

AN ANALYSIS ON THE DEVELOPMENT OF THE TORT OF DECEIT AND PASSING-OFF

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Abstract

The act of deceit is said to be caused when there occurs a wilful misrepresentation that ultimately leads to unlawful loss or injury to the person acting in reliance of the same. This particular concept of tort jurisprudence has significantly contributed to the judicial developments in the early English Law. The tort of passing-off is something that is based on the protection of goodwill and the equity principles served as significant sources that shaped passing off as a property right. These concepts require further analysis due the fact that there exists a significant complexity in the tort of deceit or passing-off due to the fact that there comes a requirement of establishing proof of wrongful act in order to achieve any sort of remedy. The present article aims to thoroughly analyse the evolutionary and developmental aspects of the tort of deceit and passing-off through the identification of important judicial decisions that accentuated the process and arrive at suitable conclusions regarding the same.

Keywords: Deceit, Passing off, Equity law, torts, classic trinity, misrepresentation.

Introduction

Deceit can be defined as a fraudulent misrepresentation by which one man deceives or tricks another and subsequently creating loss to the other party³⁹. Thus, a claim for fraudulent representation can be found in the tort of deceit. The elements essential to establish a tort of deceit are the making of a false representation, the knowledge of falsity, intention that the claimant should act in reliance, reliance by the claimant and the impact on the claimant which is accompanied by the quantum of damage suffered. The closeness between the tort of deceit and contract liability can be said to have influenced the judicial attitudes during its development. The English law of deceit as an action before the court has its origin during the fourteenth and fifteenth centuries. It took its modern

development from 1789 with the landmark judgement of *Pasley v Freeman*, where it was held that it was not necessary that the defendant should be benefitted by the deceit and whether the representor colluded with another⁴⁰. In the early law of equity, it was settled that liability will arise if a person made a false representation carelessly to another on how to deal in a matter of business upon the faith of such a representation⁴¹. It was in the case of *Derry v Peek*⁴² that the House of Lords held that a person will not be liable for false representation even when it was made carelessly, provided it was made in an honest belief that it was true. Thus, it turned out that an action for deceit did not arouse if it was found that it was made only with negligence and not misrepresentation. Hence this case set the

³⁹ *Pasley v Freeman* 100 Eng. Rep. 450 (K.B 1789).

⁴¹ Peter Eggers, *DECEIT: THE LIE OF THE LAW*, Taylor & Francis, London, September Edition of 2013, pg.304.

⁴² *Derry v Peek* (1889) LR 14 App Case 337.

³⁹ Black Laws Dictionary, 2nd edition, pg. 493.

boundaries for the tort of deceit. Thus, proving deceit turned out to be difficult when compared to that of proving negligence because of its requirement for intention. But there existed a vacuum as the ingredients were not identified conclusively. The way in which the essential elements were identified and the progress of their applicability in judicial decisions also need to be analysed. The person making the representation, at that time should have the knowledge that it was false⁴³. Thus, the way in which the concept of scienter has been used in deceit cases is something that needs to be discussed. It can be identified that throughout the development of this tort, it has been explained and clarified with reference to the moral condemnation of lying. During the centuries that followed 1789, the tort of deceit and the general law of misrepresentation has developed and the decisions of the house of lords played a significant role in it and had a universal impact.

The root of the tort of passing-off can be traced back to that of misrepresentation. Raising an action for passing off will protect the goodwill of a trader from misrepresentation. In the Dutch *Advocaat* case⁴⁴ the ingredients of passing-off were discussed. Until the eighteenth century those cases of passing-off were classified within that of deceit itself. It was in the case of *Millington v Fox*⁴⁵ that it was decided that proof of wrong was not essential to impose liability for the wrong of passing-off and from here began the real development of the concept on its own. The basic question that arises in this tort is that whether the public is misled by the conduct of the defendant to cause a confusion between the business of the plaintiff and the defendant. Reputation, misrepresentation, and damage to goodwill are three vital elements of the tort of passing-off. These three elements are called as the 'classic trinity'. The was referred in *Reckitt & Colman Ltd*

*v Borden Inc*⁴⁶ by the house of lords. What that makes passing off different from trademark is the fact that even when the remedy for both is same, trademark is available only to registered goods and services while passing off is available to unregistered goods and services. Also, a significant question that arises is that regarding the motive of the defendant. For a long period, the question remained unanswered as to whether a person be still liable even when he/she was unaware of the brand of the plaintiff. But as of now motive is not an essential aspect and what matters is the reputation established by the plaintiff⁴⁷.

The research work will analyse the above pointed concepts and will be exploring the evolution and development of the tort of deceit and passing off. The initial focus will be on the English law and it will subsequently shift to that of Indian law. The work will end by a comparative analysis of the concept under both laws and an opinion shall be generated for the same.

I. The Tort of deceit

A) An understanding on the concept.

In simple words, deceit can be understood as the act of deceiving someone by misrepresenting the truth. It can even be a mere declaration which misleads another and makes him believe what is false and subsequently creating injury. Misrepresentation can be fraudulent, negligent and innocent. In a tort of deceit, a claim for fraudulent misrepresentation is visible. Fraudulent misrepresentation is a lie which would force a person to enter into an agreement that would in turn cause some damage to him/her. Misrepresentation can be made orally, written or even through conduct that will amount to an assertion not in accordance with the truth⁴⁸. While perusing the ground for an action on deceit, it can be identified that a false affirmation of the

⁴³ Robert Miller, *Scienter in Deceit and Estoppel*, *Indiana Law Journal*, Vol 6, pg. 152-164.

⁴⁴ *Erven Warnink BV v J Townend & Sons (Hull) Ltd* (1979) AC 731.

⁴⁵ *Millington v Fox* 13 N. Y. S. 334 (1891).

⁴⁶ *Reckitt & Colman Ltd v Borden Inc* (1990) 1 All E.R 873.

⁴⁷ Gary Lilienthal, *The Development of The Tort of Passing-Off*, *School of business law and taxation*, Curtin University, October edition of 2012.

⁴⁸ Gregory Klass, *Meaning, Purpose and Cause in the Law of Deception*, *The Georgetown Law Journal*, Vol 2012, pg.452.

defendant, made with an intention to defraud the plaintiff and on the reliance of which a damage is caused to the plaintiff gives sufficient ground.

B) Analysing the essential elements

Firstly, a misrepresentation of fact is essential. It may be even implied from a party's conduct. The same was mentioned in the case of *S Chatterjee v K. L. Bhave (Dr.)*⁴⁹. Even a verbally accurate statement can turn out to be false if the facts have been misstated altogether and can ultimately constitute to be a misrepresentation of fact. A mere expression of opinion cannot be considered as an assertion of fact. Moreover, the representation made must be fraudulent in nature. There must be an active attempt to deceive by making a statement which is false in fact. Secondly, the defendant must be aware that the representation made was false. In other words, the representation must have been made with the knowledge of its falsehood. The same was elaborated in the case of *Derry v Peek*⁵⁰. Thirdly, the representation must induce the plaintiff or a third person to act on it. The representation made can be either directly or indirectly. In the case of *Langridge v Levy*⁵¹, the father bought a gun which the defendant claimed to be of good quality and fit and the same exploded in the hands of the son who was the plaintiff. Here, it was held that the seller was liable since the plaintiff acted on basis of the false representation made by him. The false representation should have been made with the thought that the plaintiff would rely on it and in turn would suffer some loss or injury. In the case of *Denton v G. N. Ry. Co*⁵², an appointment was missed by the plaintiff by relying on the timetable of a railway company. This was held to be a misrepresentation and the plaintiff was entitled to claim damages. The burden of proof lies on the plaintiff to show that the act was done in reliance of the misrepresentation made.

Thus, injury to the plaintiff turns out to be the next essential ingredient. But on analysis, there exist certain contradictions for the same. In the landmark case of *Wilkinson v Downtown*⁵³, the plaintiff suffered illness due to the defendant's practical joke. But the court refused to allow the claim with respect to the illness on the reason that it was made under the tort of deceit. Here, no remedy was able even when an injury was caused by the false statement made by the defendant. Thus, the element of injury turns out to be a kind of pragmatic control device⁵⁴. The injury must be immediate and should not be the remote consequence of the representation made. In the case of *ECO3 Capital Ltd & Ors v Ludsin Overseas Ltd*⁵⁵, where was court was to decide whether those who had incused a company to invest in a land purchase scheme by concealing its true structure and price. The appellants argued that intention to deceit could not be found and thus not liable for deceit. The court ruled that all the four elements of tort were established and that intention to deceive was not a separate element of tort and was only another way of describing the mental element. Thus, an intention to deceive need not be stated expressly in order to claim against a tort of deceit. There must exist a causal link between the representation made and the loss suffered. Tort of deceit is considered as an economic tort. In an economic tort, even words alone can cause actionable loss, without reliance of it by the claimant. But in the judicial decisions regarding a tort of deceit, the insistence on the need for reliance as an element was emphasized as in the case of *Bradford Third Equitable Building Society v Borders*⁵⁶. Thus, reliance proves to be an anomaly within the elements in tort of deceit.

II. Tort of Passing Off

A) Nature and gist.

⁵³ *Wilkinson v Downtown* [1897] 2QB 57.

⁵⁴ *Supra* note 10, pg. 18

⁵⁵ *ECO3 Capital Ltd & Ors v Ludsin Overseas Ltd* [2013] EWCA Civil 413.

⁵⁶ *Bradford Third Equitable Building Society v Borders* [1941] AII ER 205 (HL).

⁴⁹ *S Chatterjee v Dr KL Bhave and Ors* AIR 1960 MP 323.

⁵⁰ *Supra* note 4.

⁵¹ *Langridge v Levy* (1837) 2 M. & W. 519.

⁵² *Denton v Great Northern Railway Co* [1856] 5 E. & A. 860.

Passing off basically works on the principle that no person can unlawfully gain by deceiving the consumers that there is a relation between his goods and that of another trader. This can be even based on the protection of the goodwill rather than that of the name itself. In the case of *IRC v Muller & Co's Margarine Ltd*⁵⁷ where goodwill was defined as the benefit and advantage based on the reputation or name of the business which serves as an attractive force that brings the customers. In simple terms, passing off can thus be described as the misappropriation of this goodwill which leads to the deception of consumers. Passing off requires damage which can either be diversion of trade or dilution of goodwill. Diversion of trade occurs when the consumers buy the defendant's products believing them to be that of the plaintiff. Dilution of goodwill occurs when the consumer's buy the products of the defendant by believing them to be of the plaintiff's and getting disappointed by the quality of the product which subsequently leads a loss of value in the goodwill of the plaintiff. The goodwill associated with geographical and descriptive terms are protected by extended passing off. When coming to the basic elements of the tort of passing off, it was in the *Dutch Advocat* case⁵⁸, where Lord Fraser put forth that misrepresentation made by a trader during trade to the prospective customers of his trade which will injure the business or goodwill of another trader and causing actual damage was essential for claiming an action. In the *Jif Lemon*⁵⁹ case, these elements were narrowed down to three basic features, now known as the classic trinity- reputation, misrepresentation and damage to goodwill. In order to meet the needs of the modern commercial environment, a lot of developments have been made under the law of passing off. It was the English case of *Chocosuisse Union des Fabricants Suisses de Chocolat and Ors v Cadbury Ltd*

(*Chocosuisse*)⁶⁰, that potentially further extended the tort of extended passing-off.

B) Influence of equity principles

In order to realise the scope of the tort of passing off, the concept of equity was largely used. Equity was believed to have protected proprietary rights and that it had intervened to restrain what would have been fraud if allowed to go further. This viewpoint leads the equity courts to award compensation instead of injunctions. During the period of nineteenth century, the courts of law agreed that the tort of passing-off was based on the question of fact, rather than on questions of law⁶¹. It was the court of equity which played the role of hypothesizing the underlying legal right that they would protect. Analysis of the reported cases point out that even before any successful cause of action came in the common law courts, the concept of passing-off was successful in equity. The concept of passing off came to be understood more in terms of damage to property rights. Under common law, passing off was considered to be a personal right which was based on fraud. Thus, under the common law, the proof of fraud granted remedy of damages. It was in equity law that the concept was identified more as a property right. In the case of *Cartier v Carlile*⁶², it was held that mere proof of likelihood of deception was sufficient to claim an action. In the case of *Edelsten v Edelsten*⁶³, it was held that a person can be held liable whether his actions were honest or not. Here, mere requirement of notice satisfied the requirement of fraud. With the influence of equity principles, the action was thus made based on a property right⁶⁴. Thus, it turned out that an action for passing off can be claimed without fraud.

⁵⁷ *IRC v Muller & Co's Margarine Ltd* [1901] AC 217.

⁵⁸ *Supra* note 6.

⁵⁹ *Supra* note 8.

⁶⁰ *Chocosuisse Union des Fabricants Suisses de Chocolat and Ors v Cadbury Ltd (Chocoussie)* (1998) 41 IPR 1 (HC).

⁶¹ *Supra* note 9, pg. 19

⁶² *Cartier v Carlile* [1862] 31 Beav. 392, 54 Eng. Rep. 1151

⁶³ *Edelsten v Edelsten* [1863] 7 LT 768.

⁶⁴ *Supra* note 13.

III. Comparing the tort of passing off in India and UK

In the Indian scenario, the case of *Cadila Health Care Ltd v Cadila Pharmaceuticals*⁶⁵, the apex court held that the principles laid down by the English courts cannot be adopted by the Indian courts in its entirety. This was based on the notion that there exists a difference in the mentality of the customers in India and that of England. Thus, the type of the mark, the degree of phonetically similar in idea, goods or services in relation to which the trademark is being used, class of customers, mode of purchasing, any other relevant facts to ascertain the dissimilarity in the marks, all are considered as relevant while deciding a case in India. In India, The Trademark Act of 1999 provides protection against passing off. But the passing off tort has derived its basic principles from the common law system of UK. Passing off is a common law remedy whereas infringement is a statutory remedy. In passing off, registration of trademark is not a pre-requisite whereas in case of infringement registration of trademarks serves as an essential. In India the Trademark Act, 1999 deals with the aspect of infringement. But there exists no specific provision mentioning about passing off. The concept of passing off in India has basically evolved through different judicial decisions.

Conclusion and suggestions

In the tort of deceit, the element of reliance poses certain set of anomalies when it comes to considering deceit as an economic tort. Thus, there arises a need to probe further on the applicability of the principle of causation as an element in the tort of deceit rather than considering reliance as an important element. Recent judicial decisions have also pointed out the fact that intention need not be an express element to claim an action under a tort of deceit. The principle of equity played a considerable role in developing the tort of passing off. Equity principles along with the

common law, formed a fusion, by which for the tort of passing off, remedies were available under both equity and common law. In a dynamic country like India, the concept of passing off has great relevance and a substantive part of the concept is built upon the common law principles in India. To sum up, the concepts of deceit and passing off have basically evolved from the tort of misrepresentation and the elements required for the two wrongs must be determined according to the fact and circumstances of individual cases and jurisdictions, considering the fact both form a part of economic tort.

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