An Appraisal of the Scope of Redress for Pollution Damage under Common Law in Nigeria

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Abstract
This paper examines the scope and efficacy of the application of common law remedies in oil pollution cases in Nigeria by the courts. As a result of the dearth and insufficiency of available statutory remedies, most victims of oil and gas pollution in Nigeria, fall back on common law remedies. The paper finds that most of the common law remedies are highly limited in their application as a result of the avalanche of defences available in them and which are always exploited by defendants to escape liability. The paper finds that there is a need for the courts in Nigeria to become more proactive in their interpretation of the scope of the application of the traditional common law remedies so as to side track and relegate the limiting influences of the traditional defences in appropriate cases. This approach has already been adopted by the apex court of another commonwealth country, to wit, India. The end result has been an enhancement of justice delivery in environmental pollution cases in India.

Introduction

Oil pollution damage has become a ubiquitous feature of the Nigerian oil and gas industry. It could take the form of oil spillage, effluent discharge, gas flaring or other acts of pollution that arise in the course of oil and gas exploration and exploitation. The almost inevitable pollution damage arising from the resultant features of oil production on the environment of the oil bearing communities often times reaches unbearable dimensions such that personal harm could be occasioned to individual members of the host communities. The farming and fishing environments also suffer untold haemorrhage. Farmlands are sometimes destroyed, sources of drinking water are poisoned and the health and general wellbeing of the inhabitants of the oil bearing communities are jeopardized[1].

The losses suffered by members of the host communities are redress able under common law but the outcome of litigation commenced by aggrieved members of the host communities on the basis of the common law are most often than not disappointing. The common law is often resorted to because most of the plethora of laws available within the statutory framework for environmental protection in Nigeria are not targeted at the oil and gas sector. Consequently, they do not provide adequate remedies for the victims of oil and gas pollution. Similarly, most traditional common law torts under which the actions for remedy can be brought are laden with an avalanche of defences. The statutory framework can be located in laws such as the Petroleum Act,[2], the Oil in Navigable

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[1] *Amos v SPDC Limited* (1974) 4ECSLR 486

[2]Cap P10, Laws of the Federation of Nigeria(LFN), 2004

Waters Act[3], Associated Gas Re-injection Act,[4] National Oil Spills Detection and Response Agency Act[5], etc. It is also striking to note that most of these laws that provide for criminal sanctions against oil polluters have no provisions for civil remedies for victims of oil and gas pollution.

As a result of not finding succour within the statutory framework, victims of oil and gas pollution fall back on the remedies afforded by the common law provisions of negligence, nuisance, trespass and strict liability. Amongst these torts, strict liability if applied in line with global trends within the common law community as will be shown, affords the victims of oil and gas pollution the greatest quantum of satisfactory redress.

The Limits of the Torts of Negligence, Nuisance and Trespass in the Redress of Oil and Gas Pollution Damage in Nigeria

It is regrettable that most of the claims brought under the tort of negligence are greeted with an avalanche of defences. An attempt shall now be made to review the outcome of some of the cases that were anchored on the tort of negligence. In *Shell Petroleum Development Company v Otoko*[6], the respondents as plaintiffs at the high court, sued for damages arising from the negligence of the defendants in allowing oil to spill from their oil facility to damage their farmlands and fishing ponds. The high court found for them and awarded damages against the defendants now appellants. On appeal, it was held that the spill was caused by the malicious act of a third party who unscrewed a valve in the manifold of the pipeline facility. The Court of Appeal held that the harm occasioned to the respondents was not foreseeable and that the appellants were therefore not liable to the respondents in negligence. According to the court, the appellants did not instigate the malicious act of the third party.

In the above case, the contention by the appellants that any person who could handle a spanner could unscrew the manifold, was accepted by the court, as removing the burden on them to prove that they were not negligent in the management of their facility. The court relied on both the defence of the malicious act of third parties and that the incident was not foreseeable to hold that negligence was not proved. With all due respect, it is submitted that the appellant in building their facility would have taken into consideration, the volatile political climate in the Niger- Delta, and would have built them in such a way that ordinary malicious persons with spanners could not have been able to unscrew the pipeline manifold. Furthermore, the appellants ought to have provided adequate security around critical areas of their pipelines so as to avoid unauthorized persons from tampering with the pipelines. There was evidence at the trial that the security men employed by the appellants to guide the pipelines were in the habit of abandoning their duty posts sometimes for weeks. His Lordships of the Court of Appeal should have adverted their minds to the aforementioned facts and applied the rule in *Ryland v Fletcher* to hold the appellants strictly liable for the damage caused by the spill.

[3]Cap 06, LFN 2004
[4]Cap A25, LFN, 2004
[5]National Oil Spill Detection and Response Agency Act, 2006

[6](1990) 6NWLR (Pt. 159) 694

In another case of *Chinda v Shell Petroleum Development Company Limited*[7], the plaintiffs sued for damages in negligence as a result of damage to his buildings, trees and land occasioned by gas flares from the defendant's gas flare site. It was held that negligence was not proved as the plaintiff was unable to show that the defendant was negligent in the operation of its flare site. Again, it is unfathomable to imagine that the plaintiffs who do not have a working knowledge of the operations of the flare sites would know the technicalities involved in the release of poisonous gases from the flares so as to establish whether or not the defendants were negligent. What was however clear was that the operation of the flares had occasioned injury to the plaintiff. The court before reaching its decision that the defendant was not negligent, should have taken into consideration the fact that in flaring unused gas into the atmosphere, the defendant was engaged in a dangerous business for which it should be strictly liable to victims without the necessity of proving negligence. It is noteworthy that flaring of gas has long being abolished in the United Kingdom[8].

In the case claims brought under the tort of nuisance, the story is the same with negligence. The division of nuisance into public and private nuisance has been a nightmare for litigants seeking redress for oil pollution damage on the basis of the tort of nuisance. The consequence of the division is that a person can only bring an action in private nuisance. Any person who wants to bring an action for the redress of an incident of public nuisance can only do so with the consent of the Attorney General. Oil pollution damage in most cases occurs in such a way as to constitute public nuisance. Besides, a person can only succeed in an action for public nuisance if he is able to show that he suffered more harm than other members of the society. In *Amos v SPDC Limited*[9], the plaintiff brought an action for damages for nuisance as a result of the defendant's blocking of the Koko Creek for over three months. The Court held that the plaintiff could not establish a case of nuisance against the defendant as the Koko Creek was a public waterway and plaintiff was not able to prove any special damage he suffered over and above the other members of the community.

A defendant in an action for compensation for pollution damage under the tort of nuisance may plead that the act complained about is backed up by legislation or that it is reasonable having regards to the locality. He may also plead that the action which is complained about is an act of God or the malicious act of a stranger.

Furthermore, as in negligence, there is also the requirement for foresee ability of the damage complained about under nuisance before a defendant can be held liable. The defences available to defendants in an action brought under the tort of nuisance have rendered the effectiveness of this fort questionable for the redress of pollution damage arising from oil and gas production

Is the Tort of Strict Liability the Panacea?

Strict liability may be defined as a kind of liability without fault. It could take different forms which include liability as defined in *Ryland v Fletcher*[10], liability for animals, liability for defective

[7] (1974) 2 RSLR p.1

[8] Sagay I. E., "The Nigerian Unfinished Federal Project". *5th Justice Idigbe Memorial Lectures, University of Benin, 2008*

[9] (1974)4ECSLR 486

[10] (1866) L.R 1 Ex 26

products, and liability for breach of a statutory duty, liability for libel, e. t .c. In all the above heads of liability, liability is strict.

However, the only form of application of strict liability that is relevant to the redress of environmental damage arising from oil pollution is the concept of strict liability envisioned by the rule in *Ryland v Fletcher*. This rule as a principle of law was laid down by Blackburn J in the 19th century when he posited that:

> *a person who for his own purposes brings into his land and collects and keeps anything likely to do mischief if it escapes must keep it at his peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape*[11]. [12]

The four elements that are encapsulated in the rule may be summarized as follows: (1) Bringing and keeping in one's land a non-natural user, (2) the duty of the defendant to keep it therein at his own peril, (3) escape of the thing from the closed custody of the defendant and (4) liability for the natural consequence of its escape. This in the context of oil and gas pollution would mean that a person or company who is engaged in a business that can endanger the lives and properties of the members of the host community should be strictly liable for any harm caused to the members of the community as a result of the failure of such person or company to keep the oil or gas from escaping from their confinement.

In *Umudge v. Shell B.P. (Nig) Ltd*[13], the plaintiffs brought an action against the defendants for damages done to the plaintiff's farmland, fish ponds, and lakes by the defendants through their agents. The plaintiffs brought their action under the rule in *Ryland v Fletcher*. The case of the plaintiffs was that the defendants allowed crude oil to escape from their facility and seep into their fishing ponds and lakes thereby causing them damage. The lower court found that the pollution emanated from a pit burowed by the defendant in which oil was collected and that the oil escaped from the pit damaging the farmland, ponds and lakes of the plaintiffs. The learned trial judge gave judgment in favour of the plaintiffs. On appeal, the defendant / appellant contended that plaintiff's action ought to fail because fishes could not be the subject matter of private ownership. In other words, they were contending that the polluting incident ought to come under the context of public nuisance and was not sustainable under the instant private person action.

In response to this contention, the then Supreme Court per Idigbe J.S.C.(as he then was) held as follows dismissing the contention:

> *As already explained, liability on the part of the owner or the person in control of an oil waste pit such as the one located in location E in the case in hand exist under the rule in Ryland v Fletcher, although the escape has not occurred as a result of negligence on their part. There is no evidence of any novus actus interveniens, in regard to the escape of the crude oil waste nor is there any evidence that the respondent consented or in any way or contributed in the collection of the crude oil waste in location E nor is there any evidence of palpitation, under any statutory provision for the collection of same by the appellants and*

[11] *supra*

[13] *(1975) 1 SC 155*

> *cannot therefore avail of any of the exceptions to the rule foretasted. The appellants are by themselves liable under the rule in Ryland v Fletcher for charges arising from the escape of oil waste from the oil pit.*

The court however held that the defendants were not liable for damage suffered by the blocking of the stream since same was a public nuisance and did not cause the plaintiffs to suffer any special damage different from that of other members of the community. It is instructive to note that the court went outside the defence to actions in nuisance raised by the defendants to find them liable under the rule in *Ryland v Fletcher*.

In *SPDC v Anaro*[14]**,** it was the contention of the defendant/appellant that since plaintiffs gave evidence of the physical condition of their land after an oil spill, they could no longer rely on the doctrine of *res ipsa loquiteur* to prove their case, and the plaintiffs/respondents had the burden of proving the negligence of the defendants to be entitled to their claims. They also contended that the rule in *Ryland v. Fletcher* did not avail the plaintiffs. Commendably however, the courts applied the principles of law constituted by the rule in *Ryland v Fletcher* to make the following findings.

1. That the oil prospecting company built pipelines carrying crude oil across the land of the plaintiffs.
2. That if the oil spilled, it was capable of endangering the farmland of the plaintiffs and causing severe damage to crops and other vegetation including fish in rivers.
3. That such a spillage occurred which resulted in damages to crop and vegetation.

Having made the above findings of fact, the court went on to hold that where a person is in control or possession of land, as in the instant case, where petroleum products are stored, he will be strictly liable under the rule in *Ryland v Fletcher* for any damage arising from the escape of the petroleum products to other lands. According to their Lordships of the Court of Appeal, crude oil is in the category of "anything that is likely to do mischief if it escapes". It is instructive and cheering; that the Supreme Court has upheld the above judgment in 2017, albeit after more than 30 years from the time the suit was first instituted at the Warri High Court. While agreeing with the above judgment, it needs to be further re-emphasized, that crude oil extraction from several thousands of meters beneath the earth surface is a "non-natural user" of land and as such, operators should be strictly liable for pollution damage arising from their activities. .

This perception of the concept of non-natural user is in line with the position enunciated by Lord Moulton in *Richard v Lotham*[15], where he held as follows:

> *It must be of the same special use bringing with it increased danger to others, and must not be the ordinary use of the land or such use as is proper for the general benefit of the community.*

Oil pollution damage is certainly in the category of environmental damages that calls for a strict invocation of the rule in *Ryland v. Fletcher.*

[14] 2000) 10NWLR (Pt. 676) 248

[15](1913) AC263 @ 279

Exemption from liability under the rule in *Ryland v Fletcher*

A defendant will not be liable to claims under the rule in *Ryland v Fletcher* if the plaintiff had consented to the presence of the source of danger on his land. This will be the case where people rent out their lands to telecommunication service providers for the erection of masts, and such masts eventually cause harm to the plaintiff.

Second where the damage inducing incident is caused by an act of God or an act of a stranger, the defendant will not be liable. This defence is however only available where the harm in question was not foreseeable and could thus not be prevented by human intervention and foresight. In *Milroy v Texaco Trinidad Inc*[16], a case that emanated from the Island state of Trinidad and Tobago, the court held that the defendant oil company was not liable for pollution damage arising from oil spillage caused by an unknown trespasser who drilled a hole in the oil pipeline. It was for this same reason of the act of an unknown person that the plaintiff's case failed under negligence in the Nigerian case of *SPDC v Otoko*. It is necessary however to point out that Otoko's case is not on all fours with the instant case. This is because it does make sense to expect that no sane person will want to drill a hole in an oil pipeline. The act was thus not reasonably foreseeable in the Trinidadian case. However, in the case of Otoko, destruction of oil pipelines has become the norm rather than the exception in Nigeria's crisis ridden Niger Delta. This is because of the age long hostilities between the oil producing communities and the oil companies occasioned by a dismal neglect of the development of the oil producing areas in Nigeria despite decades of oil production. Thus, it is reasonably foreseeable in Nigeria that oil pipelines could be vandalized. The oil companies therefore have a duty to ensure that they build the pipelines in such a way that their manifolds cannot easily be unscrewed by "anyone who can handle a spanner'. Alternatively, they must police the pipelines to keep them safe. Failure in these two regards ought to lead reasonably to liability in negligence and even under the rule in *Ryland v Fletcher*.

Another defence that could be a set back to the application of the rule is the defence of statutory authority. This defence may however not be available to oil polluters because it can only avail public authorities charged with the collection of refuse where they are able to establish that an act of pollution done by them was not as a result of negligence on their part but was in the course of their official duties. Accordingly, the common exceptions to the application of this rule in oil pollution cases in Nigeria is the notorious claim that the pollution incident was caused by an act of a stranger or an act of God. This therefore underpins the need for the extension of the application of the doctrine by the Nigerian courts through a systematic process of judicial activism that will involve the propounding of supplementary doctrines.

Expanding the Frontiers of Common Law Remedies for Pollution Damage Arising from the Nigerian Oil and Gas Industry

In view of the avalanche of defences available to polluters under traditional common law torts, there is a need for the courts to move away from traditional common law restrictive doctrines. They need to become more creative in meeting the justice of the oil pollution cases brought before them. This is especially necessary because even the common law is not static. The Indian judiciary has taken a lead worthy of emulation in this direction. In *Union Carbide Corporation v Union of*

[16] (1969) 15WLR 251

India[17], the Supreme Court of India held that where an enterprise is occupied with an inherently dangerous or hazardous activity and harm results to anybody as a result of a mishap in the operation of such dangerous or naturally unsafe activity, for instance, in the escape of poisonous gas, the enterprise is strictly and completely obligated to repay every one of the individuals who are affected by the accident and such risk is not subject to any exemptions. This is an extension or expansion of the doctrine of strict liability and has become known in the annals of Indian jurisprudence as the doctrine of "Absolute Liability" The Nigerian courts can borrow a leaf from this stance of judicial innovation.

In *Vellore CitIzen's Welfare Forum v Union of India*[18], the Supreme Court of India further upheld the "Polluter Pays Principle" as part of the extant laws of the Union of India, to the effect that whosoever messes up the environment for whatever cause was under a legal compulsion to clean it up. This is also another commendable step in unfettering the reliefs available to victims of environmental pollution under common law.

Conclusion

The Nigerian Courts in handling oil pollution cases must desist from seeing the traditional doctrines of torts under common law as inflexible especially where there are no statutory remedies. They must adopt the position that the common law is not static as has been ably demonstrated by the Indian judiciary. Pollution damage cases must be handled with the mind-set of the exigencies of the present times.

Furthermore, with the vetoing of the bill before the national Assembly for the establishment of a National Oil Pollution Agency by the presidency, the courts must continue to expand the frontiers of the common law in their application to oil and gas pollution compensation cases since the only hope for a comprehensive statutory approach to the problem has been dashed.

[17] AIR 1990 SC 273
[18] AIR 1996 SC