

SCRUTINIZING THE ADEQUACY OF COMPENSATION FOR OIL POLLUTION DAMAGE IN NIGERIA: AN AGENDA BEYOND NATIONAL CONTEMPLATION*

Abstract

Oil exploration, extraction, refining, production and transportation very often result in environmental pollution leading to huge losses to the victims of such pollution damage. While oil has become a seeming indispensable source of energy and tremendous wealth to nations endowed with it, its exploration wreaks havoc whenever there is mishap or sabotage leading to pollution. The impact of oil pollution includes habitat degradation, atmospheric pollution from gas flaring, contamination of rivers, streams, farmlands, fields etc. These unfortunate incidents make the victims, individuals and host communities, landowners, pond owners and other property owners demand compensation. The research aimed at evaluating the compensation regime and framework for victims of oil pollution in Nigeria. The methodology adopted is doctrinal with primary and secondary sources on international law cases, statutes, textbooks, journal articles and online materials. The article enquired if the legal regime for compensation is robust enough to offset the losses and injuries suffered by the victims and found that after decades of oil exploration and production, Nigeria is yet to have a robust and comprehensive legislative and administrative framework to adequately deal with compensation claims arising from petroleum operations. This is due to challenges like establishing compensation fund, environmental courts vested with special jurisdiction to determine and award adequate compensation, need to review the composition of head of claim etc. which must be tackled before the compensation regime achieves the desired expectations. The paper recommended a holistic review of the statutory compensation framework for oil pollution to make it more realistic and in conformity with international best practices.

Keywords: Compensation, Pollution, Exploration, Petroleum, Exploitation, Production.

1. Introduction

Oil pollution damage, the most predominant form of ocean pollution, has become a prevalent feature of the Nigerian oil and gas industry. Since the discovery of oil in 1956, the country has been suffering the negative environmental consequences of oil exploration and exploitation. 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 oftentimes reaches unbearable dimensions such that personal harm could be occasioned to individual members of the host communities.¹ The farming and fishing environment also suffer untold hemorrhage. 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 jeopardized². The losses suffered by

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¹ A community that is impoverished as a result of exploration of petroleum products. The petroleum companies and facilities may not be resident in that community, but they are affected by the activities of the company and of those facilities.

²*Amos v SPDC Limited* (1974) 4ECSLR 486

members of the host communities are redressable 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 defenses. The statutory framework can be located in laws such as the Petroleum Act³, the Oil in Navigable Waters Act⁴, Associated Gas Re-injection Act,⁵ National Oil Spills Detection and Response Agency Act⁶, 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 succor 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 global community as will be shown, affords the victim of oil and gas pollution the greatest quantum of satisfactory redress.

In conclusion, since the discovery of oil in 1956 and its commercialization in 1958, oil exploration and exploitation have been on in Nigeria and the country has accumulated huge oil and gas reserves and ranks the sixth world's largest exporter of crude oil and ranked as the third world largest producer of palm oil after Malaysia and Indonesia. Oil from the Niger Delta region accounts for more than 90% of Nigeria's exports and about 80% of the government's revenue, as far back as 1981. Activities relating to oil exploration and exploitation raise a number of issues such as depletion of biodiversity, coastal and riverbank erosion, flooding, oil spillage, gas flaring, noise pollution, sewage and waste water pollution, land degradation, soil fertility loss and deforestation which are all major environmental pollution. According to the official estimates of the Nigerian National Petroleum Corporation (NNPC), based on the quantities reported by the operating companies, approximately 2,300 cubic meters of oil are spilled in 300 separate incidents annually. It can be safely assumed that, due to under-reporting the real figure is substantially higher: conservative estimates place it up to ten times higher.

2. An Overview of Environmental Governance in the Nigerian Oil Sector

The Niger Delta Region of Nigeria is home to some 31 million people and it represents the Nigeria's South-South geopolitical zone. Based on the official definition by the Federal Government of Nigeria, the Niger Delta region encompasses the following

³ Cap P10, Laws of the Federation of Nigeria (LFN), 2004

⁴ Cap 06, LFN 2004

⁵ Cap A25, LFN, 2004

⁶ National Oil Spill Detection and Response Agency Act, 2006

states: Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Ondo, Imo and Rivers and these states have a total of 185 local government areas. According to Osuji and Onojake⁷, the Niger Delta region cuts across over 800 oil producing communities with an extensive network of over 900 producing oil wells and several petroleum production related facilities.

The various stages of petroleum exploration operations and activities which process includes development and production, decommissioning and rehabilitation, transportation and distribution has often resulted in considerable environmental impacts, human health risks and in most cases cause interference with sociocultural systems as well as socio-economic problems within the oil-producing host communities. For example, disturbance of forest and ground surface as result of geological and seismic surveys, site clearing for construction of roads, tank farms, brine pits and pipelines, exploratory drilling, development drilling and production wells, construction of processing and production facilities. All these activities cause environmental pollution and pose potential risks to the atmosphere, soils, sediments, surface and groundwater, marine environment and terrestrial ecosystems in the oil-producing host communities in the Niger Delta over the past fifty-five years, a total of about 1,182 exploration wells have been drilled to date in the delta basin, and about 400 oil and gas fields of varying sizes have been documented⁸.

Nigerian crude oil is very light (low density), with a rapid evaporation loss which could be up to 50 percent within forty-eight hours.⁹ The oil companies therefore maintain that the effects of oil spills are largely temporary and localized. Shell states that "Complete rehabilitation after clean-up takes 12-18 months."¹⁰ A study of a major 1970 spill at Ebubu, in Ogoni, on the other hand, carried out nineteen years after it had been set ablaze, leaving a five-meter thick crust, found that vegetation was recovering, but that vegetation in areas downstream of the spill was still being degraded due to a slow seepage of crude oil from the spill site.¹¹ This is an exceptional case, but studies have shown that the chronic occurrence of minor spills can have "greater detrimental effects on the environment than the more visible, large-scale spillages associated with tanker accidents blowouts."¹² Even when oil-in-water values have dropped below detectable limits, oil-in-sediment values can remain high.¹³ In the absence of serious independent scientific studies of the long term effects of hydrocarbon pollution in the

⁷Osuji L. C., and C. M. Onojake, "Trace Heavy Metals Associated with Crude Oil: A Case Study of Ebocha-8 Oil-Spill-Polluted Site in Niger Delta, Nigeria," *Chemistry and Biodiversity*, 1 (11). 1708-1715, 2004.

⁸Obaje, N.G., *Geology and mineral resources of Nigeria*, London, UK: Springer, 2009.

⁹Moffat and Lindén, "Perception and Reality," p.532.

¹⁰SPDC, People and the Environment Annual Report 1996, p.14.

¹¹Emmanuel Asuquo Obot, A. Chinda, and S. Braid, "Vegetation recovery and herbaceous production in a freshwater wetland 19 years after a major oil spill," *African Journal of Ecology* 1992, vol.30, pp.149-156.

¹²R.J. Snowden and L.K.E. Ekweozor, "The Impact of a Minor Oil Spillage in the Estuarine Niger Delta," *Marine Pollution Bulletin* vol.18, no.11, November 1987, pp.595-599.

¹³C.B. Powell, S.A. Whie, B. Baranowska- Dutkiewicz, D. D. Ibiebele, M. Isoun, and F.U.Ofoegbu, "Oshika Oil Spill Environmental Impact: 11 to 14, 1985, Kaduna (published by the Petroleum Inspectorate, NNPC).

Niger Delta, the damage caused by individual spills on the overall environment cannot be evaluated, though spills in other parts of the world have been noted to cause long term effects. Moreover, the lighter compounds that evaporate quickly (such as toluene and benzene) also have a relatively high solubility and can be toxic at very low concentrations.¹⁴

Oil leaks are usually from high pressure pipelines, and therefore spurt out over a wide area, destroying crops, artificial fishponds used for fish farming, “economic trees” (that is, economically valuable trees, including those growing “wild but owned by particular families) and other income-generating assets. Even a small leak can thus wipe out a year's food supply for a family, with it wiping out income from products sold for cash. The consequences of such loss of livelihood can range from children missing school because their parents are unable to afford the fees, to virtual destitution. Even if the land recovers for the following year, the spill has consequences over a much longer period for the families directly affected. In tidal salt water areas, where fishing grounds tend to be open, individual families are less likely to be totally wiped out, while spills will in any event disperse more quickly.

Since in most areas of the delta drinking water is drawn straight from streams and creeks, with no other option available to the local people, a spill can cause severe problems for the population dependent on the water source affected, even if it disperses rapidly and the water soon returns to its previous condition. Crude oil contains thousands of different chemicals, many of them toxic and some known to be carcinogenic with no determined safe threshold for humane exposure.¹⁵ Following the major Texaco spill of 1980, it was reported that 180 people died in one community as a result of the pollution.¹⁶ In January 1998, Nigerian opposition radio reported that about one hundred villagers from communities affected by a major Mobil spill of January 12 had been hospitalized as a result of drinking contaminated water.¹⁷ Litigation against oil companies for compensation in the event of spills has also claimed for deaths of children caused by drinking polluted water.¹⁸ Often, local residents complain that fish taste of paraffin (kerosene), indicating hydrocarbon contamination.

Roads and canals built by the oil companies can also be destructive in a more direct way than simply by promoting the mixed blessing of human access. In a number of cases, roads have been built on causeways across seasonally flooded plains, whose

¹⁴Greenpeace U.K., "Greenpeace Oil Briefing No.5: The Environmental Impacts of Oil, "and "Greenpeace Oil Briefing No. 6: Possible Long-Term Impacts of the Braer Disaster: Review of Previous Spills" (London, January 1993).

¹⁵Greenpeace U.K., "Greenpeace Oil Briefing No. 7: Human Health Impacts of Oil"(London, January 1993).

¹⁶Fekumo, "Civil Liability for Damage Caused by Oil Pollution," p.268.

¹⁷Radio Kudirat Nigeria, January 30, 1998, as reported by BBC SWB, February 4,1998

¹⁸. For example, *SPDC v. Chief Caiphos Enoch and two others* [1992] 8 NWLR (Nigerian Weekly Law Reports) (Part 259), p.335, in which five children are alleged to have died as a result of drinking oil-contaminated water.

ecology depends on the changing hydrological conditions. Unless proper culverts are built under the causeways, as is all too often not the case, the drainage of the area is affected, causing permanent flooding on one side of the road and the drying out of the other. As a result, trees die, fishponds are destroyed, and seasonal fishing completely disrupted, often destroying a significant percentage of the income derived by local communities from the land or even the entire livelihood of some families.

Canals can also disrupt delicate hydrological systems, especially when they are constructed in the border zone between fresh water and brackish water in the riverine areas. Such disruption can destroy long-established fishing grounds. As a consequence, traditional fishing grounds and sources of drinking water have been wiped out: the damage is described by one expert on the Niger Delta environment as "one of the most extreme cases of habitat destruction" in the delta.

As recent as three decades ago, oil and gas legislations in Nigeria were not environmental centric. This posture impaired the legal capacity to effectively combat environmental degradation connected with oil development activities. However, the toxic waste incident that occurred in Koko town marked a shift in attitude towards environmental protection matters in Nigeria.¹⁹ Consequently, Nigeria enacted several environmental protection laws to regulate oil spillages in the petroleum industry; undertook formalized regulation; generated practicable policies for natural resource preservation and conservation. Evidently, these laws appear to be inadequate and lack the deterrence effect relative to the scale of offences committed by oil operators and other groups.²⁰ Petroleum exploration and production activities have constrained the right of Nigerians to a wholesome environment. This assertion is largely attributable to the multifaceted negative environmental consequences affecting various localities overextended periods. Ineffective government regulation and unsound environmental protection practices have promoted oil spills. In the same vein; vandalization, oil theft, and militant activities by varying groups have contributed to escalating this trend.

For a better understanding of the petroleum sector, it is pertinent to state the three different phases of the petroleum industry which are the upstream sector, the midstream sector and the downstream sector. The upstream sector regulates or involves all activities carried out in the exploration, drilling, extraction, development and production of crude oil. It also includes the treatment of oil and processing gas²¹ the midstream sector involves the transportation (by pipeline, rail, barge, oil truck) storage and its operations are often taken to include some elements of the upstream and downstream sectors. Downstream operation on the other hand involves conversion

¹⁹Ogbodo, S. G. (2009), Environmental protection in Nigeria: Two decades after the Koko incident. *Annual Survey of International and Comparative Law*, 15(1), 1-18.

²⁰Aniefiok, E. I., Usenobong, F. U. (2016), Petroleum industry in Nigeria: Environmental issues, national environmental legislation and implementation of international environmental law. *American Journal of Environmental Protection*, 4(1), 21-37.

²¹Offiong U Bassey;

of crude oil into usable form such as premium motor spirit, diesel, kerosene, gas utilisation project etc.

3. The Legal Framework for Environmental Governance in the Nigerian Oil and Gas Sector

The following are the laws governing environmental pollution in Nigeria's oil industry.

1. The 1999 Constitution of the Federal Republic of Nigeria (as amended)
2. Minerals Act, 1946
3. Water works Act 1915
4. Petroleum (Drilling and Production) Regulations, 1969 (Amendment: 1988, 2001, 2006)
5. Petroleum Regulations, 1967
6. Oil pipelines Act, 1956 (Amendment; 1956)
7. Oil in Navigable Waters Act, 1968
8. Petroleum Decree Act, 1969
9. Petroleum Refining Regulations, 1974
10. Associated Gas Re-Injection Regulation, 1980
11. Crude Oil (Transportation and Shipment Regulations)1984
12. The National Policy on the Environment, 1989 (revised in 1999)
13. Federal Solid and Hazardous Waste Management Regulations, 1991
14. National Environmental Protection (Effluent Limitations) Regulations, 1991
15. Environmental Protection (Pollution Abatement in Industries Generating Wastes) Regulations, 1991
16. Environmental Impact Assessment (EIA) Act, 1992
17. Mineral Oil (Safety) Regulations, 1997
18. Department of Petroleum Resources (DPR) Environmental Guidelines and Standard for the Petroleum Industry in Nigeria (EGASPIN), 2002.
19. Deep Waters Block Allocation to Companies (Block-in-rights) Regulations, 2003
20. Oil Prospecting Licenses (Conversion to Oil Mining Leases) Regulations, 2003
21. Marginal Fields Operations (Fiscal Regime) Regulations, 2005
22. Harmful Waste (Special Criminal Provision) Act (Decree No. 42 of 1988
23. National Environmental Standards Regulation and Enforcement Agency (Establishment) Act 2007 (NESREA).
24. The Nigerian Minerals and Mining Act 2007
25. National Oil Spill Detection and Response Agency Act 2007

The Constitution of the Federal Republic of Nigeria,1999 (as amended) (hereinafter referred to as the Constitution) is the organic law from which all other laws flow and derived their validity as enunciated in the case of *Njikonye v MTN Nig. Comm. Ltd.*²²

²²(2008) ALL F.W.L.R (PT.413)1343

This is thus the supreme law in relation to the Nigeria petroleum industry and its effect is espoused in Section 1(1) and (3) of the Constitution, the supremacy clause and renders void any inconsistent law to its provisions. Being the grundnorm of all legislations in Nigeria, it goes to recognize the important nature of environmental protection which is captured in the provision of Section 20²³ which provides thus: "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria".

Section 44(3) of the 1999 Constitution vests the ownership and control of mineral oil and natural gas in the Federal Government of Nigeria, title over all petroleum, which includes natural oil and gas, under, or upon, any land in Nigeria, its territorial waters and its exclusive economic zone and managed in such manner as may be prescribed by the National Assembly. Pursuant to this enabling law, the National Assembly had passed several laws regulating environmental degradation arising from Oil and Gas activities in Nigeria without much relief to citizens. Issues as to enforcements of these enactments and regulations to ensure compliance by the concerned persons/organisations was however a totally different discourse.

The major legislation regulating the mining, exploration, production and distribution of petroleum in Nigeria is the Petroleum Act, 1969 which vests in the Federal Government, the ownership of petroleum resources in Nigeria. Under the Act, all activities ranging from exploration to production and distribution of crude oil and natural gas may only be done with the consent of the Minister of Petroleum Resources who typically acts through the Department of Petroleum Resources on the issue of licences and permits. The provisions of Section 247 of the Criminal Code provides that any person who vitiates the atmosphere in any place so as to make it noxious to public health or any person who does any act to which he knows or has reason to believe to spread infection or any disease dangerous to life, whether human or animal is guilty of misdemeanor or and is liable to imprisonment for six months. Thus, the Code is punitive and not compensatory with regard to pollution as it does not provide for compensation for victims.

The Oil in Navigable Water Decree 1968 (now Act) was promulgated by the Federal Government to implement the terms of the International Convention for the Prevention of Pollution of the Sea by Oil 1954-1962 to which Nigeria is a signatory. Under this Act, it is a punishable offence for any person to discharge oil from any Nigerian ship into any prohibited sea area but no compensation regime is provided for in the said Act. Section 27 of the National Environmental Standards and Regulation Enforcement Agency (NESREA) Act 2007 criminalizes the discharge of hazardous substances into the environment without lawful authority and same is punishable with a fine not exceeding, N1,000,000 (One Million Naira) and an imprisonment term of 5 years. In

²³27. 1999 Constitution of the Federal Republic of Nigeria (as amended)

the case of a company, there is an additional fine of N50,000 for every day the offence persists. However, the Act has no compensation provision.

The National Environment Protection (Pollution Abatement in Industries and Facilities Producing Waste) Regulations (1991) in Section 1 prohibits the release of hazardous substances into the air, land or water of Nigeria beyond approved limits set by the Agency. Sections 4 and 5 requires industries to report a discharge if it occurs and to submit a comprehensive list of chemicals used for production to the Agency. The Hydrocarbon Oil Refineries Act, CAP H5, LFN 2004 in Section 1 prohibits any unlicensed refining of hydrocarbon oils in places other than a refinery; and Section 9 requires refineries to maintain pollution prevention facilities. This Act also does not provide for compensation for victims of such illegal activities.

The Associated Gas Re-Injection Act, CAP A20, LFN 2004 in Section 3 (1) prohibits, without lawful permission, any Oil and Gas Company from flaring gas in Nigeria. Section 4 stipulates the penalty for breach of permit conditions. Again, this Act also does not provide compensation for air pollution caused by gas-flaring. The Petroleum Drilling and Production Regulation in Sections 23 and 27 prohibit, without lawful permission, the cutting down of trees in forest reserves while Section 25 establishes that reasonable measures be taken to prevent water pollution and to end it, if it occurs. The Petroleum Refining Regulation in Section 45 makes any contravention punishable with a fine of N100 or an imprisonment term of six months. The Mineral Oil Safety Regulations and Crude Oil Transportation and Shipment Regulations prescribe precautions to be taken in the production, loading, transfer and storage of petroleum products to prevent environmental pollution.

Petroleum Products and Distribution Act, CAP P12, LFN 2004 criminalizes the offence of sabotage which could result in environmental pollution with a death sentence or an imprisonment term not exceeding 21 years. Again, this law is punitive and has no compensation for the victims of the criminal conduct it prohibits.

3.1. Legal Framework for Compensation for Oil Pollution in Nigeria

Although Nigeria has a number of Statutes that deal with pollution, the major thrust of these legislations are geared towards preventing oil pollution and providing punitive penalties for those found responsible for oil pollution. Land Use Act²⁴ provide for compensation in matters relating to land or landed property acquisition relating to oil and minerals exploration but does not directly provide for compensation to landowners as a result of oil pollution. Only the Oil Pipelines Act²⁵ contains provisions that are directly related to compensation arising from oil pollution. Other Statutes such as

²⁴ 28 Cap L5, LFN,2004

²⁵ Cap07, LFN, 200433

Minerals and Mining Act 2007, and Petroleum Act²⁶, and Oil in Navigational Water Act²⁷, make only tangential reference to compensation for oil spillage as they deal primarily with acquisition rather than injurious affection.

3.1.1. Compensation Under Statute

The Oil Pipelines Act provides for compensation covering two (2) regimes. The first regime is compensation to the owners or occupiers for any damage done to any land entered upon and any buildings, crops or profitable trees thereon, pursuant to the right of licence granted by the Act.²⁸ If there is any dispute in respect of such compensation, the court shall award such compensation as it considers just in respect of any damage done to any buildings, crops or profitable trees by the holder of the permit in the exercise of his rights there under and in addition may award such sum in respect of disturbance (if any) as it may consider Just.²⁹

The second regime for compensation is provided for under Section 11(5) of the Act which stipulates that the holder of a license shall pay compensation³⁰

In determining the loss in value of the land or interests in land of a claimant the court shall assess the value of the land or the interests injuriously affected at the date immediately before the grant of the licence and shall assess the residual value to the claimant of the same land or interests consequent upon and at the date of the grant of the licence and shall determine the loss suffered by the claimant as the difference between the values so found, if such residual value is a lesser sum.³¹ However, no compensation shall be awarded in respect of unoccupied land as defined in the Land Use Act, except to the extent and in the circumstances specified in that Act.³² In determining compensation in accordance with the provisions of Act, the court shall apply the provisions of the Land Use Act so far as they are applicable and not in conflict with anything in the Act as if the land or interests concerned were land or interests acquired by the President for a public purpose.³³ Compensation (if any) awarded by the court in accordance with Act shall be a sum of money payable forthwith or shall consist of periodical installments or partly one and partly the other.³⁴ Where the interests injuriously affected are those of a local community, the court may order the compensation to be paid to any chief, headman or member of that community on behalf of such community or that it be paid in accordance with a scheme of distribution approved by the court or that it be paid into a fund to be administered by a person approved by a person approved by the court on trust for application to the

²⁶ Cap 350 LFN 1990

²⁷ Cap 337 LFN 1990

²⁸ *Ibid* Section 6 (3).

²⁹ *Ibid* Section

³⁰ S. 11(5)

³¹ *Ibid* S.20(3)

³² *Ibid* S.20(4)

³³ *Ibid* S.20(5)

³⁴ *Ibid* S.20(7)

general, social or educational benefit and advancement of that community or any section thereof.³⁵

Section (29) of the Land Use Act³⁶ provides for calculation of compensation. From the foregoing, the law relating to compensation for oil pollution in Nigeria is based on the same parameters with that of compensation for revocation under the Land Use Act, while providing specific items for compensation, leaves open a number of crucial issues including the exact 'heads of claim' as well as the basis and the method of valuation applicable. Apparently, the discretion is left to the valuers and of course, the court, which is the final arbiter.

3.1.2. Claim for Damages under law of Tort

It is pertinent to note that a person who has suffered any injury, loss or damage as a result of oil pollution is not precluded to sue and claim damages under the law tort. Thus, a victim of oil pollution can bring an action under the tort of nuisance, negligence or the rule in *Rylands V Fletcher*³⁷. An action in negligence requires the company to prove that he has been negligent. This involves proving that the defendant owes him a duty of care and that the duty has been breached.

This is a heavy burden on the victim. The difficulty of proving negligence is even more complex in cases involving high skill and technology because the burden of proof becomes higher on the plaintiff who finds it difficult to prove that the operator was negligent. This was the decision of the court in *J Chinda & Ors. v Shell B.P.*³⁸

The victim can also rely on the tort of nuisance. However, must be able to prove that he has suffered damage. An action brought under private nuisance constitutes no problem, but if the action is brought under public nuisance, some difficulties may be encountered. Apart from the fact that usually the state can bring an action for the crime of public nuisance, an individual who brings an action under public nuisance must be able to prove that he has suffered particular damage not suffered by others as emphasized in the cases of *Amos & org V shell B.P.*³⁹ and *Olaye v. N.A.O.C.*⁴⁰ This will probably be very difficult because public nuisance usually affects all or part of a community.

These are the Guidelines to be applied by the court in assessing or awarding compensation. However, this is only applicable to oil spill from pipeline or an ancillary

³⁵ *Ibid* S.21

³⁶ Cap L5, LFN 2004

³⁷(1868)LR 3 HL 330

³⁸ (1974)2 R.S.L.R.

³⁹(1974)4 E.S.C.L.R.48

⁴⁰(1973)2 R.S.L.R.96

installation. All said and done, Nigeria needs more laws and statues on the compensation of oil spillage to afford the victims adequate, timely and fair compensation.

3.2 The Approach of the Nigerian Courts

The approach of Courts in Nigeria and beyond is a good measurement of the impact of environmental governance in the petroleum industry in Nigeria. At Common Law, the principle enunciated in *Rylands v Fletcher*⁴¹ is the basis of initiation of action for negligence and nuisance which is applicable for the purposes of attaining environmental justice in Nigeria. Nevertheless, where there is a rule on serving pre-action notices on persons or body corporate before an action can be initiated against such persons, it must be complied with strictly.⁴² Also, the Courts have held that time only begins to run when a cause of action only accrues when the damage occurs and is known to the claimant.⁴³ This, too, is applicable in the case of breach of environmental laws governing the petroleum industry. Furthermore, it has been settled that in the case of oil spills and anything related to mining and petroleum, the Federal High Court has the exclusive jurisdiction to hear and determine such matters as per the provisions of Section 251 (n) of the CFRN 1999 (as amended) and as upheld in the case of *Shell Petroleum Development Co. (Nig.) Ltd v Sirpi-Alusteel Construction Ltd*.⁴⁴ Consequently, a claimant has to approach the Federal High Court to ventilate his claims for damages he perceives he has suffered due to the breach of environmental laws governing the petroleum industry. A claimant in this instance is at liberty to claim general and special damages, but it must be noted that the Courts have adopted the position that special damages must be strictly proven before an award of damages can be awarded against a defendant. This position has been upheld in a number of cases such as *SPDC v Prince Ogan Mafibisemi & Ors*,⁴⁵ *H.R.H. Abraham Nahbon Thomas & Ors v SPDC*⁴⁶ and in the recent case of *SPDC' v Chief Joel Anaro & Ors*.⁴⁷

4. International Legal regime for the Compensation for Oil pollution

The international regime for the compensation of pollution damage caused by spills from tankers is based on two treaties adopted by the auspices of the International Maritime Organization (IMO), the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention), and the 1992 International Convention on the Establishment of an International Fund for compensation for Oil Pollution Damage (1992 Fund convention). These conventions adopted in 1969 and 1971 respectively. The 1992 Civil Liability Convention govern the liability of ship-owners for pollution damage. The Convention lays down the

⁴¹ H. & C. 774, 159 Eng Rep 737 (Ex.1865).

⁴² *AMCON v Onyedika & Anor* (2018) LPELR-43764 (CA).

⁴³ *Sifax Nigeria Ltd v Migfo Nigeria Ltd* (2018)9 NWLR (Pt 1623)138.

⁴⁴ (2007) 1 NWLR (Pt.1067).

⁴⁵ (2010) LPELR-CA/B/2016/04

⁴⁶ (2010) LPELR-8626 (CA)

⁴⁷(2015) LPELR-247500 (SC)

principle of strict liability for ship-owners and creates a system of compulsory liability insurance. Ship-owners are normally entitled to limit their liability to an amount which is linked to the tonnage of his ship.

The 1992 Fund Convention, which is supplementary to the 1992 Civil Liability Convention, set up an intergovernmental organisation, the International Oil Pollution Fund (1992 Fund), which provides additional compensation to victims when compensation under the Civil Liability Convention is inadequate. By becoming party to the Fund Convention, a State becomes a member of the 1992 Fund. The organisation has its headquarters in London. The 1992 Fund succeeds a previous organisation, the 1971 Fund, which is at present being wound up on 15 April 2005, 106 States were parties to the 1992 Civil Liability Convention, and 93 States were parties to the 1992 Fund Convention. A third tier of compensation in the form of a Supplementary Fund was established on 3 March 2005 by means of a Protocol adopted in 2003. To date nine states have ratified the Protocol.

However, the common features of these international compensations regimes are:

1. Damage to property tends to be calculated by reference to the actual cost of repairing or replacing the property, or the difference between the value before and after the spill;
2. Compensation or damage to natural resources (where this is provided for) tends to be calculated by reference to the cost of remediating or replacing the lost or damaged natural resources. The compensation schemes do not generally provide for additional, independent compensation for damage to natural resources;
3. Damages or loss of subsistence use of natural resources can be included;
4. Compensation for consequential losses and pure economic losses (such as loss of income) are generally provided;
5. The cost of bringing a claim, including the use of adviser where appropriate;
6. The heads of loss identified in the compensation schemes are generally not exhaustive or exclusive.
7. Non-pecuniary losses (save to the extent that these might be recoverable as damage to natural resources or loss of subsistence use) and punitive damages are generally not expressly recoverable under the compensation schemes;

The International compensation schemes tend to require the responsible party (or the related fund, where appropriate) to reimburse persons for their reasonable efforts in cleaning up or remediating an oil spill. The responsibility and enforcement mechanisms for clean-up and remediation vary from scheme to scheme. Under International Environmental law, liability and compensation for pollution damage caused by oil spills from laden tankers is governed by two international conventions: The Civil Liability Convention forms the basic structure on which the regimes of liability and compensation for oil pollution damage from ships are based. In addition,

it also established a system of strict liability for tanker owners and introduced compulsory liability insurance. The Fund Convention has created a system of supplementary compensation administered by an inter-governmental organization and the International Oil Pollution Compensation Fund (IOPC Fund). The IOPC Fund pays compensations to victims of oil pollution in member states when the compensations from the ship-owners and their insurer are insufficient.

The IOPC Fund has developed a policy on the admissibility of claims covering clean-up costs, measures to prevent pollution occurrence, damage to property and economic loss suffered by fishermen, hotel-owners and others who depend directly for their livelihood on marine-related activities. Although these protocols provide higher levels of compensation, Nigeria has not yet acceded to both protocols and it is hoped that in view of the obvious advantages offered, the federal government of Nigeria will consider accession to the 1992 Protocols. An oil pollution incident may cause three types of economic loss: physical property damage, economic loss due to the non-use of the contaminated assets, loss of earning related to impairment of the environment.

Physical property damage: According to *article 1.6 (b) of 1992 CLC*, pollution damage includes “further loss or damage caused by preventive measures”. This can be interpreted to include physical property damage as well as physical damage to persons. Therefore, as mentioned above, claims for the pecuniary expenses related to the clean-up of oiled property, for example, cost of cleaning or repairing property such as boats, yachts and fishing gear which have been contaminated or damaged are accepted. If it is impossible for the property to be cleaned or repaired, then replacement costs are accepted, though with a reduction for wear and tear.

Economic loss due to the non-use of the contaminated assets: The Fund accepts in principle claims for loss of earnings suffered by the owners or users of property contaminated as a result of a spill. This is so-called consequential loss. One example of consequential loss is a fisherman’s loss of income as a result of his vessels or nets being contaminated by oil.

Loss of earnings related to impairment of the environment: When an oil pollution incident happens, persons whose property has not being polluted may also sustain loss of earnings. A fisherman whose boat and nets have not been contaminated may be prevented from fishing because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, an hotelier or restaurateurs whose premises are close to a contaminated public beach may suffer loss of profit because the number of guests falls during the period of pollution. This is so called pure economic loss. Under article 1.6 (a) of 1992 CLC, the definition of pollution damage includes the terms “loss of profit from impairment of the environment”. This means that loss of earning or revenue due to contamination of the environment is recoverable.

However, claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.

4.1 Compensation for Oil Pollution in the United States

The United States of America (US) is a major oil producing country like Nigeria and has had incidents of oil pollution. The US legal system has a more defined, practical and actionable ground for legal redress compared to the Nigerian system. The Law of oil pollution liability is a mixture of civil liability and criminal liability in the US.

The Oil Pollution Act 1990 is the primary statute in the USA that comprehensively covers liability⁴⁸ and compensation concerning all types of oil spill⁴⁹. The Oil Pollution Act (OPA 90) came into effect in August 1990 largely in response to the legal issues presented by the Exxon Valdez oil spill. The Oil Pollution Act (OPA 90) came into effect in August 1990 largely in response to the legal issues presented by the Exxon Valdez oil spill⁵⁰. Under the OPA the responsible party is strictly liable (with specific exceptions) therefore, the person who has suffered damages need not prove negligence for the damage and loss caused by oil pollution. The OPA covers two types of compensation⁵¹ namely:

- i. Removal Cost: The costs of removal and the cost to prevent minimize or mitigate oil pollution. The removal cost can be claimed by Federal, State Authority and any person who took actions.
- ii. Compensations for Damages to Natural Resources, Property, Revenue and Economic Loss to be paid to the State but a private party is also entitled to compensation here.

The OPA also establishes the Oil Spill Liability Trust Fund which ensures that once the cost of clean-up exceeds the limit of liability of the polluter, the Fund would cover the balance. The Fund also pays for the cleanup where the polluter has a valid defense. The Limit of a defaulter's liability under the OPA is \$75,000,000 (Seventy-five million dollars) and where this amount is not sufficient to cover the compensation, the balance is made up by the Oil Spill Liability Trust Fund which is primarily financed through a fee on domestic and imported crude oil.

The OPA specifically provides that the costs recoverable are the cost of actual damage and cost for restoring to the state before damage from oil pollution.

⁴⁸AiliZongi, "Liability Regime Concerning the Oil Pollution Rising from Offshore Facilities", University of Oslo, Faculty of Law <https://www.duo.uio.no/bitstream/handle/10852/38222/MT.pdf> accessed 3 May, 2023, Emuejevokeop.cit

⁴⁹Section 1002 (b) of OPA.

⁵⁰<https://www.britannica.com/event/Exxon-Valdez-oil-spill>. Accessed on May 2023

⁵¹AiliZongi(Supra)

The Clean Water Act (Federal Water Pollution Control Act)⁵²: This Act establishes the basic structure for regulating discharges of pollutants, imposes liability for the cost of removal as well as for damages to natural resources. However, claims for private loss are not included but the Act imposes administrative and criminal penalties for unlawful discharges and for failure to carry out orders issued under the Act. The Oil Pollution Act (OPA 90) does not preclude States from addressing oil pollution. Under State Laws there is no limit under tort law for recoverable damages although, pure economic loss is normally unrecoverable. Under the US general tort law, the responsible party may be imposed punitive damages based on fault liability.⁵³

5. Conclusion and Recommendations

After decades of oil exploration and production, Nigeria is yet to have a robust and comprehensive legislative and administrative framework which will adequately deal with compensation claims arising from petroleum operations.

There is need for a review of the statutory compensation framework for oil pollution to make it more realistic and in conformity with international standards. The head of claims under the extant framework are limited in scope and do not provide for adequate compensation to victims of oil pollution.

There is also need for establishment of environmental courts vested with special powers and jurisdiction to enforce breach of environmental laws and determine and award adequate compensation to victims of oil pollution. The adjudicatory system as presently constituted does not afford victims of oil pollution justice.

A need also arises to establish a compensation fund to be funded by a percentage from the gross profits of oil companies which can be utilized to compensate victims of oil pollution where pollution occurs as a result of acts of third parties.

There is also need to review the composition of heads of claim, as well as the procedural guide to the conduct of compensation valuation. There is also a need to revisit the imposition or adoption of predetermined value of claimants' interests by the use of Oil Producers Trade Section (OPTS) rate of compensation and other similar rates compiled by the state or oil companies. Adequate compensation goes beyond arriving at figures. The use of predetermined rate as a substitute to valuation assessment carried out by a qualified Estate Surveyor and Valuers should be discouraged as this will only fan the already heated atmosphere. Estate Surveyors and Valuers by their training are equipped with right knowledge and skill to determine an equitable value for impaired interests of oil pollution victims.

⁵²33 U.S Code §1251 et seq 1972 https://www.epa.gov/sites/production/files/2017-08/documents/federal-water-pollution-control-act-508_full.pdf accessed 3 October, 2019

⁵³AiliZongi, supra note 102