

THE LIMITS OF THE TORT OF NEGLIGENCE IN REDRESSING OIL SPILL DAMAGE IN NIGERIA¹

Abstract

There are many sources of environmental pollution. One thing that is however certain is that while the effect of some pollutants such as noise is localized and short lived, the effect of others from the oil industry are permanent and worldwide in distribution. The scope of oil pollution on the Nigerian environment spans almost the entire process of oil exploration and production. Oil and gas pollution is one of the most controversial and complicated sources 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 a socio-political polemic 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. Compensation is usually paid to the victims of such pollution and for the restoration of the environment. The study appraises the efficacy or otherwise of the tort of negligence in redressing oil spill damage in Nigeria.

Key words: *Tort of Negligence, Oil Spill, Damage, Limitations, Nigeria*

1. Introduction

Oil and gas pollution has become an inevitable consequence of the commercial production of oil and gas in Nigeria. A reoccurring controversy has been how to redress oil pollution damage by having in place an adequate legal framework for the compensation of victims of oil and gas pollution damage. Claimants sometimes anchor their claim for compensation on the tort of negligence. Negligence by its very nature is not a tort actionable *per se*. Besides, the technical and scientific nature of the precautionary steps that should be taken to avoid pollution in the cause of oil and gas production does not easily lend itself to accessibility by claimants. A claimant for compensation for damages caused by oil and gas pollution who relies on the tort of negligence has the onerous task of identifying, first, the technical and scientific precautions that ought to be taken to avoid pollution in the cause of oil and gas production, and second, to establish by cogent and credible evidence that such precautionary measures were not observed by the oil producing company. Subsequently, the claimant further has to prove that the oil pollution damage he is complaining about was as a result of the non-observance of such measures by the oil producing company. The consequence of this scenario is that the tort of negligence has become an elusive mechanism for the achieving the goal of a claimant for compensation in oil pollution damage cases. The study appraises the efficacy or otherwise of the tort of negligence in redressing oil spill damage in Nigeria.

2. Oil Spillage

Oil spillage is the situation where oil which is meant for a flow station or other evacuation point through pipelines or tankers is discharged into the surrounding marine and land environments either due to accident or due to acts of omission or commission by man. There are a number of causes of oil spillage in Nigeria. These include corrosion of pipelines and tankers which accounts for about 50% of oil spillages recorded so far in Nigeria. Sabotage accounts for about 28% of the incidents of oil spillage in Nigeria. Sabotage occurs mainly as a result of illegal bunkering. In the attempt to tap oil pipelines could become damaged or destroyed. When this happens, the oil being carried in the pipeline could be discharged into the surrounding land or marine environment as a pollutant. 21% of the spills are caused by recklessness and carelessness towards the environment in the process of oil production. The remaining 1% is due to defective or non-functional equipment being used by the oil companies.

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Oil spillage in Nigeria has been categorized into four groups, minor, medium, major and disaster spills.² A minor spill occurs when less than 25 barrels of oil are spilled in inland waters or less than 250 barrels on land, off shore or coastal waters. These spills will be minor indeed when they do not pose a threat to public health or welfare. Medium spills occur when the spills are less than 250 barrels in the inland waters and between 250 to 2,500 barrels on land, offshore or coastal waters. For major spills, the discharge to the inland waters must be in excess of 250 barrels and 2,500 barrels on land, off shore or coastal waters. A disaster spillage refers to any uncontrolled well blow out pipeline rupture or storage tank failure which poses an imminent threat to the public health or welfare.³ A major recent oil spillage occurred in Idoha, an offshore platform in South Eastern Nigeria where about 40,000 barrels of oil were spilled into the environment as a result of corroded pipes and tanks. A new dimension to sabotage is the constitutional crisis in which the Niger-Delta region is engulfed as a result of agitations for resource control and self-determination; pipelines are sometimes blown up by militants in recent times to press home their agitations.

There have been several oil spill incidents at different times in different parts of the Niger Delta. Between 1976 and 1998, there was a total of 5724 oil spill incidents resulting in the spill of about 2,571, 113.90 barrels of oil into the environment. Some major spills recorded are the GOCON's Escarvoes spills in 1978 wherein about 300,000 barrels were pumped into the environment, Shell Petroleum Development Company's (SPDC's) Forcados terminal tank failure in 1978 of about 580,000 barrels, Texaco Fumina-5 blowout in 1980 of about 400,000 barrels and the Abudu Pipeline Spill 1982 of about 18,818 barrels,⁴ are also good instances. Other major spill incidents are the Jesse fire incident which claimed about a thousand lives and the Idoho oil spill of 1998 where about 40,000 barrels were spilled. The heaviest recorded yearly spills were in 1979 and 1980 wherein a net volume of 694,117.13 barrels and 600,511.02 barrels were recorded.

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.⁵ 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 maintenance.⁶ 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.

3. The Impact of Oil Spillage on the Nigerian Environment

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

²Impact of Oil Spill along the Nigerian Coast, *op.cit*

³D.S. Hellifpro, *Spillage, Bane of Petroleum, Ultimate Water Technology and Environment*, 1996, p. 24

⁴Niger Delta Environment Survey (NDES) 1977, Environmental and socio-economic Characteristics

⁵ "Impact 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

⁶*ibid*

a result of constant pollution by oil and also due to poor upstream land management.⁷ 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 occupy about 5,000-8,500km² of land in the Niger Delta.⁸ Consequently, once a spill occurs, tidal forces and the hydrological power of the rivers transport the oil 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.⁹

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.¹⁰ 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.

One particular useful plant that is prevalent in the Niger Delta that its survival has been threatened by soil toxification as a result of oil spills is *Rizhophora Racemora*. In its place, an invasive palm species which use is yet unknown in the Niger-Deltas known as *Nypafruiticans* is fast colonizing the area.¹¹ This invasive palm with shallower roots impedes navigation and reduces the overall biodiversity of the ecosystem by destabilizing the banks of the waterways. The gradual but consistent loss of the mangrove has also had degrading effects on the lives of the Niger Delta people. It has for example denied them of their source of wood. Secondly, the loss of these forests has meant the decimation of some species that are vital to the subsistence practice of the local Niger Delta population. Oil production on the other hand bestows little or no benefit on the local population. Furthermore, the mangrove forests that are being destroyed are home to certain rare and endangered species such as the manatee and pygmy hippopotamus.

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 are 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 leads to a loss of habitat for these fishes.¹² 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

⁷ 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.

⁸ *op. cit fn.8*

⁹ MERCK "Indigenous Plants to the Rescue" Science in Africa, feb. 2002 available at <http://www.scienceinafrica.com.za/2002/February/oil.html> accessed 20-11-2012

¹⁰ *op. cit fn.9*

¹¹ NFC "Nipa Palm Utilization Project", Nigerian Conservative Foundation, 1996, available at <http://www.africanconservation.org/ncttemp/nipa.html> accessed 25/10/2012

¹² available at http://en.Wikipedia.org/wiki/Gas_flare .p1 of 3, accessed 23-09-2012

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.

The spread of water hyacinth across the Nigerian coast has also been attributed to oil spillage. This invasive plant specie 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.

4. Nature and Meaning of Negligence

Negligence in law generally means a breach of duty to take care not to injure the plaintiff or any other persons by the defendant, which duty has been breached by the defendant and which breach has led to legal injury on the plaintiff. Negligence is an independent tort and by its very nature, it is not actionable *per se*. This is because the tort of negligence can only be established when it is shown that the plaintiff has suffered a legal injury as a result of the defendant's act or omission, and that as a result of the legal injury, plaintiff has suffered damages. Where legal injury is established by the plaintiff but he is unable to show the damages suffered by him as a result of the legal injury, the tort of negligence cannot be established. Conversely, where the plaintiff has suffered some damages which cannot be traced to any legal injury arising from the defendant's acts or omission, the tort of negligence will also fail. Thus, there must be a causal relationship between the damages suffered by the defendant and the legal injury inflicted upon him by the defendant's act or omission. This is the reason why it is often said that negligence is a question of facts and not law. Negligence has been defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation.¹³

The presumption inherent in the law of negligence is that the defendant owes a duty of care to the whole world while doing his business or conducting his own affairs to ensure that he exercised the standard of care of a reasonably prudent man to ensure that he does not hurt or injure others. The Nigerian Supreme Court after reviewing the line of authorities on the question of negligence, concluded thus:

... the tort of negligence arises when a legal duty owed by the defendant to the plaintiff is breached. And to succeed in an action for negligence, the plaintiff must prove by the preponderance of evidence or balance of probabilities that-

- (a) the defendant owed him a duty of care;
- (b) the duty of care was breached;

¹³B.A. Garner (ed.in chief), *Black's Law Dictionary*, (8th. Ed.) (Minnesota: Thompson West, 2004), p.1061

(c) the defendant suffered damages arising from the breach.¹⁴

Where damage is suffered by the plaintiff not as a result of the breach of a legal duty owed to him by the defendant, the defendant shall not be liable to him in negligence. The onus of proving negligence is on the plaintiff. Section 217 of the Torts Law of Enugu State¹⁵ defined negligence as: “the breach of legal duty to take care which results in damage which may not have been desired or even contemplated by the person committing the breach to the person to whom the duty is owed”. The theory issue in proof of negligence is to show that the defendant owes the plaintiff a duty of care in the particular instance where negligence is being alleged. From that point, the plaintiff goes on to show that the defendant breached that care and that he has suffered damages as a result. In *Anya v. I.C.H. and others*,¹⁶ both the Court of Appeal and the Supreme Court found that the defendants did not owe the plaintiff any duty of care to protect his car from being stolen when same was parked in the defendants’ premises where plaintiff lodged.

Negligence does not need to involve intentional acts or omissions intended to produce a desired result which is unpleasant to the plaintiff. It is sufficient to show that the conduct of the defendant was heedless and reckless in terms of not observing the duty of care owed by him to the plaintiff. For a claim in negligence to succeed, the plaintiff after establishing that a duty of care owed to him by the defendant was breached by the defendant, he must go further to show that he has suffered damages as a result of the legal injury occasioned by the breach. In other words, legal injury without damage will not establish the tort of negligence unlike the case with trespass. This is why the tort of negligence is said not to be actionable *per se*. The plaintiff must establish a causal relationship between the damage he has suffered with the defendant’s act or omission. Plaintiff’s damages must not be attributable to other causes other than defendant’s act or omission. This leads us to the concept of *novus interveniens* and contributory negligence. In *novus interveniens*, though there was a duty of care owed by the defendant to the plaintiff which was breached, but the damages or loss suffered by the plaintiff cannot be directly attributable to the defendant’s breach as a result of a certain extent such as an act of God which snapped the chain of causation.

In *Ekwo v Enechukwu*¹⁷ plaintiff was injured by defendant. However, the defendant visited quack doctors which led to the wound becoming septic and the leg was ultimately amputated. It was held that the defendant’s acts alone were not the direct cause of the amputation of plaintiff’s leg. In the case of contributory negligence, the plaintiff’s act or omission is what has aggravated the damages suffered by him beyond the cause of the defendant’s breach of duty of care. This omission or act on the plaintiff is taken into account by the court in the computation of damages.

What assists the courts to determine whether or not the tort of negligence has been committed is the existence of proximity or sufficient relationship such that it ought to be in the reasonable contemplation of the defendant that carelessness or heedlessness on his part may likely cause damages to the plaintiff. Thus, the fact that an accident has occurred is not sufficient to establish a breach of duty of care owed by the defendant to the plaintiff. An indispensable factor in establishing negligence is the neighbourhood principle, according to which there need

¹⁴Justice K.O. Anyah (*Ltd.*) v. ICH. (2003) 4WRN 1

¹⁵Cap Revised Laws of Enugu State 1991 as amended

¹⁶*supra*

¹⁷ (1954) 14 WACA 512

to be sufficient proximity between the plaintiff and the defendant such that the defendant owes the plaintiff a duty of care.

The neighbourhood principle was established in the celebrated case of *Donoghue v. Stevenson*¹⁸ where the English House of Lords held that a manufacturer shall be liable in negligence to the plaintiff consumer in respect of a bottle containing its product in which a noxious matter was found. The lower court had earlier dismissed the suit since according to it there was no legal connection between the girl and the manufacturer. But in the reasoning of Lord Atkin,

The rule that you are to love your neighbour as yourself becomes in law that you must not injure your neighbour... you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is your neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

5. The Relationship between the Tort of Negligence and Oil Spillage

Oil spillage can cause environmental damages to beaches and coastlines, farm land, forest and humans, health buildings and economic activities generally. When an oil pollution incident occurs, the first major problem for a plaintiff in an action for negligence in respect of the incident, is to show the existence of duty of care owed to his person or property affected by the incident, by the defendant. In the case of wild birds and free swimming fishes, the plaintiff is expected to establish some proprietary or possessory right in respect of such things or fishes before he can satisfy the elements of the tort of negligence.

It is this proprietary or possessory right over property affected by the oil spill that will fulfill the requirements of *locus standi* under common law. Having established *locus standi*, the next thing is to establish a causal relationship between the act or omission and damage complained about. This has often proved a problem for claimants under oil pollution damage because a defendant may avail himself of the defence that the damage did not occur as a result of the initial spill from his facility but as a result of a subsequent failure to keep the spill from extending to the plaintiff's property. Thus, the proximate cause of the spill will not be the initial spill but the failure to prevent it from spreading. A defendant may also allude the subsequent failure to the fact that hostilities from the host community where the spill occurred prevented speedy clean up, hence the damage suffered by the plaintiff.

In *Shell Petroleum Development Company Nig v. Chief Otoko and others*¹⁹, it was held that where the cause of an oil spill is the malicious act of a third party which was not reasonably foreseeable by the defendant so as to provide against it and where there is a finding of fact that the defendant never instigated such an act, the defendant will not be liable. The issue of "causation in fact" has been the bane of claims in negligence because an event that is considered an injury or damage to the plaintiff could be attributable to several causes. The onus is on the plaintiff to show that the damage suffered by him was in fact caused by the very act of the

¹⁸ (1932) A.C. 562

¹⁹ (1990) 6 NWLR (pt.159) 693

defendant and not other or intervening acts.²⁰This has hindered the success of many oil pollution suits. The situation in Nigeria is worsened by the lack of accurate records of releases and discharges.

Furthermore, one defence that is usually exploited by oil companies to action in negligence for oil pollution is that they have made all reasonable efforts to contain the spill after it occurred and that no duty of care was breached. This is based on the premise that the plaintiff's duty to care is limited to a duty to take reasonable care to stop spilled oil from affecting the interests of the plaintiff. This is because under the common law, liabilities for discharges will only arise when they constitute unreasonable interference with the plaintiff's neighbor's use and enjoyment of land.

For the plaintiff in oil pollution damage who is trying to use the remedy of negligence, a practical problem is how to prove that the defendant did not observe laid down standards and has therefore failed in his duty to take care. This is because the causal mechanisms for environmental damage are poorly understood and the courts are usually invited to draw conclusions from complex and inconsistent body of scientific facts presented before it. The plaintiff will therefore be required in most cases to call expert witness which cost is often unaffordable to most Nigerian plaintiffs suing for oil pollution damage. In some cases, where the witnesses are called, their evidence could be treated as hearsay or opinion and thus inadmissible or of little weight when admitted. In the English case, *Wagon Mound (No 1)*²¹ a vessel that was on a demised charter to the appellant was being filled in Sydney Harbour, close to the respondent's ship repairer's wharf. In the course of refueling, oil was spilled from the vessel and ignited a fire from welding works from the wharf which damaged the wharf. It was noteworthy that welding works at the wharf had previously been halted but was restarted after advance to the effect. The Privy Council dismissed the claims for negligence stating that for damage in negligence, it must be of such a kind that a reasonable man should have foreseen. In other words, foreseeability of harm is one of the components in establishing a breach of the duty of care. By implication, an act or omission of the defendant from which the plaintiff suffered damage may not constitute a breach of the duty to take care if the damage was not reasonably foreseeable as a possible consequence or result of that act or omission. In that case, the damage is said to be remote from the cause.

In *Seismograph Services Limited v. Benedict Etedgene Onokpasa*,²² there were seismic surveys which involved shooting operations by the appellant. The question for determination was whether the shooting operations were the proximate cause of extrinsic damages to the respondent's buildings. The Court emphasized the fact that it was the plaintiff that had the burden of proving the negligence of the defendant. The Court went on to hold that the action failed since the plaintiff was unable to discharge the burden of proof on him.

In *Shell Petroleum Development Company v. Chief Otoko*,²³ the respondents who were the plaintiffs at the High Court claimed for damages being and as representing compensation payable by the defendants (the appellants) for injurious effect of crude oil spill on the Andoni River and the consequent deprivation of the use of the creeks and rivers as a result of the defendant's negligence. The appellants contended that the spillage polluted the Andoni River and Creeks with resultant damage to their properties. They alleged that their juju shrines were

²⁰Charlesworth on Negligence 5th. Ed. (ed.R.A Percy) para 77

²¹(1961) 1 Lloyd's Rep. 1 CPC

²²(1972) 4 S.C.123

²³(1990) 6 N.W.L.R (pt. 159) 693

desecrated and that drinking water in two wells owned by them was polluted, fish and other fauna and flora perished and that their economic life came to a standstill. It was also in evidence that the spillage was caused by the act of a third party which removed a screw or bolt from the manifold from where the spill occurred. The applicant cleaned up the area by engaging a contractor to do the job. The respondents employed a firm of experts who investigated various aspects of the pollution and carried out a variation of the properties that were destroyed. The High Court found for the plaintiffs/respondents but the defendant/applicant brought the instant appeal calling on the Court of Appeal to determine whether the defendant was liable in negligence to the plaintiffs. Mr. Anyamene (SAN) contended for the appellants that the report of an expert which was tendered by the respondents at the trial court upon which the court acted was no evidence since the expert was not called as a witness to testify in the proceedings and be cross examined. The Court of Appeal accepted this contention and preferred the expert witness of the defendant/appellant who testified at the lower court that the defendant/appellant's pipeline was opened by an unknown person to the plaintiff/respondent's witness who testified that there was no proper supervision of the pipelines as the defendant/applicant's security men were sometimes away from their duty posts for up to two weeks. The appellant also gave evidence at the trial Court that anybody who can handle a spanner can unscrew the valves. The Appeal Court held that negligence was not proved and that since the spill was caused by malicious act of a third party who was not instigated by appellant, the appellant could not have reasonably foreseen that any sane person will want to unscrew the valves. The appeal succeeded and the judgment of the trial court was set aside.

In yet another interesting case,²⁴ the plaintiff alleged that the defendant negligently spilled oil from the tank in Bony which caused extensive damage to fish, marine life, and the plaintiff's fishing nets. After a joint inspection of the spill site, the parties decided to settle. The defendant offered to pay the sum of ₦22, 000.00 as compensation to the plaintiff which offer was summarily rejected by the plaintiff, who engaged PW2 to prepare a report of the damage done as a result of the spill. The report increased the claim from ₦22, 000 to ₦12, 210,648. The defendant gave evidence that it was never negligent and that it took all reasonable care to ensure that the spill did not spread. It went further to clean up the remaining spills after recovering some spills. The Court of Appeal held that the burden of proof was on the plaintiff who should not only plead particulars of negligence but should also proceed to lead evidence in proof of the facts pleaded. The Court of Appeal held that the evidence of PW2 who could not state the quantum of oil spilled and its effect on marine life was not helpful to the case of the plaintiffs since plaintiffs could not discharge the burden of proof on them as required by the law of negligence. According to the court the plaintiffs could not show that the said nets were soaked with only oil and not other substances. The Court held further that the plaintiff had no *locus standi* to bring the suit on behalf of 9,6000 fishermen of the Jumbo House of Bonny since himself was not a fisherman and the aggrieved fishermen were supposed to have instituted their own action. The appeal failed and was dismissed.

Again, in *Atubi & ors v. Shell Petroleum Development Co*²⁵, the plaintiff claimed that the defendants caused crude oil, gas and chemicals from their facilities to escape from a pipeline under their control thereby destroying their farmlands and fishes in the lakes. The Court held that the plaintiffs failed to prove that the defendants were negligent and the matter was dismissed. In a similar scenario in *Chinda v. Shell B.P. Petroleum Development Company of Nigeria Ltd*,²⁶ the case of the plaintiffs was that the defendants were negligent in the

²⁴*Jumbo v. Shell Petroleum Co. Nig Ltd.* (1999) 13 N.W.L.R (pt. 633) 57

²⁵ Suit No. UCH/48/73 of 12th November, 1974

²⁶(1974) 2 R.S.L.R. p.1

management of their flare sites and consequently a lot of damage was done to the plaintiffs' tree, land and houses in plaintiffs' village which is within a short distance from the plane sites. The Court held that plaintiff's claim failed because he had not produced any evidence to show that there was negligence in the defendant's operation of the plane sites.

6. The Extent of the Usefulness of the Tort of Negligence in Redressing Oil and Gas Pollution Damage

Generally speaking, a claimant for compensation for oil pollution damage under the common law principle of negligence faces a bulwark of challenges. The first is that the burden of proof in the common law tort of negligence is of limited applicability to environmental damages. This is because the multi-national oil company is engaged in a legitimate and approved business, ie exploration and exploitation of oil resources. Once they have complied with the duties imposed on them by law in their line of business, they would appear to have discharged the duty on them not to injure their host communities.

A corresponding puzzle is that when oil spills or leaks occur, it is almost impossible for those outside the context of the oil companies to establish with certainty the actual cause of the incident so as to determine whether the defendant oil company has failed to discharge its duty of care towards members of the host communities. This is because this *modus operandi* is scientific and upbeat technology which most times may not be intelligible to illiterates in the science and technology logjam including lawyers and judges. The consequence is that the court may unwittingly decide to go along with the story of the pool of experts who are easily pooled together by the multinational oil companies owing to their financial muscles.

Another problem faced by victims of oil pollution in attaining redress through the common law tort of negligence is the issue of *locus standi*. *Locus standi* has been defined as the legal capacity to institute, initiate or commence an action in a court of law or tribunal without any inhibition, obstruction or hindrance from any person or body whatsoever.²⁷ The Nigerian courts are reluctant to grant *locus standi* to people who have not suffered in any way different from that of others or who may not share a common interest with others whom he claims to be representing.

In *Jumbo v. Shell Petroleum Development*²⁸, the appellate Court found that the plaintiff who sued on behalf of 9,600 fishermen of the Jumbo House of Bonny was not himself a fisherman and held that those directly concerned ought to have instituted the action themselves. Similarly, in *Shell (Nig) Development Company Ltd v. Otoko*,²⁹ the Court of Appeal stated the view that

The allegation is that the spillage injuriously affected fishermen, farmers, persons bathing and washing in the Andoni River and adjoining creeks, persons using the river and the adjoining creeks for cassava processing. It is plain to me that there is a diversity of interests, that there was no joint tort, for the damage caused to each of them can only be personal to each of them.

It is clear from the above that the question of *locus standi* plays a significant role in the determination of hostility for the tort of negligence in oil pollution cases. There are arguments on the two sides of the divide for and against a strict application of the rule of *locus standi* in

²⁷*Adesanya v. President FRN* (1981) 2 NCLR 358

²⁸*supra* at p.370

²⁹*Supra* at p.371

determining claims for pollution damage brought under the tort of negligence. It has been argued that it would amount to an unnecessary stricture on the growth of the tort of negligence to disqualify a native of an area that has suffered pollution from instituting an action on behalf of his people simply because fishing nets was mentioned as one of their clothes and he himself is not a fisherman.³⁰ However, there is no guarantee that the person bringing such an action has sufficient proprietary interest in the subject matter of litigation.

Furthermore, where damages are awarded, in the absence of a clear Power of Attorney donated by the victims to the Plaintiff for the purposes of instituting the action, there is no assurance that the damages awarded will get to the actual victims of the tort. It has become a notorious fact that the unfortunate situation in the Niger-Delta area as regards oil pollution damage has produced a crop of professional “meddlesome interlopers” and litigants whose interests are not the pains of the actual victims of pollution damage or the degraded environment but their pockets.

The Courts cannot therefore be blamed for being careful. It will be morally wrong for the courts to give a leeway for economic opportunists who have emerged to exploit other people’s misfortunes to line their pockets. One sure way out of the problem is to make the right to a pollution free environment a fundamental constitutional right that should be included in Chapter IV of the CFRN, 1999 as amended. If environmental rights become constitutional rights, their enforcement could then come within the ambit of the Fundamental Rights Enforcement Procedure Rules, 2009 which has dispensed with the requirement for *locus standi* in public interest litigation.

The problem with applying the “risk factor” principles in oil pollution litigations is the intervening variable of sabotage. Sabotage simply means the malicious act of a third party done with one purpose of interfering with oil production. There are three faces to sabotage in the Nigerian setting. The first has to do with violent agitations for resource control which is more of an act arising from constitutional crises apparent in the way and the manner the Nigerian Federation is constituted. The second has to do with crude oil stealing by common criminals who unscrew valves from pipelines or bore holes on them with the purpose of drawing the oil into waiting receptacles. The third is the act sometimes perpetrated by the professional litigants aimed at causing a spill so as to generate a litigation or negotiation for the payment of compensation and/or damages. This is the reason why it may be unreasonable to subscribe to the notion that negligence in oil pollution cases should be presumed on the basis that the activities of the operators have a high degree of likelihood of harm to the host communities and by extraction, the plaintiffs in oil pollution cases anchored on negligence. As a final note, it is important to state that until the issue of sabotage in the first and last sense is dealt with, it will be difficult to pin down the oil companies to a higher degree of duty of care in respect of the factor of the seriousness of injury as was established in the Privy Council’s decision in *North Western Utilities v. London Guarantee and Accredited Company*.³¹

In the above case, a hotel belonging to and insured by the plaintiffs was destroyed by fire as a result of natural gas that escaped from the defendant’s pipelines – which was fractured by the act of a third party who may have been digging up the ground for sewer project. The Privy Council held the utilities company liable in negligence by holding that they would have appreciated the possibility of damage to their mains by the construction of the sewer and the

³⁰Ebirum Okechukwu & Ndukwe Charles; *Nigerian Law on Oil Pollution*, (Ibadan: Spectrum, 2008) p.14
³¹(1936) A.C. 108 at p. 126

consequent serious injury that would have arisen and taken steps to guard against same probably by putting their mains above the ground rather than underground.

Would this be applicable in *Otoko's* case where evidence was adduced that the spillage was caused by the unscrewing of the valve of the pipeline operated by the defendant/appellant and that anybody that can handle a spanner could unscrew the valves? Should not the defendant/applicant have taken precautions to re-in force the valves in such a way that it cannot be opened without the use of superior technology? The answer is yes and no. It is yes in a normal situation where no sane person will desire to open the valve and any damage to it may be attributable to the accidental acts of another as in North Western utilities case. However, in a situation where sabotage of oil facilities is the order of the day, it will be difficult to hold the appellant's liable on grounds of negligence. This is because no matter the extent of precaution it takes, the unscrewing of valves and outright blowing up of pipelines by agitators or saboteurs cannot really be stopped by using superior bolts and nuts.

It is therefore submitted that a more concerted effort by the government and people of Nigeria to bring peace to the oil producing region is the only way sabotage of oil facilities can be brought to an end. Under the prevailing circumstances, it will be difficult to hold the oil operator liable for negligence in *Otoko's* case simply because it did not use superior valves in its pipelines.

7. Conclusion and Recommendations

It is however submitted that since the host communities are marginal beneficiaries of oil exploration and exploitation, the fact that the Nigerian ECOWAS depends largely on oil output should not play any significant role in the determination of liability of operators for environmental damage in suits brought by them under the head of negligence. In other words, the activities of the oil companies should not be viewed as so important so as to reduce the duty on theirs to take care to ensure that the host communities are not injured by their activities.

Similarly, the Courts are enjoined to place a high demand on the companies to ensure that they observe the highest level of best available practice to prevent or completely minimize the possibility of an oil spill occurring. This is particularly so when the mega dollar profits they make from oil production is taken into consideration. In other words, they should be made liable in negligence whenever it can be shown that they did not apply the highest precautionary measure in any given situation. Fortunately, there is a move to legislate this principle into law by virtue of subsidiary legislation of 2011 made pursuant to the NOSDRA Act of 2006 and the proposed National Oil Pollution Management Agency Act currently before the National Assembly.

In the final analysis, the problem is not with the propriety of the common law principle of negligence which has developed over the years as a vehicle for seeking redress by the victim of a tort. It is rather that the special circumstances of oil pollution damage to the environment in the context of what could almost be regarded as "constitutional crisis" has rendered the application of the doctrine in oil pollution cases inadequate for the protection of the victims of oil and gas pollution. First is the lack of transparency in the operations of the oil companies such that when a spill incident occurs it is difficult to tell whether it is as a result of equipment failure or accidental ship in equipment handling by the staffers of the oil company. Second, members of the host communities where the environment is devastated are so poor and uninformed that they are not able to obtain information about petrochemical operations so as to adduce sufficient evidence in proof of the operator's negligence. Third, the prevalence of sabotage and tampering with pipelines by aggrieved youths has made the defence of the act of third parties easily

available to the defendants. There is a need to ensure transparency with respect to anti-pollution steps that are mandatorily required to be taken by oil companies so as to enable a correct determination or assessment of their conduct in that direction. These have to be addressed so that when a pollution incident occurs, it will be easy to check and know whether they have complied with laid down procedures or not as required by the tort of negligence.