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Common Law Approach to Environmental Litigation in Nigeria: Prospects and Challenges

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Abstract

The paper examines the common law approach to environmental litigation in Nigeria, focusing on the causes of action under the common law and their application to environmental disputes. The objective is to identify the potential prospects and challenges common law causes of action may pose to litigants. The paper argues that environmental actions in Nigeria are primarily instituted under common law remedies of nuisance, negligence and strict liability. However, it also contends that common law remedies are grossly inadequate for effective environmental protection, as they are often individually driven and not particularly concerned with improving environmental condition. To address this inadequacy, the paper recommends that combining Common law and statutory litigation approaches may provide a more effective solution.

Keywords: Common Law, Environmental Litigation, Climate Change, Nigeria.

1. Introduction

As the impacts of environmental degradation and climate change continue to worsen, and the insufficient action by government to address them, victims and concerned environmental groups have been invoking the powers of courts to pressure governments to take more ambitious and necessary measures to protect the environment and tackle the climate crisis.[1] Historically, environmental litigation has been embraced in many jurisdictions as part of the governance and legal tool to protect the environment.[2] This form of litigation takes different forms depending on the strategies and causes of action employed by litigants and in most cases the peculiarity of a country's legal system and the attitude of courts may inform the choice of strategies to be employed and the overall likelihood of success.[3]

In Nigeria, environmental litigation is also growing given the increasing impacts of environmental abuse and degradation.[4] The trend of cases filed in Nigerian courts shows that litigants are employing different strategies and causes of action, including - civil action based on common law principle of Tort, statutory or constitutional approach, criminal prosecution, public interest litigation, and human rights enforcement- to institute environmental claims. While other strategies and causes of action have been sparingly employed by litigants, the common law approach is the most dominant cause of action employed by litigants to institute environmental claims in Nigerian courts. The preference for common law causes of action is not unconnected

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[1] L J Kotzé & A Du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2020) 50 (3) *Environmental Law*, 615–663. <https://www.jstor.org/stable/27007692>

[2] 'Global Climate Change Litigation Report: 2020 Status Review', <https://reliefweb.int/report/world/global-climate-litigation-report-2020-status-review?gad_source=1&gclid=EAIaIQobChMIqYmAmLGmhgMVu5NQBh3-qgYDEAAYASAAEgIgF_D_BwEaccessed> 22 May 2024.

[3] M L Banda and F Scott, 'Litigating Climate Change in National Courts: Trends and Development in Global Climate Law' (2017) 47 (10) *ELR* ,121-134

[4] U Etemire, 'Global Perspectives on Corporate Climate Legal Tactics: Nigeria National Report', <https://www.biicl.org/documents/12171_global_perspectives_on_corporate_climate_legal_tactics_-_nigeria_national_report_v1.pdf>accessed 22 May 2024.

with what scholars have described as absence and insufficient environmental laws and policies.[5] Most statutes based environmental laws do not provide effective remedy to the victims and are challenged by inadequate institutional enforcement.

The common law provides many causes of action for litigants to premise their environmental claims in courts, including nuisance, negligence and strict liability rule. While nuisance is the most commonly employed common law cause of action for environmental litigation in Nigeria, others have also been employed individually and jointly. As climate change continue to worsen, common law approach provides an immediate and additional source of legal protection for litigants[6] and can be invoked by victims of impacts of environmental abuses, climate change and other actors to bring claims in courts in Nigeria. Despite their limitations, common law causes of action, according to Ladan, can be used to 'apprehend environmental pollution and ensure some degree of environmental conservation.[7] However, it has been argued that the primary objective of common law causes of action is the restoration of the human victim to the original, pre-injury state, irrespective of how the environment was adversely impacted.[8]

Therefore, this paper examines the common law causes of action relevant to environmental protection and how they can be potentially useful for climate related claims in courts. The objective is to highlight the potential prospects and challenges common law causes action may present to litigants. The paper argues that environmental actions are mainly instituted under common law remedies of nuisance, negligence and strict liability rule. However, the author further argues that common law remedies are grossly ineffective for the protection of the environment. This is because an action under common law is not particularly concerned with improving environmental conditions of the impacted sites.

2. Common Law Approach to Environment and Climate Change Litigation in Nigeria

In Nigeria, most of the environmental disputes are adjudicated under Common law principles of tort mainly because such disputes were not viewed as public matter, requiring state intervention.[9] Victims of environmental degradation and abuse in Nigeria usually invoked Common Law causes of action to bring action in the regular courts. The branch of Common Law that is often considered relevant to the protection of the environment is the Law of Tort. It has been said that tortious liability arises from the breach of a duty primarily fixed by law, a breach of this duty is redressible by an action for unliquidated damages.[10]As a matter of law, the plaintiff must prove that the conduct of the defendant caused the actual damage before he can succeed in his claim. The aspect of law of tort that deals with protection of the environment and most often invoked by victims of environmental abuse are Nuisance, Negligence, Strict liability and Trust Doctrine. We shall examine these common law causes of action, highlighting their significance to environmental litigation in Nigeria.

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[5]U Etimire, 'The Future of Climate Change Litigation in Nigeria: COPW v. NNPC in the Spotlight' (2021) 2 *CCLR*, 160.

[6] A Ogunranti, 'Private Law as a Tool for Climate Justice in Canada: Reflections on the New Zealand Court's Decision in Michael Smith v Fonterra Co-Operative Group Limited' (2024) 47 (4) *Manitoba Law Journal*. 2.

[7]M T Ladan , 'Access to Environmental Justice in Oil pollution and Gas Flaring Cases as a Human Right Issue in Nigeria', paper present at a Training Workshop for Federal Ministry of Justice Lawyers by the Institute for Oil and Gas law, Abuja 2011, 20.

[8]M Latham *et.al*, 'The Intersection of Tort and Environmental Law: Where the Twain Should Meet and Depart' (2011) 80 (2) *Fordham Law Review*, 754.

[9]M T Ladan, 'A Review of the NESREA Act and Regulations 2007- 2009: A New Dawn in Environmental Protection in Nigeria' (2010) 6 (1) *Nigeria Bar Journal* 176-200.

[10]WVH Rogers, *Winfield and Jolowicz on Tort* (7th edn, London: Sweet and Maxwell, 2006) p 639.

2.1 Nuisance

The tort of nuisance is recognized as the aspect of common law which has contributed most significantly to environmental protection.[11] Indeed, it has been said that in modern parlance, nuisance is the branch of the law of tort most closely concerned with protection of the environment.[12]Thus, nuisance has been held to occur in actions concerning pollution by oil[13] or noxious fumes,[14] interference with leisure activities,[15] offensive smells from premises used for keeping animals[16].

Nuisance is said to occur when the emission of noxious or offensive materials from the defendant's premises significantly impairs the use and enjoyment by another of his property or prejudicially affects his health, comfort or convenience. Nuisance is an act or omission that is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of a right belonging to him as a member of the public, when it is a public nuisance, or his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land, when it is private nuisance.[17] Nuisance is divided into two: public and private.[18]A public nuisance is one which materially affects the reasonable comfort and convenience of life of a class of the public who come within the sphere or neighbourhood of its operation. A public or common nuisance can be described as an act which interferes with the enjoyment of a right which all members of the society are entitled to, such as the right to fresh air, or travel on the highways.[19] It can also be seen as a large number of acts injurious to the public at large, such as keeping of a common gaming house, or the obstruction of highway.[20] Generally, public nuisance is considered as a crime which protects public rights and violators are usually made to face criminal prosecution.[21] In most cases, such offences are punished by state through criminal prosecution.[22] So long as the public only or some section of it is injured no civil action can be brought by a private person for public nuisance. Where however any private person is injured in some way peculiar to himself, that is, if he can show that he has suffered some particular or special loss over and above the ordinary inconvenience suffered by the public at large, then he can sue in tort.[23]

Private nuisance has been described as the unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it[24]. As a general rule, private nuisance affects an individual and not the general public or a section of it.[25] In *Abiola v Ijeoma*, the court ordered damages against the defendant on the ground that the noise by the chicken and

[11]C T Emejuru and M O Izzi, 'Environmental Justice and Sustainable Development in Nigeria' (2015) 1 (1) Donnish *Journal of Biodiversity and Conservation*. 3.
[12]Ibid.
[13]*Esso Petroleum Co. Ltd. v. Southport Corp.* (1956) A.C. 218.
[14]*St Helen's Smelting Co. v Tipping* (1865) 11 H.L.C. 642.
[15]*Bridlington Relay v Yorkshire Electricity Board* (1965 Ch. 436.
[16]*Rapier v London Tramways Co* (1893) 2 Ch. 588.
[17]*Lase Fajuke v Kupoluyi* (2005) All FWLR (Pt.277) 833 at p.840.
[18]E M Akpambang, 'Promoting Right to a Healthy Environment through Constitutionalism in Nigeria' (2016) 4 (3) *International Journal of Environment and Pollution Research*. 57.
[19] Rogers (n9).
[20]Ibid.
[21]I Ehighelua, *Environmental Protection Law*, (Warri: New Pages Law Publishing Co., 2007) 195.
[22] Rogers (n9).
[23] Ibid, p 644
[24] See *Read v Lyons & Co. Ltd.* (1945) K.B. 216 at 236.
[25]Ehighelua (n20).

the nauseating smells from the pens affected the plaintiff's sleep and interfered with his comforts and amounted to private nuisance. Also, in *Tebite v Nigerian Marine & Trading Co. Ltd.*, the court held the defendants liable for nuisance on the ground that the defendants' machine emitted loud noise and noxious fumes which diffused into the plaintiff's premises and caused him much discomfort and inconvenience.

As far as environmental protection is concerned, there is no significant issue with private nuisance once the plaintiff is able to prove that the noxious or offensive materials from the defendant's premises significantly impairs the use and enjoyment of his property or prejudicially affects his health, comfort or convenience. However, litigants face significant hurdles in the area of public nuisance, given the fact that it affects the general public or a section of it. As a matter of policy, public nuisance suits are to be brought at the instance of the State by the Attorney General.[26] Individuals are only allowed to file public nuisance suits if they are able to prove that they have suffered damages beyond the general public.[27]

This explains why some public nuisance cases were not successful in courts.[28] For instance, in *Dumez Nigeria Ltd. v Ogboli*, the respondent brought a nuisance suit against the appellant, claiming that the road construction embarked upon by the appellant had caused damage to the farm and crops of the respondents. The Supreme Court dismissed the claim on the ground that the respondent failed to lead evidence of special or particular damage suffered as a result of the activities of the appellant.

However, the trends of cases has shown that nuisance, like other common law cause of action, is grossly ineffective for the protection of the environment. This is because an action in nuisance is not particularly concerned with improving environmental conditions of the impacted sites. The primary objective is the restoration of the human victim to the original, pre-injury state, irrespective of how the environment was adversely impacted.[29] Again, the nature of proof required to establish a claim for nuisance is so herculean that it has put off genuine case of environmental abuse, and this explains why the use of the tort of nuisance as a remedy in environmental litigations arising out of petroleum operations in Nigeria has attracted some setbacks. For instance, in *Seismograph Service (Nigeria) Ltd. v. Robinson Kwavbe Ogbeni,*[30]the Supreme Court set aside the judgment of the trial court and held that expert evidence was necessary to link the damage to the seismic operations and that the plaintiff failed to discharge the onus on him to establish such connection. The Respondent in the above case did not call any expert evidence to prove that it was the Appellant Seismic operation that damaged his building. On the contrary, the Appellant called expert evidence to prove otherwise.

2.2 Negligence

As a common law cause of action, negligence constitutes a special cause of action usually involved in connection with personal injuries or damage to property.[31] There must be a duty

[26] Though the position in Nigeria has now changed due to the decision of the Supreme Court in the case of *Adediran and Another v Interland and Transport Limited*[1991] 9 NWLR (pt 214) 155. The Apex court departed from the common law rule, requiring the leave of Attorney-General to institute action on public rights, relying on the provision of section 6 (6) (b) of the 1999 Constitution (as amended).

[27] *A-G AkwaIbom State v Essien* (2004) 7 NWLR (Pt 872) 288 at 321.

[28] such as *Amos v Shell BP (Nigeria) Ltd* 1975) LLJR-SC*; Seismograph Services Ltd. v Akpuovo* (1974) LCN/1910*; and Dumez Nigeria Ltd. v Ogboli* (1972) LCN/1471

[29] Latham, (n 7).

[30] (1976) All NLR 163.

[31] Rogers (n9).

imposed by law on the defendant to take care. A breach of that duty by the defendant which results in damage to the plaintiff constitutes the torts. Lord Atkin[32] in *Donoghue v Stevenson* expounded the duty of care rule also referred to as the neighbourhood principle when he stated that:

> *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, 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 into question.*

Negligence as a tort can be established when it is proved that the defendant owes the plaintiff a duty of care and the plaintiff has suffered a legal injury as a result of the defendant's act or omission (breach of duty). Consequently, with respect to environmental claim, a plaintiff suing for negligence as a result of oil pollution must prove that the defendant company which caused the pollution owed him a duty of care; that the duty has been breached and that the damage of which he complained was caused by that breach of duty. Emphasising this problem of proof, the Nigerian Court of Appeal in the recent case of *S.P.D.C.N. Ltd. v. Okeh*[33] ruled that:

> *When an oil pollution occurs, the first major problem of a plaintiff in an action for negligence in respect of the incidence is to show the existence of duty of care owed to his person or property affected by the incident by the defendant … Then the next is to establish a causal relationship between the act or omission and damage complained about.*[34]

However, Emejuru and Izzi observe that even though negligence principle is firmly established under the Nigerian laws, only few environmental cases seem to have been brought before courts.[35] Establishing a negligent claim is enormous given the requirement of law on the elements of negligence required to be proved.[36] Eze identifies two reasons why this is the state of affairs. First, the difficulty in scaling the hurdles of burden of proof, especially regarding the elements of tort of negligence. Second, the stringent requirement of *locus standi* may precludes litigants who have not suffered injury from seeking redress.[37] Highlighting the difficulty faced by litigants under negligence claim, Ehighelua observed that:

> *A plaintiff may see a large pool of crude oil on his farm or have his pond polluted yet he may not know exactly how it happened, therefore he may not be able to plead adequate particulars of negligence, and he would not be able to prove how the defendant was negligent and how that negligence resulted in damage to the plaintiff.*[38]

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[32] (1932) AC 562.
[33](2018) 17 NWLR (Pt. 1649) 420.
[34]*ibid*. 435, para. C.
[35]Emejuru C. T and Izzi M. O, 'Environmental Justice and Sustainable Development in Nigeria' (2015) 1 (1) Donnish Journal of Biodiversity and Conservation. 3.
[36] Emejuru and Izzi, n10).
[37]Eze, A.G., 'The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria' *NAUJILJ* 2014. 58.
[38] Ehighelua (n20).

These and many more factors have accounted for the failure of environmental cases founded on tort of negligence. For instance, in *Shell Petroleum Development of Nigeria Ltd. v Otoko*[39], the Nigerian Court of Appeal ruled that the plaintiff failed to prove that the oil spillage from the defendants was the proximate cause of the damage suffered by the plaintiff. Additionally, the court ruled that for an action in negligence to succeed, it must be shown that such negligence is the proximate cause of the damage suffered by the plaintiff, and not the malicious act of a third person. Other subsequent cases followed this line of reasoning, emphasising the primacy of discharging burden of proof in claims of negligence.[40]

However, in 2021, a Nigerian Federal Judge ordered Exxon Mobil and the Nigerian National Petroleum Corporation (NNPC) to pay the sum N81.9 billion in compensation to the fishing and farming communities for the several oil spills that destroyed their rivers, streams and other sources of livelihood. Specifically, the court held that both ExxonMobil and NNPC were negligent in the way they handled oil spills that caused environmental degradation in the communities.[41] Also, in *S.P.D.C.N. v. Anaro*,[42] the Supreme Court held that the maxim *res ipsa loquitor* was applicable to the case in order to raise an inference of negligence because if the appellant's pipeline had been well-maintained and fault-free, they would not have ordinarily burst, crack or rupture, spilling its contents to cause havoc to the respondents' creeks and fishes.

2.3 Strict Liability Action

Another common law cause of action which has been invoked in environmental litigation is the strict liability rule named after the famous case of *Rylands v Fletcher*, the rule essentially holds a party strictly liable in the sense that it relieves the claimant of the burden of proving fault or negligence. However, liability under this rule even though strict, is not absolute since there are a wide number of defences that can be relied on.[43] The classic definition of the principle was given by Blackburn J., in the famous case of *Rylands v Fletcher*[44]:

> *we think that the true rule of law, is that the person who for his own purposes 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 its escape.*

However, the House of Lords added another qualification for the operation of the rule, which is that the collection and keeping of the thing which escapes must have been in the course of a non-natural use of land. The rule in *Ryland's* case remained the principle for many years until the House of Lords added what is clearly a fundamental qualification in the *Cambridge Water Co v Eastern Counties Leather Plc*,[45] where the court ruled that "*the rule was inapplicable unless it could be foreseen that damage of the relevant type would occur as the result of an escape".*

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[39]1990) 6 NWLR (Part 159) 693.

[40]*Shell Petroleum Development Co. Ltd. v Amachree* (2002) FWLR (Pt. 130) 1654; *Royal Ade Nig. Ltd. v National Oil and Chemical Company Plc.* (2004) ALL FWLR (Pt. 213) 1760; *Jumbo v Shell Petroleum Co. Nig. Ltd. v. (1999) 13 NWLR (Pt. 633) 57.*

[41]<https://nairametrics.com/2021/06/21/court-orders-mobil-nnpc-to-pay-n81-9-billion-to-communities-over-oil-spillage/>acessed 22 May 2024.

[42](2015) 12 NWLR (Pt. 1472) 122 at 179.

[43] 'He (Defendant) can excuse himself by showing that the escape was owing to the plaintiff's default or perhaps that the escape was the consequence of his major, or the act of God …' Blackburn J.

[44](1868) CR HL 330

[45](1994) 2 A.C. 264.

Accordingly, if the possibility of the damage which occurs is scientifically unknown at the time when the escape takes place, there is no liability.

Also, within the context of environmental litigation, the Nigerian Court of Appeal in the recent case of *S.P.D.C.N. Ltd. v. Okeh*[46]outlined four (4) conditions that must be fulfilled before a claim founded on strict liability rule will succeed. They are as follows:

a) The defendant must have brought the thing on his land for his own use;
b) The thing must be likely to cause harm if it escapes;
c) The defendant's use of the land must be non-natural;
d) The thing must actually escape.

The Court of Appeal further held that in the above case all the conditions existed as a result of the escape of oil or oily waste from the appellant's trunk oil pipeline to the respondents' land resulting to the pollution.[47] Also, in *Umudje v Shell BP Nig. Limited*,[48]the Supreme Court found the defendant liable under the rule in *Rylands case* since there was clear proof that crude oil waste which the defendant had accumulated in a pit on their land had escaped on to the plaintiff's land where it had polluted certain ponds and killed their fish.[49]

Indeed, while the common law causes of action have been widely deployed by litigants in environmental disputes, scholars have identified several challenges that are impeding its success.

3. Challenges to Common Law Approach to Environmental Litigation

The importance of common law causes of action to environmental litigation cannot be over-emphasised. However, scholars have identified some notable challenges of the common law approach to environmental litigation. Latham argues that the common law approach is not sufficient to protect the environment because the primary objective of common law causes of action is the restoration of the human victim to the original, pre-injury state, irrespective of how the environment was adversely impacted.[50] Along this line, Ladan notes that common law cannot be used on an efficient basis for the public regulation of the environment.[51] Also, Carlarne identifies 'doctrine of displacement' as another factor limiting the effectiveness of common law approach. This means that where a law is enacted by the legislature to specifically address a particular environmental or climate issue, this removes it from the purview of common law claim.[52] The implication of this is that both the litigants and the courts cannot determine the case on common law cause of action when there is a clear provision of statutes addressing the claim.

Furthermore, cases founded on common law claims face additional challenge of establishing causation or proof problem. The trend of cases faces the difficulty of establishing the causal connection between the alleged defendant's action and the injury to the plaintiff.[53]The nature of

[46](2018) 17 NWLR (Pt. 1649) 420.
[47]*ibid*. at 439.
[48](1975) 9-11 S.C. 115
[49]See also *Shell Petroleum Development Co. Ltd. v Anaro* (2001) FWLR (Pt.50) 1815, where Akintan JCA held that 'Similarly the appellant knew the he was keeping material – crude oil which could be regarded as dangerous to the environment if allowed to spill and there was in fact a spillage. The rule in *Rylands v Fletcher* was also applicable.'
[50] Latham (n 7).
[51]Ladan (n 8).
[52]C P Carlarne, 'The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis', in B Mayer and A Zahar (eds), *Debating Climate Law*, (Cambridge University Press, 2021).
[53]J Peel, 'Issues and Challenges of Climate Change Litigation' (2011) CCLR 1.

proof required to establish common law claims is so herculean that it has put off genuine case of environmental abuse, and this explains why the use of the tort of nuisance and negligence as a remedy in environmental litigations arising out of petroleum operations in Nigeria has attracted some setbacks, leading to dismissal of some of the cases founded on common law approach.

Statutory approach to environmental litigation, whereby litigants premise their environmental claims on relevant environmental laws is capable of augmenting the inadequacy of common law strategy. For instance, Nigeria has enacted several environmental and climate change related statutes, including Environmental Impact Assessment Act, Climate Change Act, 2021, NESREA Act, Harmful Waste Act, Petroleum Industry Act, ecetera.[54] These laws provide an environmental protection and compensation regime. As observed by Ladan, these laws create a strict liability regime in which violators are penalised in accordance with the laws.[55] It is the writer's view that this will create certainly in our laws and ensure that violators do not take advantage of the undue technicality of proof under the common law approach.

4. Conclusion

This paper has examined the common law approach to environmental litigation in Nigeria, highlighting the causes of action under the common law and their relevance to environmental litigation. Additionally, it has discussed the potential prospects and challenges that common law causes of action may pose for the litigants. The paper has argued that environmental actions are mainly instituted under common law remedies of nuisance, negligence and strict liability rule. Furthermore, it has contended that common law remedies are grossly ineffective for the protection of the environment, as they are individually driven and not particularly concerned with improving environmental condition. Ultimately, this paper recommends that combining common law and statutory litigation approaches has the potential to address the inadequacies of the common law approach.

[54] Latham (n 7).
[55] Ladan (n8).++