

REMEDIES FOR ENVIRONMENTAL DAMAGE UNDER THE NATIONAL ENVIRONMENTAL STANDARDS AND REGULATIONS ENFORCEMENT AGENCY (NESREA) (ESTABLISHMENT) ACT 2007 AND THE HARMFUL WASTE (SPECIAL CRIMINAL PROVISIONS, ETC) ACT 1988^{1*}

Abstract

This article examines remedies for environmental damage under the NESREA Act 2007 and the Harmful Waste (Special Criminal Provisions, Etc.) Act 1988. For a remedy to crystalize, damage must have arisen, thus, environmental damage presupposes the existence of harm caused to an individual or property which causes impairment to function. Environmental damage may be to biodiversity, land, water due to activities that adversely affect human health or water quality. The main purpose of these regulations is to ensure compliance with environmental laws and regulations failure of which several remedies may accrue, thus, the polluter-pays-principle. This article examines the basis of liability, and situations that may give rise to a civil claim under the extant laws.

Keywords: *environmental damage, remedies, harmful waste, NESREA, judicial review, strict liability, negligence, injunctions*

1. Introduction

Before the dumping of toxic waste in Koko village, in the present day Delta State in 1987, Nigeria had no clear cut legal framework to manage environmental challenges. There ‘were no institutional arrangements or mechanisms for environmental protection and enforcement of environmental laws and regulations in the country’. The Harmful Waste (Special Criminal Provisions, etc) Act was enacted in 1988 as response to the Koko toxic waste incident, to deal specifically with illegal dumping of harmful waste. The Act prohibits the carrying, depositing and dumping of harmful waste on any land, territorial waters and matters relating thereto. Thereafter, the now extinct Federal Environmental Protection Agency (FEPA) Act 1988 (amended in 1992) was enacted. FEPA failed to meet the legitimate expectation of the citizens. To fill this gap, the Federal Government pursuant to its ‘environmental objectives’ as contained in section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended), enacted the National Environmental Standards and Regulations Enforcement Agency (NESREA) (Establishment) Act 2007, thus, repealing the Federal Environmental Protection Agency Act.

The objectives of NESREA is articulated in its section 2 which vests upon the Agency responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria’s natural resources in general and environmental technology including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines. The Agency may sue and be sued in its corporate name. Under both Acts, civil or criminal actions might arise in which case there must be a ‘cause of action’ and naturally remedies.

The basis of a civil law claim is a ‘cause of action’². This arises when an injury is caused to a person or

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¹ Cap. H1 L.F.N. 2004

² *Savage v. Uwaechia* (1972) 3 S.C. 214.

property by any harmful waste or hazardous substance which has been deposited or dumped on any land or territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways.³ ‘Injury’ or ‘damage’ includes death of, or injury to any person (including diseases, any impairment or physical or mental condition).⁴ If the damage or injury is caused by a public body like the Nigeria National Petroleum Corporation or the Nigeria Ports Authority whilst exercising public powers or performing a public duty, the cause of action is in public law, whereas if it is caused by a private person or companies and firms, the cause of action is in private law. The causes of action in public law are ultra vires, natural justice and error of law. For these, the following remedies - certiorari, prohibition, mandamus and declaration are available. The causes of action in private law are trespass, nuisance, the rule in *Rylands v. Fletcher* (the strict liability rule) and negligence. The remedies for their redress are an award of damages, injunction and a declaratory judgment.

Statute may however limit a cause of action in which cases the cause of action becomes statute barred and is said to be caught by a provision of statute of limitation. If the action is incompetent and caught up by the limitation of time, it must be struck out as not being properly before the court, and whether or not pre-action notice was given by the plaintiff, the action cannot be revived. A statute in point is section 32(1) of NESREA Act⁵ on legal proceedings. Under this provision, a suit shall not be commenced against the Agency before the expiration of a period of one month, after written notice of intention to commence the suit shall have been served on the Agency by the intending plaintiff or his agent and the notice shall clearly state the cause of action, particulars of the claim, name and place of abode of the intending plaintiff and relief which he claims. To be valid or competent, any action under the NESREA Act must be filed within the statutorily stipulated period. The limitation period is one month. This line of interpretation is in consonance with the now well-settled principle of statutory interpretation⁶.

It has been posited that ‘judicial intervention in environmental issues arises when persons resort to action to seek redress for a grievance. Court action can either be civil or criminal action. Civil action is resorted to typically by private parties while criminal action tends to be the preserve of public authorities. However, the boundaries are not at all seamless: there are many instances of public authorities bringing civil action, and of private individuals initiating criminal proceedings (i.e. private prosecutions). The traditional position has been that, whereas a public authority may take action explicitly to protect the environment, a private litigant can only take court action to seek redress for a private injury. Any environmentally protective effect resulting from the private action would be purely incidental. Where the private individual wishes to bring action to redress an injury to the public he has to seek the permission of the Attorney-General... The traditional position found expression in the

³Section 12 (1), Harmful Waste (Special Criminal Provisions, Etc.) Act Cap. H1 L.F.N. 2004.

⁴Section 12 (2), *ibid.*

⁵National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, No. 92 of 2007.

⁶ See *Texaco Co. Panama v. Shell Petroleum* (2002) 94 L.R.C.N. 152 at 163 F. See also the following cases: *Federal Deposit Ins. Corp. v. Winton*, CCA.Tenn. 131 F2, 780, *Awolowo v. Shagari* (1979) 6-9 SC.56, *Adejumo v. Governor of Lagos State* (1972) 3 SC. 45; *Attorney-General of the Federation* (1981)10 SC 1, *Owena Bank (Nig) Plc. v. NSE Ltd.* (1997) 53 LRCN 2601; (1997) 8 NWLR (Pt. 515) 1 at 12; *Odubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 285; *Oduka v. Kasumu*1968) NWLR 28. *Sommer v. F.H.A.* (1992) 7 LRCN 100; (1992) 1 NWLR (Pt. 219) 548. *Attah v. Nnacho* (1965) NWLR, 2 548; *Tukur v. Governor of Gongola State* (1989) 4 NWLR (Pt. 117) 28; *Ehigokwe v. Okadigbo* (1973) 4 SC. 113; *Ezenwosu v. Ngonadi* (1992) 9 LRCN 719; (1992) 8 NWLR (Pt.258) 139. *Funduk Eng. Ltd. v. McArthur* (1996) 40/41 LRCN 1364; (1995) 2 NWLR (Pt.392) 640; *Ibrahim v. J.S.C.* (1998) 14 NWLR 1; *Mandilas v. Karaberis Ltd.* (1969) NWLR 199; *Mobil Oil Nig. Ltd. v. FBIR* (1977) 35C. 51; *Nsirim v. Nsirim* (1990) 3 NWLR (Pt. 138) 285.

jurisprudence of the courts in common law and civil law jurisdiction alike. *Gouriet v. Union of Post Office Workers*⁷, is a leading English authority on the point... A private individual could however bring action in his name on the basis of an interference with a public right in two situations: where the interference with the public rights also interferes with some private rights of the person concerned or where, in the absence of any interference with a private right, the person concerned has suffered damage peculiar to himself, which is additional to that suffered by the rest of the public'.⁸

Under the various Harmful Wastes/Hazardous Substances Laws,⁹ a civil law action could be employed to challenge the legal validity of the decisions and actions of public authorities and bodies charged with duties and responsibilities under the Act. This is the common law process of 'judicial review'. It is now largely provided for by statute.¹⁰

2. Judicial Review

Aggrieved persons under the various Harmful Waste Laws - Harmful Waste (Special Criminal Provisions etc) Act, and the NESREA Act may appeal from the administrative body or bodies implementing the provisions of the Act to the courts for review of either the findings of fact, or of law, or of both. In such circumstance, judicial review is a remedy that may be used to:

- (a). Quash a decision (*certiorari*) for instance by the Minister charged with responsibility for the Environment designating a harmless substance as 'hazardous substance';
- (b). *Stop unlawful action (prohibition)*, as to where the Minister charged with responsibility for the environment wrongfully directed that a harmless substance shall be destroyed or disposed of at such time and in such manner as the Minister thinks fit in the circumstances.¹¹

In such cases, an aggrieved person is entitled to proceed against the Minister and there is the possibility of a remedy in damages for maladministration.

- (c) *Require the performance of a public duty (mandamus)*. A private litigant may by way of application to the court secure an order or mandamus to compel the Minister charged with responsibility for the environment to take necessary measures to safeguard lives and property found or within the area or site sealed up for containing harmful waste and or upon which prohibited activities relating to harmful waste are carried on.¹² A mandamus is a command from the court that some legal duty be performed.¹³ In *Festo Balegele and 749 Others v. Dar Es Salaam City Council*,¹⁴ the applicant sought orders: (i) of certiorari to quash the decision of the Dar Es Salaam City Council to dump the city's waste at Kanduchi Mtongani; (ii) prohibiting the Dar Es Salaam City Council from continuing to dump waste at the site; and (iii) of mandamus to direct the Dar Es Salaam City Council to establish an appropriate refuse dumping site and using it. The court found that the applicants had the standing to sue, and granted the orders sought.
- (d). *Declare the legal position of the litigants (declaration)*. This remedy may be used on application by way of judicial review by a litigant who desires the court to state the rights or legal position of the parties as they stand. For instance, a party may desire to find the meaning of some provision in the Harmful Waste (Special Criminal Provisions, etc.) Act or the ambit and scope of substances

⁷[1878] A. C. 435 at. P. 500.

⁸Judicial Decisions in Matters Related to the Environment / National Decisions, Volume 1, 1998, p. ix.

⁹See Harmful Waste and NESREA Acts respectively.

¹⁰See, section 57, Environmental Impact Assessment Act Cap E12 LFN 2004 and section 32 of NESREA Act 2007.

¹¹See Section 11 (4), Harmful Waste (Special Criminal Provisions, etc.) Act, Cap.H1 LFN 2004.

¹²See, section 11 (5), *ibid*.

¹³H. W. R. Wade, *Administrative Law*, Fifth Edition, 1982, p. 630.

¹⁴Misc. Civil Cause No. 90 of 1991 (Tanzania).

that are ‘hazardous substances’ within the provisions of the NESREA Act or whether either Act applies to some particular case or whether an ‘area or site has been, is being or will or might be used directly or indirectly for the purpose of depositing or dumping any harmful waste.’¹⁵

- (e) *Give monetary compensation*
- (f) *Maintain the status quo (injunction).*

Judicial review may be awarded where a public body or a person vested with a public duty has committed the following wrongful acts or omissions:

- (a) Where it has acted beyond its legal powers (that is, ultra vires), for instance where a public body fails to take into account relevant matters or taking into account irrelevant matters in reaching a decision or an action.
- (b) Where it has breached the principles of natural justice- *audi alteram partem* and *nemo iudex in causa sua*.

Finally, judicial review qualifies as a remedy both under statute and the common law. Statutes now provide that parties aggrieved with the decision of a public body may apply for a review to the courts.

3. Strict Liability: The Rule in *Rylands v. Fletcher*¹⁶

Liability under sections 1, 2, 3, 4, 5, 6, 7, 8, 12 and 14 of the Harmful Waste (Special Criminal Provisions, etc) Act and sections 20 to 31 of the NESREA Act are strict. This is predicated upon the principle that a person who for his own purpose brings on any land or in any territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways and dumps, deposits, discharges or causes to be carried, deposited or dumped there any harmful wastes or hazardous substances, without lawful authority, which harmful or hazardous wastes are likely to do mischief whether it escapes or not, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage and injury which is the natural consequences of the escape.¹⁷

For a determination of either civil or criminal liability under sections 1, 2, 3, 4, 5, 6, 7, 8, 12 and 14 of the Harmful Waste (Special Criminal Provisions, etc.) Act and sections 20 to 31 of NESREA Act, the prohibited offences must have been committed within the specified place or places under the Act. Such places are ‘any land,’ or ‘territorial waters’ or ‘contiguous zone’ or ‘Exclusive Economic Zone’ or ‘inland waterways’ of Nigeria.

It appears that the Harmful Waste (Special Criminal Provisions etc.) Act, 2004 had the Koko toxic waste incident in mind when it provided against committing the offence(s) within the prohibited zones. The Koko toxic waste dumping took place in Koko village, Delta State. Delta State is a littoral state. Under the Act, the offences are capable of being committed within littoral or non-littoral states or ‘any land’ at all. The offences may also be committed on-shore or offshore. For a successful determination of any case arising under the sections of both Acts stated above, the plaintiff or the prosecution may rely on the Territorial Waters Act, the Exclusive Economic Zone Act, the Sea Fisheries Act and other legislations *ejusdem generis* for the propose of determining the exact place the offence(s) were

¹⁵Section 11 (1), Harmful Waste (Special Criminal Provisions, etc.)Act 2004.

¹⁶Also known as the strict liability rule. See the following cases: *Cambridge Water Company v. Eastern Counties Leather, Plc.* (1994) All E.R. 53; *Edhemowe v. Shell BP, Nigeria Ltd.* (Unreported) suit No. UHC/12/70, Ughelli High Court, 29/1/71.

¹⁷*Rylands v. Fletcher*, (1865) 3 H. & C. 774 (Court of the Exchequer); (1866) L.R. II Ex. 265 (Court of the Exchequer; Chamber); (1868) L. R. 3 H. L. 330 (House of Lords).

committed, in which case the issue of boundary determination either on land or on the sea arises. In the *locus classicus* cases of *Attorney-General of the Federation v. Attorney-General of Abia State & 35 Others*¹⁸ and *Attorney-General of the Federation v. Attorney-General of Abia State (No. 2)*¹⁹ popularly known as the resource control cases, the Supreme Court considered and pronounced on the above issues.

What the various Harmful Wastes Act provisions did was to make any person who without lawful authority breaches any provisions of the Act strictly liable for the consequences of damage and or injury arising from carrying on prohibited activities relating to harmful waste. The person becomes liable because he engages or engaged in a 'non- natural use of land' on the 'prohibited zones'. 'Non-natural use' refers to the conduct of ultra- hazardous activities on land and the 'prohibited zones'. Under the Act,²⁰ mere purchase, sale, importation, transit, transportation, deposit, storage of harmful wastes makes a person strictly liable both in civil and criminal jurisdictions. The strict liability provisions contained in the Act²¹ flows from the Rule in *Rylands v. Fletcher*,²² based on the facts of the English case after which it is named. The defendant had constructed a reservoir to collect and hold water for his mill. Under his land was underground working of an abandoned coal mine whose existence he was unaware of. After the reservoir had been filled, the water escaped down the underground workings through some old shafts, and flooded the plaintiff's colliery. The plaintiff filed suit and the court decided that: 'the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of the escape.'²³

The case was appealed to the English House of Lords, which upheld the decision, one of the judges adding that the defendant was liable because he had been engaged in a 'non-natural use of his land'. It is important to distinguish between the fundamental phrase in Sir Colin Blackburn's judgment in that 'escape' must take place and such 'escape' must cause 'mischief' for liability to arise, whereas under the various Harmful Waste Laws, what is required for liability to arise is to just 'bring', 'collect' and 'keep' harmful wastes on the 'prohibited zones' without lawful authority. Mere 'bringing' without more makes a person strictly liable. In other words, people who bring onto their land any substance likely to do harm if it escapes, will be held liable for the damage caused by its escape. A defendant may be held fully accountable (strictly liable) for all damages resulting from the escape of the substance even though the utmost care was taken to prevent its escape. It is not necessary for the plaintiff to prove carelessness on the part of the defendant but only that their actions caused the damage.

Two important qualifications to the *Rylands* principle are: that the activity on the defendant's land must be a 'non-natural' use of land; and that the risk of damage to the plaintiff must be 'reasonably foreseeable'. The question of what is a non-natural use of land has caused considerable difficulty in legal cases. However, in 1966 Saskatchewan farmers successfully used the principle to recover compensation for crop damage from pesticide drift. The court held that spraying herbicides from an airplane was a 'non-natural' rather than a 'natural' use of property because it was (at least at the time) an unusual spraying method involving more risk to others than tractor drawn spray techniques.²⁴

¹⁸[2001] 11 NWLR (Part 725) 689.

¹⁹[2002] 6 NWLR (Part 764) 542-905.

²⁰Ibid.

²¹Ibid.

²²Ibid.

²³Per Blackburn, J. in *Rylands v. Fletcher* (1866) L. R. 1 Ex. 265 at p. 279.

²⁴*Mihalchuk v. Ratke* (1966) 57 D.L.R. (2d) 269 (Sask. Q. B.) and *Kwasnuik v. Ratke* (1966) 55 W.W.R (N.S.) 555 appld.

To establish strict liability under the *Rylands* principle, there must be some special use which brings with it an increased danger to others. The ordinary use of the land or a use that is for the general benefit of the community, without the special use or increased danger, will not be held strictly liable. However; the substance in question need not be inherently dangerous. In the *Rylands* case the defendant was held strictly liable for damage caused when water escaped from a reservoir on his property and flooded his neighbour's mine shaft. Liability under the *Rylands* principle has been found in respect of a wide range of substances including herbicides, insecticides, acidic air contaminations, sewage, vibrations and noxious fumes.

4. Nuisance

Nuisance takes place when physical injury is inflicted on the plaintiff's property or when the ordinary use of same is materially interfered with or impaired. It is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property, working obstruction or injury to the right of another, such that the law will presume resulting damage. Whether or not anything is nuisance is to be determined not merely by an abstract consideration of the thing itself, but with reference to the locality, the duration and all the circumstances.²⁵ Nuisance is one of the causes of action open to a party who suffers or has sustained damage or injury including any diseases and any impairment of physical or mental condition as a result of the defendant dumping, depositing or importing harmful waste or hazardous substance. There are two types of nuisance; public nuisance and private nuisance. Usually from the provisions of the Harmful Waste (Special Criminal Provisions, etc.) Act and the NESREA Act, the type of nuisance arising under both Acts be it private nuisance or public nuisance appears to occur as a result of a person's malfeasance, and except where lawful authority exists, it becomes a misfeasance. To deposit or dump harmful waste or hazardous substance upon the land of another is a public as well as a private nuisance. It is a public nuisance because such dumping or depositing constitutes an interference with the public's reasonable comfort and convenience. It is an interference with a public right and constitutes a common law criminal offence, quite apart from providing a cause of action in private law and under the Act. It is a public hazard in that it subjects persons to the risk of death, fatal injury or incurable impairment of physical and mental health.

To dump or deposit harmful waste or hazardous substance upon the premises or land of another is an interference with an occupier's use and enjoyment of his land or property. Not all interferences amount to a nuisance. To constitute a nuisance, the interference must not only be unreasonable, it must also be capable of causing material and substantial injury to property or unreasonable discomfort to those living on the property. The liability of the defendant arises from using land in such a manner as to injure a neighbouring occupier. Apart from the statutory liability under the Act²⁶, the nuisance imposes the duty of reasonable use on neighbouring occupiers of land. It is the cause of action most suited to resolving environmentally related disputes between neighbouring landowners'.²⁷

There is no known Nigerian nuisance case directly on the dumping of harmful waste or hazardous substance, but in *Adediran and Another v. Interland Transport Ltd.*,²⁸ Karibi - Whyte, J. S. C. said: 'It

²⁵See, *Ifejika v. Oputa* [2001] 11 NWLR, Part (725), 583 at pp. 589-590, paras. H-A.; *UTB v. Ozoemena* (2001) NWLR (Pt. 713, 718.

²⁶Cap. H1 LFN 2004.

²⁷*Ibid.* Judicial Decisions in Matters Related to Environment / National Decisions, Volume 1, at p. xi.

²⁸[1991] 9 NWLR (Part 214), 155.

is well settled that a nuisance whether public or private is an injury which confers on the person affected a right of action... The individual who suffers injury has a right of action because of the cause of action'.²⁹

In the English case of *Sturges v. Bridgeman*,³⁰ the court held that: 'Whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but by reference to its circumstances'. In another Nigerian case of *Seismograph Service (Nigeria) Ltd. v. Ogbeni*,³¹ the plaintiff sued for nuisance caused by the defendants, their servants or agents in the course of carrying out oil exploratory exercise of exploding the oil testing chemicals around the region of the plaintiff's building, which said explosion wrongfully caused or permitted excessive noise and vibration which damaged the buildings.³²

5. Negligence

Negligence arises under the Harmful Waste (Special Criminal Provisions, etc.) Act and the NESREA Act 2007, from failure of a person with or without lawful authority to exercise the care demanded by the circumstances in dealing with prohibited activities relating to harmful waste, with the result that the plaintiff suffers an injury. The basis of the action is a 'duty of care' which the defendant has breached, 'with consequent injury to the plaintiff'. Criminal prosecution lies for any act of wilful negligence under the Act³³, which endangers human life or health, for example: shipping with or without lawful authority harmful wastes or hazardous substances without informing the shipmaster³⁴, exposing for sale harmful wastes or hazardous substances prohibited and declared unlawful;³⁵ it also lies for all nuisances of a public and private nature occasioned by an act or acts itself carried out with lawful authority, if the creation of the nuisance is the probable consequence of the act.³⁶

The *locus classicus* on negligence is the English case of *Donoghue v. Stevenson*,³⁷ Lord Atkinson said in that case that the duty of care is owed to 'persons so closely and directly affected by the defendant's act that he ought reasonably to have them in contemplation as being so affected when directing his mind to the acts or omissions which are called into question'. In other words, both under the Act and common law, the duty of care is owed to those whom the defendant could foresee might suffer injury as a result of the defendant's act or omission in carrying out the prohibited activities relating to harmful waste or hazardous substances. According to Niki Tobi, J. C. A. (as he then was), 'an aggrieved party may file an action on the tort of negligence in an environmental litigation, and or not under the *Rule in Rylands v. Fletcher*'.³⁸ To this submission, Blackburn, J. had earlier on said in *Rylands v. Fletcher*,³⁹

The person... whose habitation is made unhealthy by the fumes and noise some vapours of his neighbour's alkali works, is damnified without any fault of his own and it seems

²⁹Ibid. at page 180.

³⁰[1879] 11 Ch. D. 852. See, *Read v. Lyons & Co. Ltd.* (1947) A. C. 156; *Ipadola v. Oshowole* (1987) 5 S. C. 376 at 389; *Esso Petroleum v. Southport Corporation* (1956) A. C. 218.; *Amos v. Shell B. P. D. Co. Ltd.* (1974) 4 E.C.S.L.R. 486; *Manchester Corporation v Farnworth* (1930) A.C. 171; *Igwe v. Kalu* (1990) 5 N.W.L.R. (Pt. 149) 155; *Okunzua v. Amosu* (1992) 6 N.W.L.R. (Part 248), 437; *Dumez v. Ogboli* (1972) All NLR 241.

³¹(1976) 4 S. C. 85.

³²See also, *Shell Petroleum Development Company of Nigeria Limited v. Chief Otoko and Others* (1990) 6 NWLRL (Part 159), 693.

³³Ibid.

³⁴*Williams v. East India Co.* (1802) 3 East 192.

³⁵*Shillito v. Thompson* (1875) 1 Q. B. D. 12.

³⁶*R. v. Moore* (1832) 3 B. & Ad. 184.

³⁷[1932] AC 562. See also, *Lochgelly Iron and Coal Co. v. McMullen* (1934) A.C. 125.

³⁸Ibid.

³⁹Ibid.

but unreasonable and just that the neighbour, who has brought something on his own property which was not naturally there harmless to others so long as it is *confined to his own property*, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.⁴⁰

Under the Harmful Waste (Special Criminal Provisions, etc.) Act, whether or not the harmful waste 'is confined to his own property...' or escapes or not, the person, that is the defendant is statutorily liable and the defence that the harmful waste or hazardous substance was confined to his own property or did not escape would not avail him. This is so, because under the Act, 'all activities relating to the purchase, sale, importation, transit, transportation, deposit, storage of harmful wastes are hereby prohibited and declared unlawful'.⁴¹ In *Shell Petroleum Development Company of Nigeria Limited v. Chief Otoko and Others*,⁴² (not a harmful waste case but concerned vicarious liability - owner of 'dangerous thing' and founded inter alia on negligence). Omosun, J. C. A. said:

To sustain an action for negligence, it must be shown that the negligence found by the court is the proximate cause of the damage and where the proximate cause is the malicious act of a third person against which precautions would have been in operative, the defendant is not liable in the absence of a finding either that he instigated it or that he ought to have foreseen and provided against it.⁴³

6. The Remedies

Apart from the criminal sanctions provided under the Harmful Waste (Special Criminal Provisions etc.) Act 2004⁴⁴ and the NESREA Act, 2007⁴⁵ and various environmental legislations relating to harmful wastes and hazardous substances, the other remedies available outside the statutory liability are damages, injunction and declaratory judgment. 'The mother of all the actions in environmental civil litigation is the claim of damages. Whether an action is commenced on negligence, or nuisance or both, the final relief sought by the plaintiff is damages...'⁴⁶

An award of damages is compensation given to a party who has suffered an injury or loss. The sum awarded is predicated upon the principle that the person who suffered the injury should be placed in the position he *or* she would have been if he had not been injured.

Section 12 of the Harmful Waste (Special Criminal Provisions, etc.) Act 2004,⁴⁷ with a side note titled

⁴⁰Ibid at page 279.

⁴¹Section 1 (1), Cap. H1 L. F. N., 2010.

⁴²Ibid.

⁴³Ibid. at p. 725, paras. A – B. See also, *Shell Petroleum Development Company (Nigeria) Limited v. H.R.H. Chief G.B.A. Tiebo VII and Others* [1996] 4 NWLR, (Part 445) 71. See the cases of *Chief Simon Onajoke v. Seismograph Service Ltd.*, suit No. SHC/28/67, Sapele High Court, delivered on January 29, 1971 (Unreported); *Seismograph Services Ltd. v. Onokpasa* (1972) 4 S.C. 123; *Ogiale v. Shell BPD Ltd.* (1997) NWLR, (Pt. 480), 148; *Seismograph Services Ltd v. Akporuovo* (1974) 1 All N.L.R. 154; *Atubie v. Shell B.P.D. Company*, suit No. UCH/48/73, delivered in Ughelli High Court on 12/11/74 (Unreported); *Chinda v. Shell B.P.D. of Nigeria Ltd.* (1974) 2 R.S.L.R. 1 and *The Torry Canyon Disaster case* (unpublished Paper, School of Law, University of Washington, (undated) at p.3.

⁴⁴Cap. H1 LFN 2004.

⁴⁵Ibid.

⁴⁶Niki Tobi, *ibid.* See *Mobil Producing (Nigeria) Unlimited v. Monokpo (C.A.)*, [2001] 18 NWLR (Part 744), 212.

⁴⁷Ibid.

‘civil liability’ provides in the following terms:

1. Where any damage has been caused by any harmful waste which has been deposited or dumped on any land or territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways, any person who deposited, dumped or imported the harmful waste or caused the harmful waste to be so deposited, dumped or imported shall be liable for the damage except where the damage -
 - (a) was due wholly to the fault of the person who suffered it; or
 - (b) was suffered by a person who voluntarily accepted the risk thereof.
2. In this section ‘damage’ includes the death of, or injury to any person (including any diseases and any impairment of physical or mental condition)⁴⁸

Under the above Act, a person aggrieved could claim damages in respect of death or injury and this includes any diseases and any impairment of physical or mental condition. It is submitted that notwithstanding the provisions of the Act in respect to statutory remedies, an aggrieved person can wholly resort to his common rights in private law to press his claims. There is no known Nigerian case on damages or compensation for injury caused by harmful waste or hazardous substances.⁴⁹

The common law provides for two types of remedies to the plaintiff who successfully sues a defendant in a civil action: damages and injunctions. The term ‘damages’ describes the amount of money awarded by the court to compensate a successful plaintiff who has suffered a loss caused by the wrongful acts of the defendant. Usually, damages are awarded to compensate a plaintiff for actual loss or damage to his or her property, out-of-pocket expenses, pain and suffering, or loss of enjoyment of property. Damages are intended to place the plaintiffs in the same position they were in prior to the unlawful activity. However, a court will sometimes award a plaintiff punitive damages (also referred to as aggravated or exemplary damages), to punish the defendant for particularly obnoxious activity and to serve as an example to others who may consider doing a similar thing.

In appropriate circumstances, the court may issue an injunction to:

- (i) prohibit defendants from doing something they intend to do (e.g. depositing a harmful or hazardous waste on a person’s land);
- (ii) prohibit defendants from continuing to do something they have already done (e.g. dumping harmful waste from a factory into a river); or
- (iii) ordering defendants to do something they do not want to do (e.g. installing a scrubber on a smoke stack).

Injunction may be interlocutory or temporary or permanent.

If a person is subject to an injunction and ignores the injunctive order then he or she is said to be in contempt of court. Ignoring a court order can be a very serious offence punishable by a fine, imprisonment, or both.

⁴⁸Ibid.

⁴⁹ See the Indian case of *Charan Lal Sahu v. Union of India* where certain victims of the Bhopal Gas Disaster successfully filed suit for damages when toxic gas escaped from a storage tank at the Bhopal Chemical plant of the Union Carbide Limited, a subsidiary of the American multinational, Union Carbide Corporation and killed approximately 3000 people and injured up to 30,000 people, polluted the environment and affected flora and fauna.

7. Defences to Civil Actions

Under the various Acts⁵⁰, the defendant may raise a number of legal defences to excuse their hazardous and polluting activities. In each of these defences the onus of proof is on the person who is attempting to use the defence. In other words, it is up to the person trying to say that it is not his or her fault to prove that the defence applies to the facts of the case. The Acts provides the following defences to a civil action⁵¹ -

- (i) that the damage was due wholly to the fault of the person who suffered it;⁵²
- (ii) that the damage was suffered by a person who voluntarily accepted the risk thereof;⁵³
- (iii) that the defendant acted under instructions from his employer and neither knows nor had reason to suppose that the deposit was unlawful;⁵⁴
- (iv) that the defendant acted with lawful authority or under a licence and took all such steps as were reasonably open to him to ensure that the conditions were complied with;⁵⁵
- (v) that a discharge was caused solely by a natural disaster or an act of war or by sabotage;⁵⁶
- (vi) that the owner or operator of a vessel or onshore or offshore facility from which there is a discharge in violation of the Act, took care to give immediate notice of the discharge and further commenced immediate clean-up operations following the best available clean-up practice and removal methods as may be prescribed by regulations made under section 28 of the Act.⁵⁷
- (vii) That the damage did not occur within the prohibited zones under the Act.

8. Conclusion

From the foregoing, remedies for environmental damage under the NESREA Act and the Harmful Waste Act may be based on claims on statutory law or on specific torts under common law. While legal action offers a potential for remedy for those affected by injuries or property loss, the legal system is hamstrung by specific limitations on the plaintiff's ability to sue. Negligence remains a ground of action under common law, but the plaintiff must show that the defendant was careless in the exercise of a specified duty of care. The plaintiff bears the burden of proof and has to show not only that the damage occurred, but that the problem was the result of negligence on the part of the defendant. This can be a very difficult burden to discharge, given the technical nature of proving environmental damage and the fact that technical evidence is very expensive to obtain or in possession of the defendant and on which the defendant is significantly more knowledgeable.

The courts in Nigeria have generally taken a conservative approach to environmental cases, tending to weigh the economic circumstances of the public over individual inconvenience or environmental sustainability. Overall, prosecuting environmental cases remain a herculean task by persons affected by adverse environmental activities in Nigeria due mostly to the technicality involved, poverty, corruption and a wide range of practical and legal obstacles. The opportunities and challenges of the Nigerian legal system are overshadowed by the practical obstacles facing many citizens. The poor economic situation and lack of knowledge of their rights makes it extremely difficult for many citizens to initiate legal proceedings.

⁵⁰ The Harmful Waste (Special Criminal Provisions, etc.)Act, Cap.H1 L.F.N. 2004 and NESREA Act, 2007.

⁵¹Ibid.

⁵²Section 12 (1), (a) Cap.H1 LFN.2004, *ibid*.

⁵³Section 12 (1), (b), Harmful Waste Act, *ibid*.

⁵⁴*Ibid*.cf. section 7 *ibid*.

⁵⁵Section 1 (2), *ibid*.

⁵⁶*Ibid*.

⁵⁷*Ibid*.

This article has examined the remedies available to persons who suffer environmental damage under the extant laws discussed. So long as access to justice remains a challenge, adequate reparations and remedies will continue to elude the victims. Only when there is effective accountability and access to justice would citizens be fulfilled in pursuing their environmental rights, but till then, it remains a tragedy that environmental damage continue to occur in Nigeria without adequate commitment on the part of government to implement and enforce the extant environmental laws. There is a serious failure of the government of Nigeria to carry out the environmental objectives contained in section 20 of the Constitution of the Federal Republic of Nigeria 1999 (as amended). The way forward is for the government and the courts to adopt active and radical approach to begin transparent enforcement and adjudication of environmental cases and refuse to be limited by fears of ‘change’ and ‘common law’ inhibitions.