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COURSE TITTLE: LAW OF TORTS 2

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QUESTION : Discuss the relevance of passing off as a form of Economic Tort in the 21st Century

INTRODUCTION :

Economic torts are torts which inflict mainly economic losses. In other words, Economic torts are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life . Economic torts include Passing off, Breach of intellectual property rights, injurious falsehood, interference with contracts , conspiracy to interfere and many more . our focus for this assignment would be passing off. The tort of passing off is to protect traders most especially unregistered business against all forms of unfair competition.

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 deceit of the public to patronize one’s business, product or services. Passing off is an unfair unconscionable competition. In other words it is the paasing off or representation to customers of one’s products, services, or business as that of another person ehose reputation and goodwill one thereby enjoys

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.

”.[[1]](#footnote-1) Passing off is when a trader by some device induces or endeavors to induce purchasers or persons who may become purchasers to believe that the goods offered for sale are of a kind, or quality, or from a source, or having a reputation, other than their own, e.g., by improperly using trade mark or a trade name or its distinctive part. The law of passing off arose to prevent unfair trading and protects the property rights of a trade in his goodwill.[[2]](#footnote-2) Jowitt’s Dictionary of English Law defines passing off as the wrong committed by a person who sells goods or carries on with business, etc. under such a name, mark, description or otherwise in such a manner as to mislead the public into believing that the goods or business, etc. are those of another person. The latter person has a right of action in damages[[3]](#footnote-3) or for an account, and for injunction to restrain the defendant for the future.

**Methods of Passing Off:**

Marketing a product as that of the plaintiff

Imitating the appearance of the plaintiff’s goods

Using a name similar to the plaintiff’s goods

Using the plaintiff’s name

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[[4]](#footnote-4)* 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)

(5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so.

**Purpose of the Law of Passing off**

Passing off is a common law tort that was established long before trademarks became registered. Its purpose is to protect traders by allowing them to bring an action against a trader attempting to ride off the back of their established relationship(goodwill) by using a similar mark or get up as their own. **Sir John Salmond** in his book ***Law of Tort*** stated the reason for the tort of passing off as thus:

 *“The law … is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of reputation already achieved by rival traders”[[5]](#footnote-5)*

**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.

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.

**Bibliography**

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1. Margaret R Brazier- “Clerk & Lindsell on Torts” p.1403 (1995, 17th Edition). [↑](#footnote-ref-1)
2. Winifield- “Tort” p.485 9th Edition. [↑](#footnote-ref-2)
3. *: Spalding v. Gamage* (1918) 35 R.P.C. 101. [↑](#footnote-ref-3)
4. [1979] AC p731 [↑](#footnote-ref-4)
5. Salmond op cit. para 149 [↑](#footnote-ref-5)