use the trademark in relation to the goods and/or services for which the mark has been registered; an action for passing off is an action against the deceit on the colorable imitation of a mark adopted by a person/company in relation to goods and services which has acquired a distinctive reputation in the market and is known as belonging to or produced by the person and company only. An action for passing off is a common law remedy and the claimant need not establish title for the same but must show that the goods and services have distinctive features. Passing off does not confer monopoly rights to any names, it does not recognize them as property in its right.

**ELEMENTS OF PASSING OFF**

In order for the plaintiff to succeed in a claim of the tort of passing off, three main elements must be proven. These three main elements were introduced in a leading decision of the House of Lords on the tort of passing off by Lord Oliver in ***Reckitt & Coleman Products v. Borden Inc.[[5]](#footnote-5)*** also known as the ***Jif Lemon case.*** Prior to that, **Lord Diplock** in ***Erven Warnink v. Townend & Sons Ltd[[6]](#footnote-6)*** also known as the Advocaat case already stated out five criteria for a claim of passing off, which include:

1. Misrepresentation
2. 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; and
5. Which causes actual damage to the business or goodwill of the trader bringing the action

**Lord Oliver** later summarized these five criteria into the three main elements which are still applicable to this day, and they include:

1. GOODWILL

The plaintiff has the burden of proving goodwill in its goods or services, get-up of goods, brands, mark or the thing standing for itself. The plaintiff must prove that he owes the ‘reputation’ in the mark, that the public associates with your specific product or service. In the case of ***Southern v. How[[7]](#footnote-7)***where an eminent clothing brand was used to dupe a customer, who bought the defendant’s low-grade clothing thinking it was the plaintiff’s brand. The defendant was held liable. This was more of a case of deceit, but the principle of passing off started here.

1. MISREPRESENTATION

The plaintiff must prove that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours. He must successfully prove that the defendants who are engaged in a common field have used a name, mark or sigh so resembling his that it is likely or calculated to deceive or cause confusion in the minds of the common customer. He also has the burden to 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. They must show likelihood or actual deception or confusion by the public. Deception or confusion, however, does not consider a moron in a hurry. 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 (often applied in trademark infringement cases).

1. **DAMAGE TO GOODWILL**

For the element of damage to goodwill, there may be a loss or division of trade or dilution of goodwill. The plaintiff needs to prove actual or special damage, real and tangible probability of damage is sufficient. This damage should however be reasonably foreseeable. It is not enough just to show likelihood or actual deception or confusion. Disclaimers may not be enough to avoid passing off or cause of action. The plaintiff must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss.

**DEFENSES OF PASSING OFF**

The defenses available to the defendants against a claim of Passing off include:

1. Consent of the plaintiff to use the name, mark, sign or slogan.
2. Indistinct name, mark, and sign of the plaintiff[[8]](#footnote-8)
3. That the plaintiff’s name, mark, sign has become in generic/common place.
4. Dissimilarities in the mark of the plaintiff and the defendant[[9]](#footnote-9)
5. Innocent usage of the plaintiff’s name

**CONCLUSION**

The purpose of Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another.

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