AN EXAMINATION OF THE LIABILITY AND COMPENSATION REGIME FOR OIL SPILL DAMAGE UNDER SECTION 11(5) OF THE OIL PIPELINES ACT OF NIGERIA

Anthony Ezonfade Okorodas, *PhD.*[1]

Ebiere Princess Okorodas, PhD.[2]

Abstract

This article examines section 11(5) of the Oil Pipelines Act of 1956 (OPA), which provides a statutory framework for civil liability and compensation for oil spill damage resulting from oil pipeline operations in Nigeria. The aim of this article is two-fold. First, the article interrogates the assertion by some writers that a person claiming compensation for oil spill damage under section 11(5) of the OPA must submit to a pre-action administrative hearing to determine the quantum of compensation payable before they can institute an action, if not satisfied. Through an analysis of relevant provisions of the OPA, the article demonstrates that the assertion is misplaced. Secondly, it is observed that judicial discussions on the liability exception contained in section 11(5) (c) of the OPA (which exempts an oil pipeline licence holder from liability for oil spill damage caused by the malicious act of a third person) have been minimal in Nigeria. In light of this, the article draws upon judicial discussions in England on similar liability provisions contained in section 85(1) of the United Kingdom Water Resources Act of 1991 (albeit in the context of criminal litigation), with a view to providing helpful guidance for Nigerian judges willing to protect the environment by robust use of their interpretative powers. The article adopts a doctrinal research methodology, relying on an analytical review of primary legislation and relevant case law to arrive at a logical conclusion.

Keywords: Liability and compensation for oil spill damage, Oil Pipelines Act, Environment, Nigeria, United Kingdom.

[1]Formerly, lecturer in law, Niger Delta University; currently, Judge of the High Court of Delta State, Nigeria. Mobile: 08137038895. Email: okorodas@yahoo.com

[2]Barrister & Solicitor of the Supreme Court of Nigeria. Mobile: +44 7488344968. Email: ebipokorodas@yahoo.com

1. Introduction

Although there are numerous statutes addressing environmental pollution in Nigeria[3], the Oil Pipelines Act of 1956 (OPA) remains the principal legislation that provides for civil liability and compensation for oil spill damage arising from oil pipeline operations. This article examines section 11(5) of the OPA, which contains the liability and compensation provisions. The principal aim of the examination is two-fold. First, there have been suggestions that under section 11(5) of the OPA, a person who has suffered oil spill damage resulting from oil pipeline operations can file an action in court to determine their entitlement to compensation only after such entitlement has been determined through an administrative procedure laid down by the OPA.[4]

The analysis undertaken in this article seeks to interrogate that view. The analysis is important because, as will be seen in the article, the Court of Appeal indicated, in *Nigerian Agip Oil Company Limited v. Ogbu*[5], that the absence of an administrative hearing could render an otherwise competent suit incompetent *ab initio.* The implications are huge. Until set aside by the Supreme Court, the decision in Ogbu's case will be binding on the high courts. Secondly, although there have been numerous judicial decisions concerning the provisions in section 11(5) of the OPA, it is observed that judicial discussions on the liability exception contained in section 11(5) (c) of the OPA (which exempts an oil pipeline licence holder from liability for oil spill damage caused by the malicious act of a third person) have been minimal.[6]

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[3] See for example, the Nigerian Minerals and Mining Act, 2007; the National Oil Spill Detection and Response Agency (Establishment) Act, 2006; the National Environmental Standards and Regulations Enforcement Agency (Establishment) Act, 2007; the Federal Environmental Protection Agency Act, 1988; the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 as amended (Ratification and Enforcement) Act, 2006; Oil in Navigable Waters Act, 1968; and the Petroleum Industry Act, 2021.

[4] See Tonye Krukrubo, et al, 'Proper Interpretation of the Oil Pipelines Act on Payment of Compensation to Victims of Oil Pipelines Operations in Nigeria: A Critique of the Hague Court of Appeal's Decision in Fidelis Ayorao Oguru & 2 ORS v. Shell Petroleum N.V. & 3 ORS' (January 2022) accessed on 09 February 2022 at https://www.aluko-oyebode.com. See also, the statement of Danjuma, JCA., in *Nigerian Agip Oil Company Limited v. Ogbu* (2017) LPELR-45217(CA), on p. 35, para. A – C of the Report.

[5] (2017) LPELR-45217(CA), on p. 35, para. A – C of the Report.

[6] See for example, the judgments of Awotoye, JCA, in *The Shell Petroleum Development Company of Nigeria Limited v. Firibeb* (2011) LPELR-62887(CA); Danjuma, JCA., in *Nigerian Agip Oil Company Limited v. Ogbu* (2017) LPELR-45217(CA); Sanga, JCA., in *Nigerian Agip Oil Company Limited v. Wilson* (2019) LPELR-49274(CA); Ogbuinya, JCA., (as he then was), in *Mobil Producing (Nigeria) Unlimited v. Ajanaku* (2021) LPELR-52566(CA); Hassan, JCA., in *Calmday v. The Shell Petroleum Development Company of Nigeria Limited* (2022) LPELR-58058(CA)

In light of this, the article draws upon judicial discussions in England on similar liability provisions contained in section 85(1) of the United Kingdom Water Resources Act of 1991, (albeit in the context of criminal litigation), with a view to providing helpful guidance for Nigerian judges willing to protect the environment by robust use of their interpretative powers.[7] The article begins with a discussion of the liability provisions embedded in section 11(5) (a) – (c) of the OPA. The article notes that section 11(5)(a) – (c) of the OPA codifies principles of liability akin to the common law principles of nuisance, negligence and the rule in *Rylands v. Fletcher*[8], although significant differences remain.

The article proceeds to interrogate the assertion that under section 11(5) of the OPA, a potential claimant who has suffered oil spill damage resulting from oil pipeline operations must submit to a pre-action administrative hearing to determine their entitlement to compensation before they can resort to litigation, if not satisfied. It is argued that this assertion is misplaced. Finally, as judicial discussions on the liability exception contained in section 11(5) (c) of the OPA (which exempts an oil pipeline licence holder from liability for oil spill damage caused by the malicious act of a third person) have been minimal in Nigeria, the article spotlights judicial discussions in England on similar liability provisions contained in section 85(1) of the United Kingdom Water Resources Act of 1991, albeit in the context of criminal litigation. It is hoped that this will provide helpful guidance for Nigerian judges willing to protect the environment by exercising their interpretative powers robustly.

The article adopts a doctrinal research methodology by analysing relevant primary legislation and judicial decisions. This methodology is suitable for the article as it facilitates a logical discussion of the topic and provides a reasoned basis for the conclusions reached. Because there is a paucity of judicial discussions on the liability exception contained in section 11(5) (c) of the OPA (which exempts an oil pipeline licence holder from liability for oil spill damage caused by the malicious act of a third person), the article also adopts a comparative dimension, drawing on case law from England on similar liability provisions contained in section 85(1) of the United Kingdom Water Resources Act of 1991. Although *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd*[9], the English decision analysed in the article, was decided in the context of criminal litigation, the decision was found relevant to the discussions on section 11(5)(c) of the OPA. The basic

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[7] *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 22.

[8] (1868) LR 3 HL 330

[9] [1999] 2 AC 22.

element of liability in section 11(5)(c) of the OPA and section 85(1) of the United Kingdom Water Resources Act of 1991 is the same: causation. Thus, the principle of causation enunciated by the English court, which formed the basis for liability for causing polluting matter to enter controlled waters, contrary to section 85(1) of the Water Resources Act, is transferable and can reasonably be adopted in the context of section 11(5)(c) of the OPA.

2. The Liability and Compensation Provisions in the OPA

As stated earlier, the Oil Pipelines Act (OPA) is the principal legislation dealing with civil liability and compensation for oil-related environmental damage. Section 11(5) of the Oil Pipelines Act appears to codify in statutory form the common law rights to damages in tort. The section creates substantive rights to compensation for damage suffered by a person. It provides for the payment of compensation to any person who suffers damage as a result of the exercise of the rights conferred on a licensee, or as a consequence of a leakage from a pipeline or ancillary installation. Section 11(5) of OPA states:

> "(5) The holder of a licence **shall** pay compensation –
>
> > (a) to any person whose land or interest in land (whether or not it is land in respect of which the licence has been granted) is **injuriously affected by the exercise of the rights conferred by the licence**, for any such injurious affection not otherwise made good; and
> >
> > (b) to any person suffering damage by reason of any **neglect** on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and
> >
> > (c) to any person suffering damage **(other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation**, for any such damage not otherwise made good.
>
> If the amount of such compensation is not agreed between any such person and the holder, **it shall be fixed by a court in accordance with Part IV of this Act."**
>
> (Bold type supplied for emphasis)

It appears that section 11(5)(a) of the OPA set out above is fashioned as a codification of the common law tort of nuisance in the sense that liability for compensation is not dependent on negligence on the part of the licence holder. Also, there is a significant element of strict liability embedded in section 11(5)(a).[10] So far as the activities of the licence holder carried out pursuant to the terms of his licence cause damage, the licence holder shall be liable to pay compensation under section 11(5)(a) of the OPA. However, the fact that section 11(5)(a) is focused on the protection of the individual's land, or interest in land, it can be argued that the provision applies only to situations analogous to private nuisance, and does not extend to claims arising from situations of public nuisance, unless such public nuisance occasions injury to private land. The focus of paragraph (a) of section 11(5) on land (and interest in land) would appear to exclude claims for damage caused to movable property. While the words used in paragraph (a) justify such exclusion, the absurdity of such interpretation is clear. For example, the exercise of the powers of the licence holder under the OPA could affect a claimant's land as well as movable properties located within the land. There is therefore no rational basis for restricting the application of section 11(5)(a) to land and interest in land only. Be that as it may, the restrictive provisions of section 11(5)(a) are remedied by the fact that claims for damage to movable property can be made under section 11(5)(b) and 11(5)(c) of the OPA.

On the other hand, section 11(5)(b) appears to have codified the common law principles relating to claims for damages for negligence, while section 11(5)(c) seems to have provided for strict liability similar to the rule in *Rylands v. Fletcher*.

In relation to the payment of compensation, section 11(5) of the OPA concludes that

> "… if the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act."

The above provision has been interpreted by some writers and judges as meaning that a person who has suffered damage as a result of the actions of a licence holder can sue **only** in respect of the quantum of compensation payable, and such a person cannot sue unless it is shown that the parties had attempted to agree, but had failed to reach an agreement as to the amount of compensation payable.

For example, in *Nigerian Agip Oil Company Limited v. Ogbu*[11], Danjuma, JCA, who delivered the lead judgment of the Court of Appeal, held[12]:

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[10] See *The Shell Petroleum Development Company of Nigeria (SPDC) v. Firibeb* (2011) LPELR-62887(CA).
[11] (2017) LPELR-45217(CA).
[12] At p. 35 of the Report.

> "By Section 11(5), it is clear that it is only when the damages caused or complained of remain unredressed, in the event of dispute as to quantum or amount of damages that a Court may be approached…. That being the case, a Court will not have jurisdiction to entertain a suit lodged in respect of damages caused when the condition precedent for the assumption of jurisdiction had not been satisfied …."[13]

In like manner, Tonye Krukrubo *et al*.[14] argue that

> "… section 11(5) of the OPA expressly specified the permissible stage that an aggrieved third party may approach the court for redress in relation to injuries arising from leakages/breakages of an oil pipeline …."

The learned writers contend that Sections 9 and 10 of the OPA provide for administrative hearings to determine a claimant's entitlement to compensation. They conclude that

> "By necessary implication, therefore, the court can only be approached for the resolution of any dispute as to the 'quantum of the compensation payable' after such dispute relating to entitlement to compensation has been determined through an administrative procedure laid down by the OPA."[15]

There is little doubt that the arguments outlined above are, with due respect, misplaced. First, sections 9 and 10 have nothing to do with the question of liability for "injuries arising from leakages/breakages of an oil pipeline", as Krukrubo *et al* appear to argue. Sections 9 and 10 relate to hearings concerning objections raised by persons whose land or interest in land may be injuriously affected by the grant of a licence. For clarity, it is important to set out the sections:

> "9 – Notice of objection
>
>> (1) A person whose land or interest in land may be injuriously affected by the grant of a licence may within the period for objections lodge verbally or in writing at one of the specified addresses notice of objection stating the interest of the objector and the grounds of objection.

[13] See p. 35, para. A – C of the Report.

[14] Tonye Krukrubo, et al, 'Proper Interpretation of the Oil Pipelines Act on Payment of Compensation to Victims of Oil Pipelines Operations in Nigeria: A Critique of the Hague Court of Appeal's Decision in Fidelis Ayorao Oguru & 2 ORS v. Shell Petroleum N.V. & 3 ORS' (January 2022) accessed on 09 February 2022 at https://www.aluko-oyebode.com.

[15] Ibid.

(2) Matters relating to quantum of compensation shall not be material grounds to include in a notice of objection under this section.

(3) It shall be the duty of any public officer who receives a verbal objection in the course of his duties to record the name and address, interest and grounds of objection of any person lodging such verbal objection in accordance with this section.

10 – Inquiry and report thereafter

(1) Upon the date fixed for the hearing of objections, the person or persons appointed by the Minister shall inquire into such objection, giving all parties concerned an opportunity to be heard, and a report thereof shall be made without delay to the Minister.

(2) Matters relating to quantum of compensation shall not be material grounds for objection under this section.

(3) If, after consideration of the report, the Minister considers that the licence should be granted, he shall inform the President accordingly, but if the Minister considers that a licence should not be granted in respect of the proposed route or any part of it, he shall so inform the applicant or the objector or objectors concerned, and thereupon the applicant shall be entitled to receive a permit to survey such other route or routes as he may propose or to submit an application for a licence in respect of another route and the provisions of Parts II and III of this Act will apply in respect thereof."

From the above, it is clear that the administrative hearing provided for in sections 9 and 10 of the OPA concerns only objections to the granting of an oil pipeline licence. The provisions therein operate only when the oil pipeline licence is still at the proposal stage. Once the licence is granted, liability for any injuries arising from the operation of the oil pipeline so licenced is covered by sections 11(5)(a), (b) and (c) of the OPA. The administrative hearings provided for in sections 9 and 10 of the OPA do not apply to any question as to whether compensation is payable under sections 11(5)(a), (b) or (c) of the OPA. The application-stage hearings provided for in sections 9 and 10 have no relation to the liability provisions in section 11(5)(a), (b) and (c) of the OPA. The procedural requirements for a claim under section 11(5) of the OPA are to be found within the confines of the same. Under section 11(5), a pipeline licence holder is required to pay compensation to a person suffering damage as a result of the exercise of the rights conferred by the licence, "and if the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part IV of this Act."

The assertion that only disputes concerning the amount of compensation payable can be submitted to the court for adjudication takes no account of the provisions of section 19 of the OPA. The section provides:

> "If there be any dispute as to **whether any compensation is payable under any provision of this Act, or as to the amount thereof**, or as to the persons to whom such compensation should be paid, such dispute shall be determined by a magistrate exercising civil jurisdiction in the area concerned if such magistrate has in respect of any other civil matter monetary jurisdiction of at least as much as the amount of compensation claimed and if there be no such magistrate by the High Court exercising jurisdiction in the area concerned …."[16] (Bold type provided for emphasis)

From a textual reading of section 19 of the OPA set out above, a person can proceed to court in any of three circumstances set out therein. The first, which is the circumstance relevant to the present discussion, is that he may proceed to court for a determination of the question whether he is indeed entitled to any compensation under the OPA. In effect, this means that, where a licence holder denies responsibility for an oil spill emanating from a licenced oil pipeline, no (pre-litigation) attempt at an agreement with the licence holder as to the amount of compensation payable is required before a person suffering damage can proceed to court to determine the question of the liability of the licence holder and the entitlement of the person to compensation under section 11(5) of the OPA. Thus, when read in conjunction with section 11(5) of the OPA, section 19 set out above makes it clear that the person who suffers injury as a result of the acts (or omissions) of the licence holder can proceed to court for a determination of the question whether compensation is payable under section 11(5)(a), (b) or (c) of the OPA, provided that it is shown that the person had notified the licence holder of his complaint and the licence holder had denied liability. This is implicit in the provisions of sections 11(5) and 19 of the OPA. As the essence of the pre-litigation protocol embedded in section 11(5) of the OPA is for the parties to reach an agreement on the amount of compensation payable, it would be absurd to insist on the same as a precondition for filing a

[16] It is to be noted that section 251(1)(n) of the Constitution of the Federal Republic of Nigeria, 1999 has conferred on the Federal High Court exclusive jurisdiction over causes and matters relating to "mines and minerals (including oil fields, oil mining, geological surveys and natural gas)." Consequently, the jurisdiction exercisable under section 19 of the OPA is now to be exercised exclusively by the Federal High Court.

lawsuit if the stance of the licence holder is that he incurs no liability. Thus, it is only where the licence holder admits liability that the pre-litigation compensation procedure stipulated in section 11(5) comes into play. Once the licence holder admits liability, the aggrieved person must not proceed to court without first attempting an out-of-court settlement with the licence holder as to the amount of compensation payable.[17]

Guidance as to the judicial award of compensation for claims brought pursuant to section 11(5) of the OPA can be found in section 20(2) of the OPA. Section 20(2) provides:

> "(2) If a claim is made under subsection (5) of section 11, the court shall award such compensation as it considers just having regard to –
>
> > (a) any damage done to any buildings, crops or profitable trees by the holder of the licence in the exercise of the rights conferred by the licence; and
> >
> > (b) any disturbance caused by the holder in the exercise of such rights; and
> >
> > (c) any damage suffered by any person by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under the licence; and
> >
> > (d) any damage suffered by any person (other than as stated in such subsection (5) of this section) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation; and
> >
> > (e) loss (if any) in value of the land or interests in land by reason of the exercise of the rights aforesaid, and also having regard to any compensation already awarded in accordance with subsection (1) of this section".[18]

The use of the word "compensation" is significant. There is no doubt that compensation is different from damages in some ways. According to the learned editors of Halsbury's Laws:[19]

> "In the sense in which the term is usually used, 'compensation' may be defined as the pecuniary recompense which a person is entitled to receive in respect of damage or loss which he has suffered, other than as a result of an actionable wrong, litigated in the civil court, committed by the person bound to make the recompense. In this sense 'compensation' is distinct from 'damages', which are recoverable in respect of an

[17] See *The Shell Petroleum Development Company of Nigeria (SPDC) Limited v. Okeh* (2025) LPELR-80874(SC)
[18] Section 20(2).
[19] Vol. 12(1) at para. 815.

actionable wrong. The two main classes of compensation consist of: (1) payments by public authorities in respect of land or other property lawfully acquired under statutory powers or injuriously affected by or under statutory provisions; and (2) payments by government departments or statutory undertakers in respect of damage to property or personal injuries."

Nigerian judges also recognise the distinction between compensation and damages. In *Umudje and another v Shell-BP Dev Co (Nig) Ltd*[20] (1975) 9-11 SC 155, Idigbe JSC explained that

> "The expression 'damages', however, cannot be regarded as synonymous with 'compensation' and, indeed, damages sometimes go beyond compensation; for example, where a plaintiff is allowed to recover, by way of damages, much more than his actual loss."[21]

In a claim for compensation, a claimant is entitled only to recovery of actual loss and no more. The principle is to restore the claimant, so far as money could serve the purpose, to the position he was immediately before the injury he suffered occurred. Once this is achieved by a monetary award, the claimant is not entitled to anything more. However, in the case of damages, in addition to actual loss, a claimant may appropriately seek, and obtain further monetary award in the form of aggravated, punitive or exemplary damages.

It would appear that the power of the court to determine the quantum of compensation payable pursuant to section 11(5) of the OPA is very much circumscribed by the provisions of section 20(2) of the OPA. This is because by section 20(2) of the OPA, "if a claim is made under subsection (5) of section 11, the court shall award such compensation as it considers just having regard to" the factors set out in paragraphs (a) - (e) of the subsection. Nevertheless, there can be considerable room for the judge to ensure that what is awarded is just in the circumstances of the particular case. For example, there is nothing in section 20(2) which suggests that in determining the quantum of compensation payable, the judge cannot take account of loss of prospective income in addition to the immediate loss occasioned by the act of the licence holder. Indeed, section 20(2)(b) of the OPA enjoins the court to have regard to "any disturbance caused by the holder in the exercise of such rights" when determining the quantum of compensation payable. Thus, where the exercise of the licence holder's rights <u>disturbs</u> the regular flow of income in the sense that, due to the act of the

[20] (1975) 9-11 SC 155.
[21] See p. 163 of the Report.

licence holder, income accruable to the claimant is either stopped or diminished, the court could award compensation to take account of such loss of future income.

It has been contended that the use of the word "disturbance" in section 20(2)(b) of the OPA cannot sustain a claim for compensation for distress, worry, fear or other mental disorder suffered as a result of the exercise of the licence holder's rights under the OPA. In *Bodo Community v. The Shell Petroleum Development Company of Nigeria Limited*,[22] Justice Akenhead of the English High Court had this to say:

> "I do not consider that the word "disturbance" in Section 20(2)(b) encompasses mental disturbance, such as distress, worry, fear and the like. It is of interest that the structure of Section 20(2) follows Section 11(5) with the injurious affection being addressed primarily in Section 20(2)(a), but it is not until one gets to sub-sections (c) and (d) that one reaches the "damage" parts of Section 11(5)(b) and (c). That is a pointer, albeit not conclusive, that the disturbance relates to land or land interests. That, coupled with the clearer use of the word "disturbance" in Section 20(1) as relating to land, points more clearly to disturbance being related to land or land use."[23]

Justice Akenhead's statement set out above cannot be faulted. The OPA, read as a whole, indicates quite clearly that the word "disturbance" is used in relation to land or interest in land injuriously affected by the exercise of the licence holder's rights under the OPA. Thus, "disturbance" can only refer to matters such as loss of amenities in relation to the land, or interest in the land, which can be made good in monetary terms.

Again, upon examination, there is nothing in section 20(2) which prevents the judge from awarding what is akin to general damages in common law. There may be instances where losses incurred as a result of the acts of the licence holder cannot be assessed with mathematical accuracy. In such circumstances, it would be unjust to leave a claimant without any remedy. It is submitted that, despite the lack of precision in stating the quantum of loss suffered, it is permissible for the court to make an award of compensation that is just and reasonable, taking into consideration the facts and circumstances of the case. The mere fact that it is determined that the claimant has suffered loss is sufficient justification for awarding just and reasonable compensation.

[22] [2014] EWHC 1973 (TCC).
[23] See para. 144 of the judgment.

It must be noted that the applicability of the compensation provisions of the OPA is limited in scope. Both the long title of the OPA and the structure of the Act itself leave no doubt that the compensation regime stipulated in sections 11(5) and 20(2) of the OPA is applicable only where the damage complained of relates to an oil pipeline licenced under the OPA, or to an installation ancillary to such oil pipeline. The long title of OPA declares it to be

> "An Act to make provision for licences to be granted for the **establishment and maintenance of pipelines** incidental and supplementary to oilfields and oil mining, and for purposes ancillary to such pipelines." (Bold type provided for emphasis)

The definition of an oil pipeline can be found in section 11(2) of the OPA:

> "For the purpose of this Act, an oil pipeline means a pipeline for the conveyance of mineral oils, natural gas and any of their derivatives or components, and also any substance (including steam and water) used or intended to be used in the production or refining or conveying of mineral oils, natural gas, and any of their derivatives or components."

It is accepted that apart from oil pipelines, which are the main focus of the OPA, installations ancillary to oil pipelines are also covered by the OPA. What constitutes an "ancillary installation" is described in section 11(3) of the OPA:

> "The power to construct, maintain and operate an oil pipeline shall include a power to construct, maintain, and operate on the route of such pipeline all other installations (referred to in this Act as 'ancillary installation') that are ancillary to the construction, maintenance and operation of such pipeline, including roadways, telephone and telegraph lines …, pumping stations, storage tanks and loading terminal."

As can be seen, section 11 of the OPA contains not only the definition of an oil pipeline and its ancillary installations (which is the subject of the licence granted to the licence holder), but also provisions for compensation payable by the holder of a licence granted under the OPA, for damage resulting from the exercise of the rights of the licence holder in relation to the subject of the licence (that is, the oil pipeline and/or its ancillary installation). It is submitted, therefore, that section 11 delimits the scope of the applicability of the compensation regime of the OPA. Unless it is shown that the complaint concerns an oil pipeline or an installation ancillary to such oil pipeline (as described in section 11(3) of the OPA), the compensation regime set out in the OPA cannot be activated.

However, it is observed that in a number of cases that go before the judges for adjudication, the judges appear to treat the compensation regime in the OPA as applicable even where it is abundantly clear that the damage complained of concerned neither an oil pipeline nor an installation ancillary to such a pipeline. For example, in *Nigerian Agip Oil Company Limited v. Ogbu,*[24] the Respondent, as plaintiff in the trial Court, claimed special and general damages for loss arising when the defendant allegedly permitted noxious and lethal chemicals and oil waste to be discharged onto his family land from a waste pit located at the defendant's oil well location, thus killing crops, economic trees and fish. It is submitted that the discharge of waste oil from a *waste pit* has no connection whatsoever with an oil pipeline licenced under the OPA. A waste pit does not come within the statutory definition of an oil pipeline under section 11(2) of the OPA. Neither can it be regarded as an installation "ancillary to the construction, maintenance and operation" of a pipeline, under section 11(3) of the OPA. The OPA covers only leaks from the breakage of oil pipelines licensed under the OPA. Nevertheless, the Court of Appeal treated the case as if the compensation regime set out in the OPA applied. It is remarkable, sadly, that neither counsel to the parties nor the trial and appellate courts paid any attention to the scope of the compensation regime, as is made clear from the provisions of section 11 of the OPA. Had attention been drawn to the provisions of section 11 of the OPA, it should have been clear to their Lordships that the compensation regime stipulated in the OPA was inapplicable to *Ogbu's* case.

3. No liability for malicious acts of third persons

Section 11 (5) (c) of the OPA states that

> "… the holder of a licence shall pay compensation to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person)[25] as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good."

The words used in the provision set out above are quite unambiguous. Where breakage of an oil pipeline, or leakage from the pipeline, is attributable to the <u>malicious</u> acts of a third person, in the sense that the third person acted with intent to cause the breakage or leakage, the licensee would generally not be held liable to pay compensation under section 11 (5) (c) of the OPA. It is to be noted that section 11(5)(c) of the OPA refers to the "<u>malicious</u> act of a

[24] (2017) LPELR-45217 (CA).
[25] Sabotage is a criminal offence punishable with death or imprisonment for a term not exceeding 21 years. See section 2 of the Petroleum Production and Distribution (Anti-Sabotage) Act, 1975.

third person." The question arises whether the qualifying word, "malicious", has any significance as far as liability for third-person acts is concerned. The full extent of the exception to liability (as contained in section 11(5)(c) of the OPA appears not to have been explored by the courts in Nigeria.[26] It may be argued that *automatic* exemption from liability under section 11(5)(c) of the OPA is restricted to situations where a third party acted *intentionally* to cause breakage or leakage from an oil pipeline. This is because the use of the word "malicious" in section 11(5)(c) of the OPA implies that for the licence holder to enjoy an automatic exception from liability attributable to a third-party act, the act complained of must be accompanied by an intent to commit the same, much the same way as the *actus reus* of a crime must (except for strict liability offences) be accompanied by the *mens rea* of the offender in criminal law. Where the third-party action was found not to be "malicious", but accidental, would section 11(5)(c) of the OPA apply to automatically exempt the oil company from liability? It is submitted that the use of the word "malicious" as a qualifier has the effect of placing accidental third-person interventions outside the scope of section 11(5)(c) of the OPA. Thus, the court should have a duty to consider whether, from the facts and circumstances of the case, including in particular the failure of the operator of the oil pipeline to take reasonable measures to prevent unauthorised access to the location of the oil pipeline, the licensee should be liable to pay compensation. It is submitted that this duty arises because there is a legitimate expectation that a licensee who operates an oil pipeline (that is inherently dangerous) must take measures to protect the pipeline against unauthorised access. There is ample justification for treating this as an *implied* precondition for a licensee's enjoyment of the liability exemption contained in section 11(5)(c) of the OPA. Otherwise, persons who are in proximity to the pipelines might be left without protection. If courts are to make any meaningful contribution to the protection of the environment, environmental statutes must be interpreted and applied in a manner that holds polluters to account. The threshold for a successful defence of sabotage ought to be kept high. Otherwise, courts would become unwitting accomplices in the unacceptable degradation of the environment. As will be demonstrated shortly, even where a third-party act is found to be intentional, an interpretative approach that declines to grant an automatic exemption from liability can be justified on grounds of public policy, as it leans in favour of environmental protection.

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[26] Judicial discussions on this have not been extensive: *The Shell Petroleum Development Company of Nigeria Limited v. Firibeb* (2011) LPELR-62887(CA); *Nigerian Agip Oil Company Limited v. Ogbu* (2017) LPELR-45217(CA); *Nigerian Agip Oil Company Limited v. Wilson* (2019) LPELR-49274(CA); *Mobil Producing (Nigeria) Unlimited v. Ajanaku* (2021) LPELR-52566(CA); *Calmday v. The Shell Petroleum Development Company of Nigeria Limited* (2022) LPELR-58058(CA)

As noted above, judicial discussions on the liability exception contained in section 11(5) (c) of the Oil Pipelines Act have been minimal.[27] Although decided in the context of criminal liability, judicial discussions in England on the liability provisions contained in section 85(1) of the Water Resources Act of 1991 may provide helpful guidance for Nigerian judges willing to protect the environment by robust use of their interpretative powers. This is discussed in the next section.

4. Alternative basis for assessing third-party acts – views from England

An alternative way to approach the issue of sabotage and third-party actions is to consider the relevance of principles of causation and *novus actus interveniens*. Similar issues have arisen in England and have been dealt with by the highest court in that jurisdiction in a pro-environment manner. In *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd*[28], the United Kingdom House of Lords (now the Supreme Court) extensively discussed the conditions under which the deliberate or malicious act of a third-party may exempt a defendant from liability for causing polluting matter to enter controlled waters, contrary to section 85(1) of the Water Resources Act. The provision in section 85(1) made it a criminal offence for anyone to cause polluting matter to enter controlled waters. It is noteworthy that the element of causation in section 85(1) of the Water Resources Act is essentially the same as that contained in the exemption provisions in section 11(5)(c) of the OPA. The approach adopted by their Lordships in not exempting the defendant from liability for causing the pollution, even though the immediate cause of the escape of the polluting matter was the malicious act of a third party, can provide a pathway for meaningful discussions of the statutory exemption contained in section 11(5) (c) of the Oil Pipelines Act of Nigeria.

In the *Environment Agency case (supra),* the appellant company maintained a diesel tank, the outlet of which was governed by a tap that had no lock. Trespassers had to scale over a fence to access it. On a certain day, an unknown person opened the tap, causing the diesel to drain into a river. Consequently, the appellant was charged under section 85(1) of the Water Resources Act with causing polluting matter to enter controlled waters. The relevant issue before their Lordships was whether a person ought to be held liable under section 85(1) where it is found

[27] See fn. 23 above.
[28] [1999] 2 AC 22.

(1) that he held polluting matter and contained it effectively such that, but for the intervening positive act of a third party, the polluting matter could not escape, and

(2) a third party's intervening positive act caused the polluting matter to escape and enter controlled waters.

The appellant's contention before the Divisional Court was that since the evidence before the trial Court showed that the tap was opened by a stranger, the appellant should have been held not liable under section 85(1) of the Water Resources Act. This is typical of the defence often put up by Multi-National Oil Companies (MNOCs) in Nigeria in reaction to claims for compensation for environmental damage resulting from breakage of, or leakage from, an oil pipeline. Defendant oil companies often raise the defence of sabotage, relying on the liability-exempting provisions in section 11(5) (c) of the Oil Pipelines Act of Nigeria, contending that they ought not to be held liable where the evidence shows that the oil spill was caused by the malicious act of a third party.

First, in light of the facts in the *Environment Agency case,* the House of Lords had to decide the question of whether the defendant *caused* the escape of the polluting matter. Citing Lord Salmon in *Alphacell Ltd. v. Woodward* [1972] A.C. 824, 847, Lord Hoffman (who delivered the lead judgment) agreed that "the courts have repeatedly said that the notion of 'causing' is one of common sense." It had been argued on behalf of the defendant company that the company could not be held to have *caused* the escape of the polluting matter, as the escape was not the result of any positive act committed by the company. Learned counsel contended that section 85(1) required some sort of positive action (on the part of the defendant), which led to the escape of the polluting matter, before the defendant could be held to have caused the escape. Counsel's argument appeared to have support in two notable cases, namely, *Price v. Cromack*[29] and *Wychavon District Council v. National Rivers Authority*.[30]

Lord Hoffman rejected the decisions in the two cases cited above:

> "… in my opinion, these two cases take far too restrictive a view of the requirement that the defendant must have done something. They seem to require that his positive act should have been in some sense the immediate cause of the escape. But the Act

[29] [1975] 1 W.L.R. 988.
[30] [1993] 1 W.L.R. 125.

contains no such requirement. It only requires a finding that something which the defendant did caused the pollution."[31]

Lord Hoffman went on to express the view that it was sufficient if the defendant had done something which led to the escape. Thus, in the present case, the fact that the company maintained a tank of diesel was ***doing something***, and that by itself could be seen as ***causing*** the escape (although the third-party action added to the cause). The court added that the chain of causation would only be broken (and the defendant not liable) if the third-party act was "extraordinary" – not simply not reasonably foreseeable.

Lord Hoffman's approach has merit in a Nigerian context. In the context of oil operations in Nigeria, courts ought to adopt this kind of expansive interpretation of "causing" in order to exert a reasonable level of environmental responsibility on oil companies. Since oil companies are engaged in the inherently dangerous business of storing and transporting crude oil in pipelines, it would be absurd to excuse them from liability merely on the ground that the immediate cause of the oil spill was the malicious action of a third party. As long as oil companies continue to store and transport crude oil in pipelines, they must always be part of the causal link in the event of an oil spill, "as a consequence of any breakage of or leakage from the pipeline." It is submitted that the liability-exempting provision in section 11(5) (c) of the Oil Pipelines Act of Nigeria should avail a defendant company only where the intervening action of a third party is of such an extraordinary nature as to break the causal link between its business of storing and transporting crude oil, and the oil spill.

Where the risk of third-party intervention was reasonably foreseeable, and a defendant company failed to take reasonable precautions to prevent such intervention from occurring, a defendant should not be excused from liability under section 11(5) (c) of the Oil Pipelines Act. In that case, the act of the third party, although the immediate cause of the escape of the polluting matter, cannot be seen to have effectively broken the causal connection. The now routine defence of third-party vandalisation of oil pipelines in Nigeria ought to be subject to this principle of statutory interpretation. Pipeline vandalisation in the Niger Delta region of Nigeria (where crude oil is produced) has now been accepted, sadly, as a fact of life. Thus, oil companies make budgetary allocations for pipeline surveillance and security services.[32] They recognise, quite rightly, that they have a duty to take all reasonable steps to secure oil

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[31] *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 22 at p. 28, para. C – E of the judgement.

[32] See Policy Brief, '*Pipeline Surveillance Contracts in the Niger Delta*' (Stakeholders Democracy Network (SDN), 2018) <Pipeline-surveillance.-Brief.-2019.pdf (stakeholderdemocracy.org)> accessed 07/03/2022.

pipelines and prevent vandals from gaining access to them. Where an oil company fails in this regard, it must be held liable for any oil spill resulting from the reasonably foreseeable activities of vandals.

While foreseeability may be an important factor in determining whether a defendant ***caused*** polluting matter to escape, both under section 11(5) (c) of the Oil Pipelines Act of Nigeria and section 85(1) of the Water Resources Act of England, it has to be noted, as Lord Hoffman did in the *Environment Agency case,* that "people often cause things which they could not have foreseen."[33] Thus, even where a defendant could not have foreseen the escape of the polluting matter in the sense that the particular occurrence was quite unexpected, he may still be held liable (in appropriate cases) for causing the escape. This notion that a defendant could cause things that he did not foresee ought to be taken as particularly relevant in oil-related activities, as it favours the protection of the environment. A positive result is that it has the potential to force oil companies in Nigeria to invest in modern technology and take steps to protect their premises and pipelines to a high standard, as failure to do so might result in liability for third-party sabotage.

Absenting foreseeability as a factor, what are the factors to be considered in determining whether the act of a third party is sufficient to negate the causal connection, for the purposes of section 11(5) (c) of the Oil Pipelines Act of Nigeria and section 85(1) of the Water Resources Act of England? According to Lord Hoffman,

> **"The true common sense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary.** Of course, an act or event which is, in general terms, a normal fact of life may also have been foreseeable in the circumstances of the particular case, but the latter is not necessary for the purposes of liability. There is nothing extraordinary or abnormal about leaky pipes or lagoons as such: these things happen, even if the particular defendant could not reasonably have foreseen that it would happen to him. **There is nothing unusual about people putting unlawful substances into the sewage system, and the same, regrettably, is true about ordinary vandalism. So, when these things happen, one does not say: that was an extraordinary coincidence, which negatived the causal connection between the**

[33] *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd* (supra) at p. 34, para. E of the judgement.

original act of accumulating the polluting substance and its escape. In the context of section 85(1), the defendant's accumulation has still caused the pollution. On the other hand, the example I gave of the terrorist attack would be something so unusual that one would not regard the defendant's conduct as having caused the escape at all.”[34]

(Bold type supplied for emphasis)

The principle outlined in Lord Hoffman’s statement above is logically sound and ought to be applicable in the Nigerian context. The current situation where oil companies constantly seek to hide behind the cover of section 11(5)(c) of the Oil Pipelines Act to escape liability for oil spills caused by petty thieves and pipeline vandals is to be deprecated, and must be rejected by the Nigerian courts. In interpreting section 11(5) (c), a necessary distinction must be made between acts of third parties which are ordinary and part of the everyday fact of life, and those which are clearly extraordinary, as can be seen in the statement of Lord Hoffman. Unless the judges adopt this approach, individuals, without any fault of their own, would continue to bear the brunt of environmental degradation arising from the oil-related activities of the MNOCs.

Conclusion

This article has examined the section 11(5) regime for liability and compensation under the OPA, which, as has been stated earlier, is the principal legislation for civil liability and compensation for environmental damage emanating from licenced oil pipelines. As can be seen above, section 11(5)(a)(b) and (c) of the OPA appear to have codified to a significant extent the common law principles of nuisance, negligence and the rule in *Rylands v. Fletcher,* insofar as liability for damage arising from oil pipeline operations is concerned.

This article has demonstrated that the assertion that only disputes concerning the quantum of compensation payable can be submitted to the court for adjudication is misplaced. A person who suffers damage as a consequence of an oil spill emanating from oil pipeline operations can seek redress in court in case the oil pipeline licence holder denies responsibility upon being notified of the resulting damage. No administrative hearing is necessary. Indeed, none is provided for in such circumstances.

With respect to the judicial attitudes in Nigeria to the defence of third-party sabotage routinely put up by the MNOCs pursuant to section 11(5)(c) of the OPA, it is recommended

[34] *Environment Agency (formerly National Rivers Authority) v. Empress Car Co* (n 286) at p. 36, para. E – H.

that greater scrutiny be applied to such defences in line with the decision of the English House of Lords in *Environment Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd*.[35] As noted above, the current situation where oil companies use the exception-to-liability provision contained in section 11(5)(c) of the OPA to escape liability for preventable oil spills caused by petty thieves and pipeline vandals must be deprecated and rejected by the courts. It is recommended that courts adopt a strong, purposive interpretative approach that protects the environment and prevents environmental degradation.

[35] [1999] 2 AC 22