

RELEVANCE OF THE TORT OF NUISANCE IN REDRESSING DAMAGE FROM OIL AND GAS POLLUTION IN NIGERIA*

Abstract

Environmental pollution from oil and gas activities has become a ubiquitous phenomenon for the Nigerian Niger Delta environment. The scope of oil and gas pollution on the Nigerian environment spans almost the entire exploration and production operations. The overall purpose of environmental protection law in the sector is to prevent pollution as much as possible. When it inevitably takes place, the law moves to control it and reduce its negative effect on the environment, restore the environment and compensate the victims. Common law of England, doctrines of equity, and statutes of general application in force before 1900 in England form a major source of law in Nigeria. These principles of law however apply subject to local enactments. The study appraises the relevance of the common law principle of nuisance in redressing oil and gas pollution damage.

Key words: *Tort of Nuisance, Oil and Gas, Pollution, Damage, Redress, Nigeria*

1. Introduction

The nature of oil and gas pollution constitutes it as a form of environmental nuisance. The problem has however been whether oil and gas pollution can be classified as a public or private nuisance. This is bearing in mind the fact that when an oil pollution incident such as oil spillage occurs, it will normally cut across large expanse of swamp and water ways. The implication is that it is difficult for any single plaintiff to claim that he has suffered more excessively than the other members of the community, this being a requirement for establishing a case of nuisance. Oil pollution adversely affects fishes and other marine life which are not capable of ownership by individuals as most of them exist as world life. In this regard, the abolition of the distinction between private and public nuisance is not helpful to the plaintiff. The study appraises the relevance of the common law principle of nuisance in redressing oil and gas pollution damage.

2. Definition of Relevant Terms

2.1 'Oil' and 'Gas': The term 'oil' is generally described from an etymological perspective as a liquid derived from the olive.¹ An extension of this general meaning can also be found from the Merriam-Webster's Collegiate Dictionary (10th Edition) which defined oil as any of numerous unctuous combustible substances that are liquid or can be liquefied easily on warming, are soluble in ether but not in water, and leave a greasy stain on paper or cloth.² The above definition readily takes in all forms of oily substances. A specialized definition relevant to our purpose here is that given by the Dictionary of Geology, whereby oil was simply described as petroleum oil.³ The term 'oil' in geological terms therefore refers to petroleum oil and not any other form of oil.

2.2 Petroleum: Petroleum has also been described as an organic material which occurs naturally in green to black coloured mixtures of hydrocarbon oils found as seepages beneath the earth crust and which could be obtained by boring into the earth crust⁴. Petroleum is formed beneath the earth crust across countries of the world including the United States, Russia, the Middle East, the North Sea region of the earth, the United Kingdom, Africa, etc. On the other hand, gas has been described as a fluid that neither has independent shape nor volume but tends to expand indefinitely.⁵ As is the case with 'oil', the term has been ascribed a specialized meaning as 'natural gas,' combustible gas or gaseous mixture

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¹ C.T. Onions (ed), *The Oxford Dictionary of English Etymology*, (London: Oxford Univ. Press, 1995) p. 125.

² *Merriam-Webster Collegiate Dictionary* (10th ed) (Massachusetts: M.W. Inc. 2001) p. 249

³ *Dictionary of Geology*, (New Delhi: Academic Publishers, 2006) P.249

⁴ M.P.M. Walker (ed) *Chambers Dictionary of Science and Technology* (New York: Chambers Harraps Publishers Ltd, 2002) p. 806.

⁵ Meriam-Webster, *op. cit.* at p 480

for fuel or lighting.⁶ Gas may exist independently of petroleum as ‘natural gas’ or may be found together with petroleum as ‘associated gas’.

2.3 Pollution: The term ‘to Pollute’ has been used to mean the same thing as ‘to corrupt or defile’. It connotes the use of something in such a way as to denigrate its natural purity and to make such a thing less useful. In relation to the environment, it is used with respect to the contamination of the soil, air, or the water with noxious substances.⁷ The FEPA Act defined pollution as ‘... man-made or man-aided alteration of chemical, physical or biological quality of the environment to the extent that is detrimental to the environment or beyond acceptable limits...’.⁸ Environmental pollution therefore involves a negative use of the environment in such a way as to reduce its life sustaining capacity. Environmental pollution is by its very nature an affront on the right to life guaranteed by constitution of most nations of the civilized world. The United Nation’s Conference on the Environment held in Stockholm, Sweden in 1972 stressed the interrelatedness between environmental protection and development, and pointed out that neglecting the legislative impetus to regulate the use of the environment could lead to a crisis of global dimension. Pollution is therefore a phenomenon that is adverse to the environment.

2.4 Oil and Gas Pollution: This describes the pollution of the environment occasioned by oil and gas prospecting and production. There are several sources of environmental pollution. This includes noise, light, volcanoes, forest fires, toxic wastes, flood disasters, human refuse, and most recently, oil and gas exploration and production. Most states in Nigeria are making frantic efforts to grapple with the mountains of human waste and refuse generated in their cities by instituting waste management authorities. Oil and gas pollution is one of the most controversial and complicated forms of environmental pollution in our world today. The controversy does not arise as a result of any doubts regarding the polluting effects of petroleum activities, but because there is socio-political polemics arising from balancing the need to put it on check and the likely result of the loss of income it generates to the producing countries. Oil and gas pollution takes the form of waste and effluent discharges into the environment during exploration activities, oil spillages, and leakages of refined petroleum products from refineries during refining and transportation, and emission of poisonous gases and other substances into the atmosphere by gas flaring.

3. The Nature, Extent and Scope / Impact of Oil and Gas Pollution on Nigeria

Environmental pollution from oil and gas activities has become a ubiquitous phenomenon for the Niger Delta environment. The Niger Delta has a richly endowed ecosystem. The oil industry unfortunately constitutes dams all over the terrain in a most reckless manner without paying much attention to the attendant environmental devastation. The extensive pipeline network connecting the fields and transporting crude from production points to export terminals has made the incidence of oil spills a regular occurrence in the region.

The incidence of oil spillage has destroyed an immense part of the Nigeria mangrove environment. An estimated 5-10% of the Nigeria mangrove ecosystem has been wiped out as a result of constant pollution by oil and also due to poor upstream land management.¹⁰ The rain forest that used to measure about 7,400km² is also fast disappearing partly due to oil spills in populated areas which normally spread over a wide area destroying crops and aquaculture through contamination of the soil and ground water. Some agricultural communities have lost a whole year’s supply of food as a result of destruction of farmlands occasioned by oil spillage. In some cases, such communities are deserted as they are rendered uninhabitable. The mangrove swamp forest occupies about 5,000-8,500km² of land in the Niger Delta.¹¹ Consequently, once a spill occurs, tidal forces and the hydrological power of the rivers transport the oil

⁶ M.P.B. Walker, *op. cit* at p. 480

⁷ *ibid* at 1197

⁸ section 48 FEPA Act, *op cit* at fn. 39

¹⁰ P.C Nwilo & T.B Olusegun, “Impact and Management of Oil Spills Pollution along the Nigerian Coast”, available at <http://www.fig.net/pub/figpub/pub36/chapters/chapter8.pdf>>accessed 20-9-2012.

¹¹ *op. cit* fn.8

into the communities of vegetation dotting the Niger Delta. The organisms that depend on each other within the mangrove ecosystem absorb oil once there is a spill and spread it among themselves.¹²

When oil is spilled into the mangrove environment, it cuts off the supply of recycled nutrients, clean water, sunlight and proper substrate to the floral communities within the mangrove. The result is that such floral communities cannot survive and perpetuate. The death of the floral organisms in turn negatively affects the habitat structure by acidifying the soil, halting cellular respiration and starving the roots of plants of vital oxygen.¹³ When an area of the mangrove has been destroyed by oil, such an area can no longer be supportive of the growth of native plants species until bacterial remediation has taken place.

The fishing industry which is an essential part of Nigeria's effort at sustainable development is also not spared by oil and gas pollution. The fishes in Nigerian waters are declining as a result of oil spills. The waters of the creeks which are used by the local population for drinking, bathing, cleaning and cooking is also being daily polluted by oil spills and discharges of different kinds of effluents emanating from petroleum activities. The River Niger is home to about 250 species of fishes of which twenty are endemic because they are not found in any other part of the world but oil spill into it and the surrounding creeks often lead to a loss of habitat for these fishes.¹⁴ The spread of water hyacinth across the Nigerian coast has also been attributed to oil spillage. This invasive plant species was earlier introduced into Africa as an ornamental plant. It however thrives in polluted water environments and has the capacity of crippling fishing activities by making the waterways impossible to navigate. Thus, fishing boats and canoes are unable to move around the waters for their fishing activities. The shallow roots of water hyacinth have the capacity to soak up water laden with oil. It can choke up both the sunlight and oxygen needed for survival by water organisms by spreading its roots and shoots across the entire water surface of a polluted water environment. While competing with other native marine plants for energy from the sun, it does not contribute to the food chain of the marine environment. It is thus a parasite since it cannot be eaten up by marine animals.

The overall effect of energy depletion traceable to the emergence of water hyacinth on the Nigerian waters as an invasive species is that some marine population such as certain species of fishes may not be able to survive or their number may drop to a point of no return. The incidence of the spread of water hyacinth across the Nigerian creeks and waterways is usually traced to films of oil frequently spilled across the creeks and waters of Nigeria, particularly the Niger Delta where almost all the petroleum activities take place.

Another indirect but deleterious effect of oil spillage is that oil spill on the agricultural fields close to the creeks and the water ways often results in the washing up of chemical pesticides into the creeks along with the oil. This has in many cases resulted in the death of fish species that live in those creeks. Gas flaring from oil wells has also become a veritable source of environmental pollution. The scenario is that while the lands and waters are being polluted by oil spills, the atmosphere is at the same time receiving a cocktail of gases that equally pollutes it. Effluent and waste discharge is yet another source of oil and gas pollution in Nigeria. Effluent discharges are discharges into the surrounding environment and water by oil companies during drill cuttings. Drilling mud fluids are extensively used in stimulating production. During seismic surveys, polluting chemicals are equally used. Barites and bentonite which are the major components of drill cuttings are dumped on the ground after seismic surveys. Those deposits on the ground prevent plant growth until the development of new top soil. During rainfall, these materials are discharged into the surrounding creeks and waters of the Niger Delta where they disperse and sink to the bottom of the water. They may eventually kill bottom water living¹⁵ plants and animals by burying them. Other sources of pollution of the environment from petroleum activities

¹² MERCK "Indigenous Plants to the Rescue" *Science in Africa*, Feb. 2002 available at <http://www.sciencein africa.com.za/2002/February/oil.html> accessed 20-11-2012

¹³ *op. cit* fn.9

¹⁴ Available at http://en.Wikipedia.org/wiki/Gas_flare .p1 of 3, accessed 23-09-2012

¹⁵ Ecosoc Affairs, Division of Policy and Development: An Interactive Expert Group Meeting on 27/08/2007, p.5

include the discharge of refinery chemicals and wastes which are harmful to the environment in the course of petroleum refining, disposal of wastes into the sea from offshore oil facilities, discharges of crude oil from accident vessels and sabotage.

The scope of oil pollution on the Nigerian environment spans almost the entire process of oil exploration and production. Production operations account for 21% of all oil spills in Nigeria while 41% of spills are accounted for by non-functional or defective production equipment.¹⁶ The rupture and leakage of production infrastructure has been attributed to be the major contributor to oil spills in Nigeria as most of them have been described as very old and lacking in regular inspection and maintainance.¹⁷ The large numbers of oil spill incidents have also been attributed to the smallness of the size of the Niger Delta area where most petroleum activities take place *vis-à-vis* the extensive and often criss-crossing pipeline network built across it. The massive criss-crossing of the pipelines render them vulnerable to leaks that may not easily be detected. It has also been observed that some of the pipes with a maximum life span of fifteen years have been in use for over fifty years.

The practice of gas flaring has also posed a great challenge to the environment. Gas flaring releases carbon IV oxide into the atmosphere which affects the ozone layer adversely. Carbon IV oxide is one of the gases that accounts for what is referred to as the ‘Green House Effect.’¹⁸ These cocktail of gases forms a sort of blanket around the earth and warms it up in what has become known as ‘global warming.’ The overall effect of global warming is the heating up of the earth’s environment. Other greenhouse gases that mix with carbon IV oxide to produce a hotter global environment are methane (CH₂), Nitrogen Oxide (N₂O) and Chloro fluorocarbons (CFC)

The incidence of light, heat and noise pollution has also been attributed to gas flaring. The process of gas flaring results in a burning temperature as well as noise such that people that live in the same neighbourhood have to shout at each other in order to be heard. The peaceful and starlit skies of the Niger Delta have also given way to the unwanted endless lights emanating from the gas flares. The vegetation around the flares are brownish in colour while the fishes in nearby streams find it difficult to survive their heated up water habitats. The acid rain caused by the continuous sky bound cocktail of greenhouse gases corrodes the roofs of the villager’s buildings.¹⁹ Gas flaring has been identified as a major cause of pollution and acid rains in the Niger Delta areas of Nigeria. According to the United States Energy Information Administration (EIA), ‘the continued process of gas flaring has not only meant that a potential energy source and source of revenue has gone up in smoke, but it is also a major contributor to air pollution and acid rain’.²⁰

Acid rains in turn result in the acidification of lakes, streams, creeks and other water courses and make the habitat of such natural waters in the Niger Delta uninhabitable for fishes and other edible animals. The waters from these sources also become unsuitable for drinking. Acid rain further results in deterioration and decay of building materials, especially roofing sheets. It also damages trees in high elevation.²¹ The health of those living in the vicinity of the flare sites is not also spared. The different brands of benzene and other toxic substances released during gas flaring have been found to be harmful not only to the environment but also to the health of humans. Independent research has linked some diseases and health problems noticeable in the Niger Delta to gas flaring. According to the United States Environmental protection Agency (EPA) Reports:

Many scientific studies have linked breathing particulate matter to a series of significant health problems including aggravated asthma, increases in respiratory

¹⁶“Impart of oil spills along the Nigerian Coast” available at <<http://www.achsmag/issues/2011/october/impacts.html>> The Association of Environmental Health and Science. Accessed 25/2/2012

¹⁷ *ibid*

¹⁸ C. Ake, cited in *Green Peace, Shell Shocked*, “The Environmental Cost of Living with Shell in Nigeria” 1995.

¹⁹ M.C. Mollies (Jnr), *Ecology, Concept and Applications*. (3rd ed.) (New York: Mcgraw Hills< 2005) PP 93 - 94

²⁰ Available at <http://www.epd.gov/acidrain/effects/index.html>.accessed 3/10/2012.

²¹ *ibid*

symptoms like coughing and difficult and painful breathing, chronic bronchitis, decreased living function and premature death.²²

Yakubu has also noted that:

Human beings exposed to these substances can suffer from a variety of respiratory problems which have been reported among many children in the Niger Delta but have apparently gone uninvestigated. These chemicals can aggravate asthma, breathing difficulties and chest pain and chronic bronchitis. Of particular note is that the chemical (toxic liquid from petroleum) which is known to be emitted from gas flares in undocumented quantities is well researched and ascertained as being a causative agent for leukemia – and other blood related diseases.²³

Global warming which is a current environmental concern of all and sundry has also been attributed to gas flaring. Yakubu has also noted that

Gas flaring also contributes to ozone depletion and leads to the exacerbation of the problem of global warming, CLC's or chlorofluorocarbons are a primary cause of ozone depletion. When industrial process releases these chemicals, they rise into the atmosphere and degrade the ozone layer. Gas flaring not only in the Niger Delta but also in Nigeria is highly inefficient and releases high amount of methane which has very high global warming potentials.²⁴

Nigeria is still deficient in the technology for converting most of the poisonous gases flared into the atmosphere to less poisonous ones. The gases are consequently prompted into the atmosphere in their raw toxic states. Methane gas is three times more powerful as a greenhouse gas than carbon IV oxide.²⁵ Oil companies operating in the Niger Delta are not interested in this technology and prefer to pay the paltry fines prescribed by statute for gas flaring. Nigeria is acclaimed to be one of the 20 countries in the world that account for 90% of the world's total gas emissions.²⁶ The largest concentration of flare sites in the world is to be found in the Niger Delta. Russia remains however the greatest gas flaring country in the world. The Nigerian government has touted several dates as deadlines for bringing an end to gas flaring. None of these dates has however been adhered to. It is noteworthy that these terminal dates are mere declarations of government policy not backed up by any legislation. This may be the reason why it has been possible for the government to be shifting the dates. The extant anti-gas flaring legislation, i.e. Associated Gas Re-injection Act²⁷ has no provision for a terminal date for placing a complete ban on gas flaring. A Nigerian Federal Court presided over by Nwokorie . J. declared gas flaring unconstitutional in 2005.²⁸ This decision has however been overturned by the Court of Appeal.

It must however be pointed out that Nigeria is one of the sixteen countries that have made progress in the reduction of gas flaring between 1995 and 2006. Other countries that have taken significant steps towards reduction in gas flaring include Argentina, Algeria, Bolivia, Cameroon, Chile, Egypt, India, Indonesia, Libya, North Korea, Norway, Peru, Syria, UAE and USA (off shore).²⁹

²² available at <http://www.epd.gov/air/urbanair/pm/html> accessed 26/07/2012

²³ Yakubu 'Nigeria Gas Flaring in the Niger Delta and its Health Hazards' *Daily Trust*, available at <http://allafrica.com/stories/200803100319.html> accessed 25/08/2012.

²⁴ *ibid*

²⁵ P.W. Boyle and A.E. Boyle, *International Law and the Environment* (2nd ed.), 2002 at 526.

²⁶ Wikipedia, *the free Encyclopaedia* available at (http://en.wikipedia.org/wiki/gas_flare accessed 4/05/2012

²⁷ Cap A25, LFN 2004

²⁸ FHC/CS/B/2005

²⁹ *Op. cit*, fn. 13

4. The Relationship between the Tort of Nuisance and Oil and Gas Pollution

Oil pollution damages are also capable of being redressed by an action under the common law tort of nuisance. This also has several limitations. Before we look at the applicability and effectiveness of bringing an action for redressing oil pollution wrongs under the tort of nuisance, it is necessary to understand the basic principles underlying nuisance as a tort under common law. There are limitations of the common law remedy of nuisance for a person seeking to use same to protect the environment, restore the natural ecology and compensate a victim or victims of oil/gas pollution damage. The first problem pertains to the fact that most oil pollution damage occur in such a way as to constitute a public nuisance. This is because when rivers are polluted, fishes and other aquatic life are destroyed, the effect is on the members of the general public of the host community. A private person can only bring an action in public nuisance if he can show that he has suffered from a harm in a way or manner that can be distinguished from that suffered by other members of the public. After sailing the hurdle of the consent of the Attorney-General, the plaintiff must prove special damage distinguishable from that suffered by other members of the public.

In *Amos and Others v. Shell Petroleum Development Company*,³⁰ the plaintiffs claimed from the defendants special and general damages for nuisance and for unlawful damages caused by the defendants who deliberately blocked the Koko creek for about three months. The nuisance was held to be a public nuisance since the Koko creek was a public waterway. The Supreme Court affirmed the lower court's decision that the plaintiffs failed to prove any special damage suffered over and above that suffered by other members of the public.

One fallout from the requirement of proving particular damage before a person can have *locus standi* to sue in public nuisance is that if such particular damage exists, the nuisance likely becomes a private nuisance. The implication is that no person except the Attorney-General can bring an action to release an act of public nuisance. This has created serious problems for environmental litigation in Nigeria and it is suggested that the requirement be dispensed with. This is because most acts of public nuisance degrade the environment and the office of the Attorney-General may not, for political or other reasons be able to contend with the number of incidents of environmental degradation begging for redresses. This is in gross violation of Nigeria's commitment in international treaties for the protection of the environment.

It is also trite that public nuisance as a crime is not expressly provided for in our statute books. Consequently, prosecuting any person for an offence not contained in any written law is contrary to the provisions of Section 36(12) of the CFRN 1999 as amended. In the case of *Aoko v. Fagbemi*,³¹ the court held that an act can only constitute a crime if it is so regarded under a written law with the punishment for such an act specified. Nigeria did not receive the common law crime of public nuisance as the constitutional provision cited above supersedes all other laws on the area. The provision in sections 245 and 247 for 'common nuisance' does not fully caption the whole meaning, essence and the purposes of the law of nuisance. Provisions in other statutes that presume to protect the environment are sometimes vague and obscure. The current state of the law however appears to suggest that a private individual can maintain an action in public nuisance by virtue of section 6(6) of the CFRN, 1999 which rests all the judicial powers of the Federation on the Courts whose jurisdiction and power shall extend to all matters between persons or between government or authority of any person in Nigeria. The implication of section 6(6) is that a private person can henceforth maintain an action in public nuisance without the consent of the A-G. This is a laudable development. It has also been suggested that mandamus shall be against the A.G. to compel him to do that which duty is binding on him.³² Unfortunately however, the exercise of the power of the Attorney-General in matters of this nature is a discretionary one and the law is settled that mandamus will not lie against a person or authority who fails to exercise a discretionary power.³³ The proper thing to do where the A.G fails or neglects to

³⁰(1974) ECSR 486 at 488; Also *Dumez Nigeria Limited v Ogboli* [1972] ALL NLR 241

³¹(1961) 1 All W.L.R 460

³²Ebirim Okechukwu and Ndukwe; *The Nigerian Law of Oil Pollution*, (Ibadan: Spectrum, 2008), p.35

³³*R v. Western Urhobo Rating Authority, Ex parte Chief Oden 7Ors.* (1961) ALL N.L.R 796

exercise his discretion judicially and judiciously is to report him to his appointer and demand for his removal.

It is however suggested that the best way out of the logjam is to make environmental rights enforceable as fundamental rights. By so doing, the provisions of the Fundamental Rights Enforcement Procedure Rules 2009 will become available for the remedying of environmental wrongs. The provisions of the Rules have expressly removed the requirement of *locus standi* in favour of public interest litigations. Accordingly, if environmental rights become enforceable constitutional rights, oil pollution damage would be treated as a breach of fundamental environmental rights to which injunctions and damages can lie as remedy. In that case, oil pollution damage as a public nuisance becomes a constitutional wrong for and against the public for which any member of the public can sue.

From the foregoing discussion, it is clear that actions for oil pollution damage are mostly tenable under private nuisance. This is also not without problems. In considering relief to stop a polluting activity, the court first satisfies itself that the annoyance or inconvenience suffered by the plaintiff and which the injunction is sought to restrain, is not only unreasonable and unnecessary but also substantial. The implication is that where a polluting act injures the public health such that it deserves a permanent injunction, the courts may still be unwilling to grant a permanent injunction that could shut down a production plant that emits noxious substances without balancing the extent of harm and the utility of such a production plant to the larger society. At the stage of balancing the public interest and the utility of the production plant, the controversy is between the parties' escape from the private nuisance domain to the public nuisance domain.

The problem that will arise would be a determination of whether a decision of private controversies should affect public issues. In other words, will the injunction benefit the plaintiff in any personal way or is it just to benefit the public at large? If the answer is that damages even if a permanent kind will likely be sufficient to redress the injury suffered by the plaintiff to his land or property, the courts will not grant an injunction as this will amount to adjudicating a public issue in a litigation that is ordinarily personal to the parties' interest. In *Boomer v. Atlantic Cement Co.*,³⁴Bergan J noted that it was a rare exercise of prejudicial litigation as a purposeful mechanism to achieve direct public objections greatly beyond the rights and interests before the court. The court noted with particular reference to air pollution that it was a problem that was far from solution even with the full public and financial powers of government.

The stopping of this kind of pollution requires research and is nothing any person can achieve through the grant of an injunction. A court should not try to legislate for the community by granting an injunction to solve a problem that requires solution through research and legislation. The effects of air pollution to the community in *Boomer's* cases is similar to the effect of oil and gas pollution on the lives of the people of Niger Delta of Nigeria in whose environment oil exploration and production is carried on. From the *dicta* of His Lordship, it is clear that the tort of nuisance is of highly limited value for the supervisor of environmental responsibility. In the said New York Court of Appeal case of *Boomer v. Atlantic Cement Co.*,³⁵His Lordship noted as follows:

A court performs essential functions when it decides the rights of parties before it. Its decision of private controversies may sometimes greatly affect public issues. Large questions of law are often resolved by the matter in which private litigation is decided. But this is normally an incident to the Court's main function to settle controversy. It is a rare exercise of judicial power to use a decision in private litigation as a purposeful mechanism to achieve direct public objectives greatly beyond the rights and interests before the Court.

³⁴ (1970), 26 N.Y.2d 219, 309, N.Y.S. 2d 312 N.E.

³⁵ *supra*

The Court was merely saying that it will not grant an injunction to restrain a public nuisance flowing from an activity apparently not declared illegal, at the private suit of an individual who has approached the court for the protection of a private right. This underscores the limited value of bringing a claim for the litigation of environment degradation under the tort of nuisance. Another setback to the granting of injunction in private nuisance is that the court more often than not reckons with the balance between the harm created by the plaintiff by the defendant's act and the social utility or economic loss that will occasion such an injunction. Opinions are however divided on whether it is the social utility or economic loss. In *Whalem v Union Bag and Paper Company*,³⁶ the Court affirmed an injunction already granted by a lower court and set aside the decision of the Court of Appeal that nullified the injunction. In the above case, the Court did not bother itself about the substantiality or otherwise of the harm done or the social utility of the defendant's activity. According to Their Lordships in the above decision, it is not the social utility of the defendants' business or the substantiality of the harm done to the plaintiffs that should influence the court to either grant or not grant an injunction but the circumstances of the case and what the courts think are right.

However, in *Northern Indiana Public Services C. v. W.J. & M.S. Vessey*,³⁷ the Supreme Court of the State of Indiana refused to grant an injunction but granted permanent damages, 'present, past and future'. The Court's decision was premised on a public interest in the operation of the gas plant and the conclusion of the Court that the balance of convenience would be better served by requiring the appellant (Public Services) to pay the appellee (Vesey) all damages suffered by it than by sealing off the plant. The above decisions though of persuasive value only to Nigerian courts in deciding oil pollution cases are quite instructive. They underpin a general judicial attitude that entails a reluctance to grant injunctions to stop the functioning of individual and other economically productive activities on the basis of a private law suit brought by a single plaintiff. In the Nigerian cases of *Shell Petroleum Development Company v. Otoko*,³⁸ *Jumbo v Shell Petroleum Company* and *Amos v. Shell Petroleum Company*³⁹, this attitude was implicit even though the courts anchored their decisions on the more technical considerations of the lack of *locus standi* and inability to prove diligence on the part of the plaintiffs.

Finally, there is a judicial position established in the case of the Privy Council's decision in the *Wagon Mound (No. 2) Overseas Trankship (U.K.) v. The Muller Steamship Co. Pty. Ltd.*⁴⁰ In that case, Their Lordships held that a plaintiff will only be able to recover special damages in cases of public nuisance if his damage was of a foreseeable kind. Thus, the concept of foreseeability applicable in negligence cases was also imported into the tort of nuisance. In that case, the Privy Council dismissed the case of nuisance and held that the damage suffered by the respondent was not the direct result of the carelessness of the act of the servants of the appellant who let oil overflow and polluted Sydney Harbor. The damage supported by the appellants was not caused by the pollution but by fire ignited by the welding work going on in the appellant's Boat Repair Wharf. The Wharf had earlier fallen into disuse but was later reactivated. When the appellant's servants spilled oil into Sydney Harbour, the pollution of the Harbour was the direct result. The fire that gutted down respondent's premises was however caused not by the act of public nuisance of the appellant's servants but by the welding works going on in the reactivated wharf. Their Lordships of the Privy Council concluded that the special damage to the respondents was not foreseeable and the case of nuisance against the appellant's failed.

The implication of the above decision for oil pollution damage is that it will be difficult for anyone to assert that damage by fire or explosion caused by the spill of oil into water or the emission of inflammable gas into the atmosphere was foreseeable and therefore actionable in nuisance. This invariably renders negligence an ineffective weapon for a plaintiff in oil pollution cases. This is because the personal harm and injury which invariably occur as a result of oil and gas pollution cannot easily be

36 208 N.Y.1, 101 NE. 805

37 468 A.2d. 150 (N.J.1993)

38 *supra*

39 *supra*

40 *supra*

proved as being foreseeable. For instance, when an oil spill occurs and the beaches are polluted, tourists will desist from coming to the centres around the beaches and the owners of the tourists' resorts will invariably lose income. Similarly, those that do business with them will also be losing income. All these losses are indirectly caused by the pollution incidence brought about by the act of oil operators either as a result of carelessness or as a result of accident. The fact remains however that those losses are not readily recommended for an action in nuisance as they may be held not to have been foreseeable from the pollution incident.

5. Conclusion and Recommendations

The major problem of this tort as a channel for redressing oil pollution damage and environmental restoration is that most oil pollution incidents occur as public nuisance. A private person can only bring an action in public nuisance if he can show that he has suffered in a way distinguished from that suffered by other members of the public. It is only the Attorney-General that can bring an action to redress a public nuisance. In cases where a polluting act constitutes a private nuisance, the damage must be reasonably foreseeable and substantial for a plaintiff's action to succeed. In other cases, the desirability of granting an injunction to restrain a private nuisance is usually balanced with the economic loss the general public will suffer if such an injunction is granted in favour of a private interest. It is suggested that the best way out of the logjams is to make environmental rights justiciable, guaranteed and enforceable. Where this happens, the Fundamental Rights Enforcement Procedure Rules 2009 which has dispensed with the requirement of *locus standi* can be resorted to for the redress of damages cause by pollution in the petroleum sector which would have ordinarily come under public nuisance. Under the present state of the law, the common law tort of nuisance is of limited value for the redress of environmental degradation occasioned by oil exploration and exploitation. Until this is done, most actions brought under the tort of nuisance are likely to fail on grounds of *locus standi* and the concept of foreseeability.