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**Economic torts**, which are also called business **torts**, are **torts** that provide the common law rules on liability which arise out of business transactions such as interference with **economic** or business relationships and are likely to involve pure **economic** loss.

Economic torts are [tortious interference](https://en.wikipedia.org/wiki/Tortious_interference) actions designed to protect trade or business. The principal torts are:

* [passing off](https://en.wikipedia.org/wiki/Passing_off),
* [injurious falsehood](https://en.wikipedia.org/wiki/Injurious_falsehood) and [trade libel](https://en.wikipedia.org/wiki/Trade_libel) (see also [Food libel laws](https://en.wikipedia.org/wiki/Food_libel_laws)),
* [conspiracy](https://en.wikipedia.org/wiki/Conspiracy_%28civil%29),
* inducement of [breach of contract](https://en.wikipedia.org/wiki/Breach_of_contract),

**The Concept of Passing Off**

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well known brand is a wrong and is known as the tort of “passing off”.

As held in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation[[1]](#footnote-1)***

“A man may not sell his own goods under the pretence that they are the goods of another man.”

The law aims to protect traders from this form of unfair competition.

Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. So basically it is an intangible asset.

A [cause of action](https://en.wikipedia.org/wiki/Cause_of_action) for passing off is a form of [intellectual property](https://en.wikipedia.org/wiki/Intellectual_property) enforcement against the unauthorized use of a [get-up](https://en.wikipedia.org/w/index.php?title=Get-up&action=edit&redlink=1) (the whole external appearance 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 any registered or unregistered trademarks. Passing off is a common law cause of action, whereas [statutory law](https://en.wikipedia.org/wiki/Statutory_law) such as the [***United Kingdom***](https://en.wikipedia.org/wiki/United_Kingdom)[***Trade Marks Act 1994***](https://en.wikipedia.org/wiki/Trade_Marks_Act_1994)***[[2]](#footnote-2)***provides for enforcement of registered trademarks through infringement proceedings.

Liability in the tort of passing off ultimately boils down to misrepresentation. It all started in the 17th century, in the cases ***Southern v. How***[[3]](#footnote-3) and ***Dean v. Steel***[[4]](#footnote-4). Usually, the judges categorized such torts under deceit or defamation .The concept of equity was largely used to realize the scope of passing off. The predominant view was that equity intervened to restrain what would be a fraud if allowed to go ahead and that it protected proprietary rights. Later, in the case Cartier v. Carlile[[5]](#footnote-5), it was decided that a “man must be taken to intend” the natural consequences of his act and mere proof of likelihood of deception was sufficient to prove the wrong.

**TYPES OF PASSING OFF:**

* **Marketing a product as that of the plaintiff**
* **Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same:**

*Hendricks v. Montagu (Universal Life Assurance Society) (1881)[[6]](#footnote-6)*

* **Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiff’s trade name as to be mistaken for it.**
* **A trade name is one under which goods are sold and which by established usage has become known to the public as indicating that those goods are the goods of that person.**
* **Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark:**
* **Imitating the get-up or appearance of the plaintiff’s goods:**

-*U.K. Tobacco Co. Ltd. v. Carrera Ltd. (1931) 16 N.L.R 1.[[7]](#footnote-7)*

*-De Facto Works Ltd. V. Odumotun Trading Co. Ltd. (1959) L.L. R .33[[8]](#footnote-8)*

**Elements Of Passing Off:**

The Dutch Advocaat [[9]](#footnote-9)case was the first case where the basic elements of the wrong of passing off were put forth by Lord Fraser. They were as follows:

1. 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 (in a quia timet action) will probably do so.

Later in the Jif Lemon[[10]](#footnote-10) case, Lord Oliver reduced these principles to three basic features (now known as the classical trinity) which included:

* **Goodwill** - you must prove that you own a 'reputation' in the mark that the public associates with your specific product or service.
* **Misrepresentation**- you must show that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours.
* **Damage** - you must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss.

**Remedies for Passing Off:**

* Apply for an injunction to prevent the business from using your trade mark or goodwill.
* Apply to have the infringing goods destroyed.
* Sue for damages or seek account for lost profit.
* Request an inquiry to establish loss.

**Passing Off defences:** The defendant may argue that:

* The mark in question is not distinctive.
* The mark is generic.
* They have used carefully and honestly their own name.
* You don't have goodwill in the mark.
* You have given consent or encouraged the use of the mark.
* You can't demonstrate damage or loss.

**RELEVANCE OF PASSING OFF IN 21ST CENTURY:**

Passing off therefore retains its importance in the protection of goodwill in such circumstances.

The constitution also provides for the tort of passing off. **Section 251(1)(f) of the Constitution[[11]](#footnote-11)** stipulates expressly that the Federal High Court shall have jurisdiction, to the exclusion of any other court, in civil causes and matters relating to 'any federal matters relating to copyright, patent, designs, trademarks and **passing off**.In the case of ***Trebor Nigeria Ltd v Niger Shoes Manufacturing Co[[12]](#footnote-12)*** Ltd an action was held to lie in passing off where the defendant packaged and marketed its product to resemble those of the plaintiff. The court held that the fundamental rule is that one man has no right to put off his goods for sale as the goods of his rival trader. The court further observed that the defendant attempted to manufacture and market a product as similar as possible to that of the plaintiff. The courts ensure that the goodwill and reputation of a person is protected so as to avoid any form of economic loss to that person.

Generally, breach of economic tort causes financial loss or injury to traders. The misrepresentation in the act of passing off causes financial injury to a company or producer. With passing off as a form of economic tort, companies and producers may be compensated for the financial injury suffered. Damages in passing off are both compensatory and punitive. The punitive nature of this act discourages producers from misrepresenting products. In the case of ***Continental Pharmaceutical Ltd v Sterling Products Nigeria Plc and Smithkline Beecham Plc[[13]](#footnote-13)*** the plaintiffs who were manufacturers of a registered trademark comprising the eclipse logo with blue and white package design with the words “conphamol” brought an action against the defendants for allegedly infringing on the salient features in the packaging of conphamol substituting only the words “Panadol” and “Panadol Extra” in the same style and font. The court held the defendants guilty and N500 million against the defendants as damages for passing off. This case shows the punitive approach the court in Nigeria may take for passing off and this therefore makes producers careful in their conduct of business and trade.

In conclusion the common law tort of passing off remains a vital form of protection of intellectual property despite the introduction of a registered system of trade mark protection. Although the scope of protection under trade mark law has been extended by the 1994 TMA certain limitations remain which leave an action of passing off as the only form of protection in such instances. The gap in Section 10 of the TMA[[14]](#footnote-14) also calls for reliance on the common law and this will be the case until statutory amendments are made.

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* United Kingdom Trade Mark Act 1994
* Black’s Law Dictionary Ninth Edition
* The Trademarks Act, Cap T13 LFN 2004
1. *[1996] 5 SCC 714* [↑](#footnote-ref-1)
2. *United Kingdom Trademark Act 1994* [↑](#footnote-ref-2)
3. *[1617] PR 143* [↑](#footnote-ref-3)
4. *[1986] PP 97* [↑](#footnote-ref-4)
5. *[1861] C 123* [↑](#footnote-ref-5)
6. *[1881] 3 PLR 1* [↑](#footnote-ref-6)
7. *[1931] 16 NLR 1.*  [↑](#footnote-ref-7)
8. *[1959] NLR 33.*  [↑](#footnote-ref-8)
9. *[1979] AC 731* [↑](#footnote-ref-9)
10. *CAP T13 LFN, 2004.* [↑](#footnote-ref-10)
11. Section 251 (f) of the 1999 Nigerian Constitution. [↑](#footnote-ref-11)
12. [1972] 14 NIJPD 127 [↑](#footnote-ref-12)
13. *[1995] 38 NIJPD 460* [↑](#footnote-ref-13)
14. Section 10 of TradeMark Act [↑](#footnote-ref-14)