

ENVIRONMENTAL LAW AND POLICY

Edited by
Simpson & Fagbohun

1998

ENVIRONMENTAL LAW AND POLICY

ENVIRONMENTAL

Published in 1998 by:

LAW CENTRE, FACULTY OF LAW,
LAGOS STATE UNIVERSITY

Computerset by:

FAMMOF Ventures Ltd.

Lagos
Nigeria

Dedicated to all those who strive to protect
the environment. Our journey and
struggle has just begun.

ISBN No. 978-33148-4-X

© All rights reserved. No part of this publication may be reproduced or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, or stored in any retrieval system of any nature, without the written permission of the copyright holder and the publisher, application of which shall be made to the copyright holder.

1998

[1998]

ENVIRONMENTAL LAW AND POLICY

CONSULTING EDITOR

OSERHEIMEN AIGBERAODION OSUNBOR

LL.B (UNN.) Ph.D (Warwick) KSC

Professor, Dean, Faculty of Law, Lagos State University

EDITORS

STRUAN SIMPSON

Project Director, The Conservation Foundation,
Kensington Gore, London

OLANREWAJU FAGBOHUN,

LL.B (Ife); LL.M (Lagos); B.L (Nig.)

Senior Lecturer, Co-ordinator, Law Centre, Faculty of Law
and Co-ordinator Department of
Environmental Education and Allied Disciplines
of the Centre for Environment and Science Education.

ASSISTANT EDITOR

ADEBAMBO ADEWOPO

LL.B (Maiduguri); LL.M (Lagos); B.L (Nig.)

Lecturer, Faculty of Law and Assistant Co-ordinator
Law Centre, Faculty of Law, Lagos State University.

©

LAW CENTRE, FACULTY OF LAW,
LAGOS STATE UNIVERSITY

1998

CONTENT

	Page
Preface	iv
Table of Contents	viii
Table of Cases	xvii
Table of Statutes	xxvi
About the Contributors	xxxix

**PART I
ENVIRONMENTAL POLICY MAKING**

1. MAN AS ENVIRONMENT: AN EXISTENTIAL APPRAISAL	OLAJIDE A.
Introduction	2
Theoretical Foundation	3
2. NIGERIA'S ENVIRONMENTAL LAWS - A CRITICAL REVIEW OF MAIN PRINCIPLES, POLICY AND PRACTICE	OLOMOLA O.A.
Introduction	10
Definition of the Environment	11
Towards the Identification of Environmental Law	12
The Land Use Decree of 1978	12
The Environmental Impact Assessment (EIA) Decree of 1992	13
The Nigerian Urban and Regional Planning Decree (NURPD) 88 of 1992	14
The Philosophical Basis of the Decree	14
Strategies for Realisation	15
The Second Philosophy	16
Strategies	16
The Third Philosophy	17
Enforcement Powers of the Development Control Department	19
Implications of Decree 88 of 1992	20
The Realities of Environmental Planning Management in Nigeria	20
The Way Forward	22
Basic Question	22
Availability of Realistic Physical Development Plan on Suitable Scales	23
Personnel	23
Provision of Appropriate Operating Facilities and Tools	24
Consistency in Development Plan Interpretation and Enforcement	25
Summary and Conclusion	25
3. ECOLOGY AND CULTURE: REFLECTIONS ON ENVIRONMENTAL LAW AND POLICY IN SUB-SAHARAN AFRICA	LAWAL K.
Synopsis	28
General Introduction	28
A Philosophical Prelude	28

The African and His Environment Before European Incursion	30
Culture and Environmental Law and Policy in Colonial Sub-Sahara Africa	32
Concluding Remarks	39
4. INDUCING ENVIRONMENTAL CHANGE THROUGH LEGISLATION: SOME LESSONS AND LIMITS	AJAYI O.
Introduction	40
Case Study 1	41
Review of the National Parks Act No. 36 of 1991	41
The Project	41
The Significance of National Parks	41
Some Salient Findings and Impressions	42
Land Use and Human Impacts and Interactions	42
Case Study 2	43
The Nigerian German Kainji Lake Fisheries Promotion Project	43
The Project	43
Significance of the Kainji Lake Fisheries	44
Some Salient Findings and Impressions	44
Scientific, Technical and Management Problems	44
Human Impact and Interactions	45
Significant Environmental Implications	46
Some Guidelines for Drafting Environmental or Natural Resource Use Legislation	47
Science Based Legislation	47
Funding Obligations on Government Regulations	47
Provision for Public Oversight	48
Adjustment of Property Regimes	48
Provision of Social Economic Incentives	48
Need for Comprehensive Inter-Sectoral Legislation	49
Planning	49
Conclusion	49
5. A CONSTITUTIONAL IMPERATIVE ON THE ENVIRONMENT: A PROGRAMME OF ACTION FOR NIGERIA	IKHARIALE M. A.
Introduction	50
Definition Problems	50
Degraded Earth	52
The Present Legal Regime on the Environment	54
Common Law	55
Statutory Regulations: Pre Koko Era	56
Koko and Its Aftermath	58
FEPA Regime	59
A Programme of Action	60
Conclusion	61

	<i>Page</i>
6. AN OVERVIEW OF THE IMPACT OF BIOLOGICAL ACTIVITIES ON THE FORMULATION OF LAW AND POLICY OF THE ENVIRONMENT	ADUAYI E.
Introduction	62
Sources of Pollution and their Biological Implications	63
Oil Industry and Pollution	65
Pollution and the Soil Environment	65
Fertilizer and Use of Agro-Chemical and the Incidence of Environmental Pollution	66
Germplasm, Genetic Resources and Biodiversity as Affected by Environmental Pollution	66
Acid Rain	67
Responsibility of the Law to the Environment, and Conclusion	68
7. ENVIRONMENTAL POLICY AND MANAGEMENT	ADARAMOLA F.
Introduction	69
Animal Ecology	70
Plant Ecology	71
Air and Atmospheric Pollution	71
Marine and Water Pollution	74
Marine Pollution	74
The Territorial Waters Decree, 1967	74
The Navigable Waters Decree, 1969	74
The Sea Fisheries Decree, 1971	75
Water Pollution	77
Land Pollution	79
Search for a Viable Environmental Policy	80
Environmental Management	81
Conclusion	82
PART 2	
ENVIRONMENTAL LITIGATION	
8. BARRIERS TO ARCHIEVING REMEDIES FOR ENVIRONMENTAL HARM	MAKUCH Z.
Introduction	86
The Problem of Causation in Civil Environmental Litigation	86
The 'But For' Test of Causation	87
Causal Mechanism	89
Satisfying the 'But For' Test with Epidemiological Evidence	94
The Problem of Causation in Criminal Environmental Litigation	98
9. TRENDS IN NIGERIAN ENVIRONMENTAL LITIGATION	AWOGBADE A.
Introduction	102
Legislative Framework	103
Prosecution for Environmental Damage	105
Incipience of the Law	106
Backlog of Environmental Damage	107

Cost of Implementing Compliance	107
Cross Sectoral and Trans-Boundary Issues	108
The State Commercial Activity	109
Adjudicatory Capacity	109
The Nigerian Factor	110
Private Litigation	111
Locus Standi	112
Damage Palliatives	113
Future of Environmental Litigation	113
10. PUBLIC ENVIRONMENTAL LITIGATION IN NIGERIA - AN AGENDA FOR REFORM	FAGBOHUN O. A.
Introduction	115
General Perspective of Litigation	117
Nature of Litigation	117
The Agreed Controls of Litigation	120
Existing Framework for Environmental Litigation in Nigeria	122
Traditional Vision of Common Law and Customary Law	122
Common Law	122
Reforms to Common Law Foundation Theories	127
Applicability of the Reforms to Nigeria	131
Customary Law	133
Statutory Regulation in Nigeria	137
The Constitution	137
Federal Environmental Protection Agency Act	142
Environmental Impact Assessment Decree	144
Oil in Navigable Waters Act	147
Nuclear Safety and Radiation Protection Decree	147
The Challenges of Public Litigation: A Case for Reform	148
The Role of NGO's	157
Conclusion	158
11. ISLAM AND JUDICIAL ACTIVISM: PUBLIC INTEREST LITIGATION AND ENVIRONMENT PROTECTION IN THE ISLAMIC REPUBLIC OF PAKISTAN	LAU M.
Introduction	159
The Tension Between Islam and Fundamental Rights in Pakistan	162
Human Rights and Islam in Pakistan	166
The Harmonious Construction of Islam and Human Rights	169
Environmental Rights	171
Conclusion	176
12. ENVIRONMENTAL LITIGATION	TOBI N.
Introduction	177
Criminal Action	179
The Federal Environmental Protection Act	179
The Harmful Waste (Special Criminal Provision) Act	181
The Criminal Code Act	182

	Page
The Decision to Prosecute	183
The Accused	183
Criminal Jurisdiction	186
Defences	187
Sentence	188
Civil Action	189
Locus Standi	189
Pre-Litigation Letter	190
Pre-Action Notice	191
Negligence	194
Nuisance	195
Damages	196
The Section 12 Cap. 165 Liability	196
Death and Personal Injury Cases	196
Property and Means of Livelihood	197
Emotional Distress	198
Proof in Civil Cases	199
Property	199
Negligence	201
Nuisance	202
Special Damage	202
Conclusion	203

**PART 3
ENVIRONMENTAL LAW AND ENFORCEMENT**

13. ENVIRONMENTAL REGULATION AND ENFORCEMENT	ILEGBUNE T.O.
Introduction	205
Environmental Legislation v. Environmental Degradation	206
Structure of Environmental Laws and Their Enforcement Mechanisms	207
FEPA Structure and Function	207
Enforcement of Environmental Powers	208
The Harmful Wastes Special Criminal Provisions Decree	209
The Oil in Navigable Waters Act	210
Other Instruments of Enforcement	210
Enforcement under Customary Law	212
What Constitutes Enforcement in Environmental Law?	213
Administrative Enforcement	214
Administrative Compensation	215
Corporations and Environmental Crime	217
Civil Liability	218
Nuisance	218
Private Nuisance	219
Negligence	219
Judicial Attitude	220
Compensation and Damages	221

	Page
Access to Justice	222
Individual Interest	222
Group Action	223
Conclusion	223
14. NEGOTIATION AS A STRATEGY IN ENFORCEMENT OF ENVIRONMENTAL PROGRAMMES (NIGERIA'S EXPERIENCE)	ODUBELA .M
Introduction	225
Enforcement Activities	226
The Role of Negotiation	226
Case Studies on the Use of Negotiation	227
Background	227
Reasons for Success of Negotiation	230
Conclusion	230
15. ENFORCING INTERNATIONAL ENVIRONMENTAL LAW: SOME PROBLEMS OF THE 1972 STOCKHOLM DECLARATION	OGAN C. A
Introduction	232
Legal Status of the Stockholm Declaration	235
Damage to the Environment: A Basis of State Responsibility in International Law?	238
The Coming of Age of Action Popularis	240
Conclusion	241

**PART 4
ENVIRONMENTAL LAW AND DEVELOPMENT**

16. SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL DIPLOMACY: RECONCILING ECONOMIC GROWTH WITH ENVIRONMENTAL PROTECTION BY THE YEAR 2000 AND BEYOND	SMITH I. O
Introduction	244
Economic Activities and Environmental Degradation	247
Politics of the Environment: Conflicts, Perceptions and Diplomacy	250
Sovereignty	250
Permanent Economic Interest	252
Utility and Construction of Scientific Evidence on Environmental Problems	254
Political-Economic Structure, Production Pattern and Environmental Institutions	255
Conflict between Trade Liberalization and Environmental Protection	256
The Concept of Sustainable Development as an Instrument of Reconciliation	258
Anthropocentrism v. Ecocentrism	260
Right to Exploit Resources and State Responsibility	262
Environmental Impact Assessment of Development Projects	265
Meeting Conditions for Attainment of Sustainable Development	267

	<i>Page</i>
Adoption of the Principle of Common but Differentiated Responsibilities	270
Technology Co-operation as a Bridge-gap	271
Environmental Challenges and Trade Policy Measures	272
Towards an Effective Reconciliation by the Year 2000 and Beyond	273
Nation States and Implementation of International Environmental Policies	274
Eradication of Poverty and Control of Production-Consumption Pattern	275
Eliminating the Conceptual Dichotomy between North and South	276
Reconciling States' Interests in International Trade with the Need for Environmental Protection	278
Development Assistance in International Economic Relations	280
Conclusion	281
17. DEVELOPMENT AND CODIFICATION OF INTERNATIONAL ENVIRONMENTAL LAW; WITHER NIGERIA A QUARTER OF A CENTURY AFTER STOCKHOLM AND HALF A DECADE AFTER RIO OKOROŌUDU-FUBARA M.	
Introduction	283
The United Nations and the Environmental Protection Network	285
Development and Codification of International Environmental Law	286
Implementing International Environmental Laws	291
Selective Incentives	293
Differential Obligations	293
Regionalization	293
Mutual Recognition	294
Model Diffusion	294
Alert Diffusion	295
Complaints and Custodian Action	295
Conclusion	296
18. LAW, THE ENVIRONMENT AND COMMUNITY STABILITY IN CONTEMPORARY NIGERIA SIMPSON S.	
Introduction	298
Background for an Alliance	300
International Science	301
National Politics	301
The Role of Scientists	302
The Law	303
Project Funding	303
Developing a Community Focus	303
Sustainable Development	304
Information	305
Some Observations on Niger Delta	305
Causes of Community Disaffection	306
Oil Pollution	306
Conclusion	306

**PART 5
POLLUTION AND ENVIRONMENTAL REGULATION**

19. OIL AND GAS EXPLORATION: RECONCILING CONTENDING ISSUES BAGUDU R. & ORS.	
Introduction	309
History of Oil and Gas Exploration	309
Forms of Environmental Degradation and Attempts to Curb them	310
Air Pollution	311
Water Pollution	312
Erosion and General Land Degradation	313
Legislation and Pollution	313
Ownership Rights of Land Containing Petroleum	316
Sustainable Development	318
Recommendations	319
20. STATUTORY CONTROL OF MUNICIPAL AND INDUSTRIAL WATER POLLUTION: NIGERIA'S EFFORTS SO FAR SALAMI O. A.	
Introduction	321
What is Water Pollution	322
Municipal Water Pollution	323
Industrial Water Pollution	324
Legislation on Water Pollution	326
Oil in Navigable Water's Decree 1968	326
Petroleum (Drilling and Production) Regulations, 1989	328
Section 245 of the Criminal Code	329
Section 10(1) of the Sea Fisheries Decree	329
Federal Environmental Protection Agency Decree	330
Harmful Waste (Special Criminal Provisions etc.) Decree	331
Guidelines and Standards in Industrial Water Pollution	332
Conclusion	333
21. COMPENSATION FOR OIL POLLUTION IN NIGERIA: A NEW AGENDA FOR SUSTAINABLE DEVELOPMENT FEKUMO F.	
Introduction	337
The Menace of Oil Pollution - Statistical Data	338
Common Law Remedies - Adequate Compensation	340
Petroleum Act and Regulations	340
Oil Pipelines Act, 1956	342
Foreseeability and the Rule in Rylands v. Fletcher	346
The New Agenda for Sustainable Development	347
Conclusion and Suggestions for Reform	355
22. THE 1982 LAW OF THE SEA CONVENTION AND MARINE POLLUTION AKINSANYA A.	
Introduction	357
Innovations/Achievements of the 1982 LOS Convention	359
Sources of Marine Pollution	366

	<i>Page</i>
National and International Measures in the Protection of the Marine Environment	373
Policy Implications of the 1982 LOS Convention	392
Conclusion	394
PART 6	
ENVIRONMENTAL LAW AND CORPORATE ACTIVITIES	
23. ENVIRONMENTAL CONSIDERATION IN THE DEVELOPMENT OF THE SOLID MINERALS INDUSTRY IN NIGERIA	OSUNBOR O. A.
Background	396
The Impact of Solid Minerals Exploration and Exploitation	397
Types of Solid Minerals	397
Effects on the Environment	397
Legislation on Mining Activities	399
Proposals for Change	401
24. THE ROLE OF INSURANCE IN ENVIRONMENTAL PROTECTION	OLAGUNJU G.
Introduction	404
The Environment and Pollution (Sources of Pollution)	404
Human Pollution	404
Vis Major	405
Civil Liability Arising from Environmental Pollution	405
Liability in Negligence	405
Liability in Nuisance	406
Strict Liability	408
Insurable Liabilities	409
Public Liability Insurance	410
Employer's Liability Insurance	411
Marine, Aviation and Joint-Venture (Oil) Insurance	411
Conclusion	412
25. INTERNATIONAL LAW AND THE PROTECTION OF THE MARINE ENVIRONMENT: PROBLEMS AND CHALLENGES FOR AFRICA IN THE 21ST CENTURY	POPOOLA A.
Introduction	413
Clarification of Operative Concepts	414
The Concept of Protection of the Marine Environment	414
The Concept of Pollution	415
The Challenges of Environmental Protection	417
Marine Pollution: Overview of the Problem	419
The Ocean as a Common and as a System	419
Sources of Pollution	421
Present State of the Law	424
Customary International Law	424
Other Legal Standards	425
Activities of International Organisations	428
African Perspectives and Challenges for the 21st Century	429
Concluding Remarks	432

24

THE ROLE OF INSURANCE IN ENVIRONMENTAL PROTECTION

Introduction

The Environment is an essential part of man's existence on earth. From historical origins God himself first had to make the environment conducive for living before creating man and putting him into it.¹

It is from his premise that we shall proceed to see how and examine the efforts that man himself has put into protecting this legacy which God handed down to him from time immemorial, at least in the area of the Law. In this aspect, the Insurance industry cannot stand alone, it has to team up with other laws to provide cover as and when necessary, against the degradation of the environment. Therefore the legal regime of insurance protection is the legal regime of combination of other laws to protect the environment.

The Environment and Pollution (Sources of Pollution)

The source of environment pollution are varied and many. Frankly speaking however, most pollutions are human related. There could however be instances where pollution is caused by natural means which falls under the *vis major* (Act of God) principle in law.

Human Pollution

The following are the identified areas of human pollution and some of the consequences arising therefrom.

1. Scientific researches and tests (e.g. Atomic, Nuclear, Rockets, Satellites etc.) leading to global warming, unstable climate conditions and sea-level rise. The latter itself makes small islands and coastal zones (e.g. the deltas and river plains) vulnerable to flooding, cyclones and tidal surges.
2. Deforestation leading to extinction of species and genetic depletion; also leading to drought and depletion of ground, surface waters, soil erosion and desertification.

1. The Holy Bible. See Genesis which states that man was created last after God had created all other things - the animals, the plants, the garden of Eden etc.

3. Industrial and Mining pollution accompanied by Toxic waste disposal leading to urban water, soil and air pollution.
4. Environmental sanitary pollution (e.g. waste disposal, fumes from burning, discharge from mechanical exhausts - cars, buses etc.).

Vis Major

In certain instances (though rare) a disruption or catastrophic act may seem to occur independent of any human intervention leading to serious environmental pollution. Examples are earthquakes, cyclones, volcanic eruptions, droughts etc. In such instances, the act leading to the pollution is described as an act of God (the *vis major*) and therefore nobody could be held responsible for it. It must be pointed out here however, that even though such act(s) usually occur independent of human actions, mostly the occurrence(s) is a cumulative effect of human actions e.g. as in scientific researches mentioned above.

Civil Liability Arising From Environmental Pollution

Liability for environmental pollution may arise in civil law under negligence, nuisance, trespass or in strict liability. In any of these cases whenever it arises, provided the risk giving rise to the pollution is insurable, the insurance industry will provide cover and pay damages to the claimant suffering from such pollution.

Liability in Negligence

Liability for environmental pollution may arise in negligence where the defendant by his act or omission caused a loss or damage to the plaintiff by the pollutant material emanating from him (the defendant) which a reasonable man ought to have foreseen, would result in such damage. The plaintiff must of course prove those three essential ingredients in Negligence in order to sustain his claim i.e. (i) that the defendant owed him a duty of care; (ii) that there was a breach of that duty; and (iii) that damage resulted from that duty. In addition, he must prove that the damage was the proximate cause of the loss (the proximate rule).

Once these are proved, the plaintiff's action succeeds and the defendant must pay damages in form of compensation to him. Because Negligence is an insurable liability, a defendant who has insured his liabilities under such head of the law would be covered by his insurer paying the amount of the compensation to the plaintiff, or indemnify the defendant where he had already paid to the plaintiff. Situations where this can arise include employers' liability insurance, public liability insurance, contractors' all risks insurance etc. We shall examine this in some detail later but before then let us see how environmental pollution can arise from the tort of nuisance and how this can be covered by insurance.

Liability in Nuisance

Nuisance is the unlawful interference with the enjoyment of land.² It could arise in two ways - privately or publicly. In either ways, as pointed out by the learned authors of Winfield and Jolowicz on Tort, it is that branch of the law of tort "most closely concerned with protection of the environment."³

Mostly, nuisance cases are concerned with pollution by oil, noxious fumes, offensive smells from premises used in rearing animals, noise, or vibrations.⁴ According to Windeyer J. in *Hargrave v. Goldman*, private nuisance may be described as the:

"Unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it."⁵

In the case of *M.K.O Abiola v. Felix O. Ijoma*,⁶ the plaintiff a Chartered Accountant lived with his family at No. 7 Shofidiya Close, Surulere. The defendant, a pharmacist owned and occupied the adjoining property at No. 8 Shofidiya Close, Surulere, and kept a poultry at the back of it as a pastime. The two houses were situated in an area zoned residential purposes only.

In 1969, the defendant purchased 400 day old chickens and kept them in pens erected on the boundary wall that separated his own building from that of the plaintiff. When the defendant first introduced this large number of chickens into the house, the plaintiff said that he protested to him that it would cause him great offence, but the defendant assured him to the contrary. As time went on, the plaintiff met the defendant to complain again that his comfort was being disturbed as a result of the poultry behind the dwelling house. The defendant took no action, and so the plaintiff brought this action to restrain the defendant's acts and to claim damages.

The plaintiff's claim was broadly based on the following:

- [1] Excessive noise made by the chickens in the early hours of the morning which prevented him (the plaintiff) from having a good sleep;
- [2] Odious smell emanating from the same chicken pens as a result of excreta or droppings from the poultry; and
- [3] Rats, flies and fleas escaping from the poultry into the house and disturbing his comfort and impairing his health.

2. See Street on Torts, (Seventh Edition), p. 229.

3. Winfield and Jolowicz on Tort, (Twelfth Edition) by W. V. H. Rogers (1984) p. 377.

4. c.f. Winfield and Jolowicz on Tort, op. cit. at p. 337; and also Nigerian Insurance Law, Funmi Adeyemi (1992) p. 199.

5. (1963) 37 ALJR 277 at 283. This was affirmed by the privy council in 1967. See (1967) AC. 645.

6. (1970) All NLR p. 569.

On the issue of noise, the court held as follows:

"I accept the evidence of the plaintiff that these chickens do make noise at the early hours of the mornings, and when some 400 chickens do join together to click or make noise about the same time and at this particular time of the night, it is bound to be excessive and to disturb the peace of a neighbour who is barely 5ft from their pens ... It seems to me to be more than triviality and the plaintiff is justified if he complains."⁷

On the issue of smells and odours, the court held that:

"There can be no doubt ... that droppings from chickens do smell when left for a while. Although the defendant claims to keep the poultry tidy, but not smell proof, it is weekly that the droppings are cleared by his labourers. These droppings or excreta will undoubtedly give out bad smells since they are not cleared up immediately and a person such as the plaintiff who is close to the poultry will sense it more than the defendant unless when the latter pays his regular visits to the poultry to satisfy his tastes ... I do not believe that the plaintiff is being fanciful in all his complaints of excessive noise and smells and they are, in my judgment more than trifling inconvenience that an ordinary person living in that part of Surulere which is a residential area can be called upon to bear."⁸

Finally, on the issue of flies, rats and fleas escaping into his house from the poultry, the court held the plaintiff's claim was not proved and dismissed that claim. But on the issue of noise and smell, the court granted an injunction and awarded £100 damages against the defendant.

The above case highlights damages arising from environmental pollution emanating from noise or smell and what remedies are available to a person suffering from such pollution.

The damages complained of, by the plaintiff are essentially those which may be covered under public liability policy.⁹

As for public nuisance, the same act may constitute both private and public nuisance except that the latter is regarded more as a crime than a tort and so it is prosecuted by the State unless the plaintiff can prove that he has suffered damages

7. Ibid, at 574 per Dosunmu, J.

8. Ibid, at 547 - 575 per Dosunmu, J. c.f. the case of Lagos City Council v. Olutimehin (1969) 1 All NLR 403, and also *Helsey v. Esso Petroleum Company Ltd.* (1961) 1 WLR 683.

9. Infra.

over and *above* others in the community. In its more practical sense, it is defined as that which materially affects the reasonable comfort and convenience of life of the members of the public as a whole, or a class of people within a community.

Liability for Trespass

Trespass to land is the unjustifiable interference with the possession of land. It deals essentially with interference with possession.

According to Street on Torts, it is:

"Intentionally or negligently entering or remaining on or directly causing any physical matter to come into contact with, land in the possession of another."¹⁰

Physical matter in this sense has been further argued to include 'perhaps anything having size or mass, including gases, flames, beams from searchlights and mirrors, but not vibrations.¹¹ Thus the placing of rubbish on another's land has been held to constitute trespass.¹²

Trespass is actionable *per se*,¹³ and so where a claim arises on it based on environmental pollution, the plaintiff need not prove that damages have resulted from such pollution. The mere presence of the pollutant material on the land is enough ground for action in trespass.

Strict Liability

This principle also known as the rule in *Rylands v. Fletcher*,¹⁴ which is the *locus classicus* states that:

"A person who (in the course of non-natural user of land) for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and if he does not do so, be *prima facie* answerable for all the damage which is the natural consequence of its escape."¹⁵

From the above it could be seen that liability for environmental pollution could be strict, and in most cases it is. This is in spite of whether the person causing the pollution was negligent or not. The fact of *Rylands v. Fletcher* itself¹⁶ shows that the defendants themselves were not negligent (even though their independent contractor was) for the water which escaped from their reservoir to damage the plaintiff's mines

10. Street on Torts, (8th edition).

11. *Ibid.*, at p. 66.

12. See the case of *Gregory v. Piper* (1928) 9 B & C 591.

13. That is without proof of actual physical injury or damage.

14. (1866) LR 1 Ex. 265.

15. *Ibid.*, at p. 279 - 280 per Black burn, J.

16. *Supra.*

but they were nevertheless held strictly liable. This shows the extent to which the court may go in protecting the individual against interference with his personal rights of enjoyment over his property.

Strict Liability applies to pollution cases and the court in later years after the *Ryland's case* have expounded it to cover a variety of cases mostly involving pollution e.g. the escape of gas,¹⁷ explosions,¹⁸ oil,¹⁹ noxious fumes,²⁰ etc. In *Umudje & Anor. v. Shell B.P.*²¹ crude oil and chemicals previously collected in a pit under the control of the defendants escaped and slipped into the plaintiff's fishing ponds and lakes thereby causing damages to the fishes and hindered fishing activities in the said lakes and the fishing ponds. The defendants were held liable under the rule in *Ryland v. Fletcher*.²²

Insurable Liabilities

Under the law of insurance, any liability which is legal is insurable.²³ Traditionally, liability may either be tortious or contractual. But of recent, the issue of statutory liability is also on the rise with statutes imposing various liabilities on the individual.²⁴

Contractual liability is that which for valuable consideration one person assumes for the benefit of another, for example, obligations under a policy of insurance, obligations under contract for supply of goods, mortgage, bailment etc. Since a person has insurable interest to the extent of his contractual obligations, contractual liabilities are generally speaking insurable, for example, contractors - all risk insurance, professional indemnity insurance etc.

Tortious liability on the other hand deals with the duties and obligations which the laws imposed upon the individuals. Failure to comply with these duties and obligations makes the wrongdoer (also referred to as the Tortfeasor) to be liable in damages. This is to serve as a form of disablement or deterrence for him against further violations. But most importantly, it is to compensate the person that has been wronged. It is in regard to this that insurance comes in, to cushion the effect of such payment

17. See the case of *Batcheller v. Tunbridge Wells Gas Co.* (1991) 84 LT 765.

18. *Allies v. Forest Rock etc Co.* (1918) 34 TLR 500; *Rainham Chemical Works Ltd. v. Balvedere Fish Guano Co. Ltd* (1921) 2 AC 465.

19. *Smith v. GWR* (1926) 135 LT 112.

20. *West v. Bristol Tramways Co.* (1908) 2 KB 14.

21. (1975) 5 UILR (pt. 1) p. 115.

22. *Supra.*

23. As against gambling and wagering. See the Life Assurance Act 1774 and the Gambling Act 1845 which prohibit any contract wherein the insured shall not have insurable interest in the thing insured, and any gaming contract respectively.

24. See the Nuclear Installation Act 1965 (Britain) which states that no person other than the United Kingdom Atomic Energy Authority shall use any site for the operation of nuclear plant unless a license to do so has been granted in respect of that site by the Minister of Power; see also the Merchant Shipping (Oil Pollution) Act 1971 (also Britain) which imposes civil liability upon the owner of a ship carrying a cargo of persistent oil in bulk for the escape or discharge of such oil from the ship; see also the Control of Pollution Act 1974 (Britain). In Nigeria various States have their environmental Sanitation within the State. There is also the Harmful Waste (Special Criminal Provisions etc) Decree 1988. This Decree prohibits dealing (either by sale, purchase, transport, storage etc) in harmful wastes throughout the federation. The Federal Environmental Protection Agency (FEPA) Decree 1988 prohibits and makes unlawful the discharge of harmful and any hazardous substance into the air, land or waters of Nigeria or the joining shorelines except such discharge is authorised. Under the two decrees it is made specifically an offence to violate these provisions.

payment (damages) on the wrongdoer while at the same time providing succour for the victim of the wrong.

So far, all that we have discussed in relation to Civil liability arising in tort are all liabilities covered by insurance. A policy may be taken out to cover a person's liability for negligence, as well as nuisance. So also may it be taken out for trespass or strict liability. This form of insurance is referred to as liability insurance and it has been defined as:

"a contract of indemnity in which the insurer undertakes, subject to the terms of the policy, to pay any damages or compensation which the insured may be liable to pay to a third party in connection with the commission of a tort or following a breach of contract."²⁵

Let us now examine some of such policies.

Public Liability Insurance

This policy covers the liability of the policy holder to the members of the public in respect of damages arising from his negligence, nuisance constituted by him, strict liability or trespass. It is a contract of indemnity and so under the policy, the insurer undertakes to pay all sums which the insured shall become legally liable to pay as a result of accidental death or injury caused to any person(s) or damage to his property. Thus accidental injury, death or damage to persons or property caused by environmental pollution is covered under the policy and the insurer will pay for loss arising therefrom. Usually, however, there is a limit on the amount of money the insurer will pay. This is referred to as the limit of indemnity and it is fixed at the onset of the policy. So that in case the insured party is claiming more than the amount of this limit, it is the insured who pays for the amount of the excess. The insurer only pays up to the limit of his indemnity as agreed in the policy. Usually too, there are policy exceptions excluding the liability of the insurer in some cases e.g. there could be exceptions regarding damage or injury caused by war, earthquake or some other catastrophies occurring through unnatural means such as pollution caused by oil spillage from volcanic eruptions, bombing of warships by enemy soldiers etc.

Under the policy, a claim may be made against the insured under third party procedure. The insurer will however only be liable to pay if the insured is also held liable. Thus, the insurer is entitled to use all the defences available to the insured against the claim. In effect, for the claimant to succeed, he must prove the liability of the insured which resulted in the pollution to him as discussed earlier either under negligence, nuisance, in strict liability or in trespass.

25. See Nigerian Insurance Law (1992) by Funmi Adeyemi p. 193; see also Moulton LJ. in *British Cash & Parcel Conveyors v. Lamson Store Service* (1908), 1 KB 1006 at 1014; and the case of *Goddard and Smith v. Frew* (1939) 4 All ER 358.

In *Mason v. Levy Auto Parts of England Ltd.*²⁶ the defendant kept combustible materials on his yard which ignited and started a fire which spread unto the plaintiff's land causing damage therein. Mackenna, J. stressing the point for the strict liability of the defendant expressed that the defendant would be liable if he brought on his land things likely to catch fire and kept them there in such conditions that, if they ignited, the fire would likely spread to the plaintiff's land, and the defendant did so in the course of non-natural use of his land. In this kind of situation an insurer will be liable if a public liability policy was in force to cover the defendant.

Employer's Liability Insurance

This policy is taken out by the employer to cover his legal liabilities to his employees while at work. At common law an employer owes a duty of care to his employees to ensure a safe place of work, a safe system of work, safe machineries and tools, and equipment to work with for them. Thus, an employee who sustains injury as a result of pollution in the working environment is entitled to a claim of damages in negligence against his employer.

Today apart from his common law liabilities, various statutes have imposed duties upon the employer to ensure that the working environment is conducive for his employees. Examples of such statutes include: the Factories Act (1956); the Labour Act (1974); the Mineral (Safe Mining) Regulations (1958); the Quarries Regulations (1969); the Petroleum Regulations (1961). Under the Workmen's Compensation Decree, 1987²⁷ an employer in Nigeria is obliged to pay compensation to his workmen of any personal injuries sustained by them caused by accident arising out of and in the course of the employment. If such accident results in death, then the employer must pay the amount due to the dead employee to his estate. Personal injury include injury arising from that sustained from working in a hazardous environment e.g. the inhaling of fumes or toxic gases and noxious substances as to result in damage to the employee. To cover this liability, the employer's liability policy is taken out by the employer which pays the cost of the damage claimed by the employee from the employer whenever a loss arises.

Marine, Aviation and Joint-venture (Oil) Insurance

Apart from the public liability insurance, policies of marine, aviation and exploratory joint-ventures in petroleum may sometimes make provisions for compensation against incidences of environmental pollution. For example the clean-up expenses and seepage, pollution and contamination policy under the joint-venture (oil exploration) agreement will usually cover such things as:

26. [1967] QB 530. See also the case of *Abiola v. Ijoma* (supra).
27. No. 17 of 1987.

- (a) All sums payable as damages for bodily injury, loss or damage to property caused directly or indirectly by seepage, pollution or contamination arising from the operations of oil wells.
- (b) All costs of cleaning-up and removing the seeping, polluting or contaminating substances, matters and mixtures connected with or emanating from oil wells.
- (c) Costs and expenses incurred by the company in the defence of any claims - e.g. Solicitor's fees, litigation expenses, costs and interests on judgment.²⁸

Conclusion

Having come this far, one may safely conclude that the role of insurance in the protection of the environment is not as much as to prevent the occurrence of environmental pollution but to cushion the effect of such pollution whenever it arises.

Whether we like it or not, human activities will always result in the degradation of the environment. Even our common defecation and the expunging of wastes from our body systems is one of such pollution. What the insurance industry is therefore concerned about is the minimization of loss compensation of same whenever it arises from such human acts or omissions. This is of course not overlooking the industry's ancillary roles such as educating the public on the effect of pollution or liaising with both government and non-governmental agencies in promoting a pollution-free environment. But this does not in any way differ from its traditional role of providing succour when human actions have run contrary to intentions.

28. See Nigerian Petroleum Law, by G. Etikerentse (1985) p. 173.