

OKORODAS & OKORODAS: Does the Oil Pipelines Act of Nigeria Exclude Common Law Claims in Respect of Damage Resulting from Oil-Related Environmental Pollution?: A Critique of the Decisions in The Bodo and Ogbu Cases

DOES THE OIL PIPELINES ACT OF NIGERIA EXCLUDE COMMON LAW CLAIMS IN RESPECT OF DAMAGE RESULTING FROM OIL-RELATED ENVIRONMENTAL POLLUTION?: A CRITIQUE OF THE DECISIONS IN THE *BODO* AND *OGBU* CASES*

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Abstract

Case law in Nigeria reveals that for decades, civil liability for oil-related environmental damage has always been established through two principal channels. The first is the common law principles of tort, consisting of nuisance, negligence and the rule in Rylands v. Fletcher. The second channel is that provided by statute law, with the primary statute being the Oil Pipelines Act (OPA) of 1956. This judicial approach appeared to remain unchallenged until 2014. In 2014, in the case of Bodo Community v. The Shell Petroleum Development Company of Nigeria Limited [2014] EWHC 1973 (TCC) (instituted in England in respect of oil spills that occurred in Nigeria), The English High Court interpreted the Oil Pipelines Act as having excluded common law claims in respect of oil spill damage emanating from oil pipelines licenced under the OPA. Subsequently, in Nigerian Agip Oil Company Limited v. Ogbu (2017) LPELR-45217, the Nigerian Court of Appeal approved without reservation the decision of the English High Court on the issue. This article responds to these judicial decisions. Using the provisions of the OPA (which was saved by the Petroleum Industry Act 2021) as a springboard, the article critiques the decisions in both cases. Through an analysis of the decisions vis-à-vis the provisions of the OPA, the article demonstrates the fallacies inherent in the argument that the OPA excludes common law claims for damage resulting from oil-related environmental pollution. The analysis contained in the article remains relevant because the issue has neither been argued before nor resolved by the Nigerian Supreme Court in subsequent cases.

Keywords: Oil-Related Environmental Pollution, Nigerian Agip Oil Company Ltd v Ogbu Case, Bodo and Ogbu Case, Petroleum Industry Act, Common Law, and Case Law

1. Introduction

Oil was first discovered in Nigeria in 1956, and commercial export began in 1958.¹ Virtually all of Nigeria's oil and gas deposits are located in the country's Niger Delta,² a huge area of wetland measuring approximately 27,000 square miles.³ Amnesty International reports that the oil and gas sector represents 97 per cent of Nigeria's foreign exchange revenues and contributes 79.5 per cent of government revenues.⁴ Similarly, in 2006, the UNDP reported that oil exports alone accounted

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¹ Amnesty International, *Petroleum, Pollution and Poverty in the Niger Delta* (Amnesty International Publication, 2009) 1, 11; Chinenye Nwapi, 'A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria' (2010) 54(2) JAL 184,189; Adati Kadafa, 'Oil Exploration and Spillage in the Niger Delta of Nigeria' (2012) 2(3) Civil and Environmental Research 38, 38.

² Jędrzej George Frynas, *Oil in Nigeria: Conflict and Litigation between Oil Companies and Village Communities* (Hamburg/London: LIT Verlag Münster 2000).

³ John Ghazvinian, 'The Curse of Oil: Niger Delta, Nigeria' (2005) 83(1) TVQR 4.

⁴ Amnesty International (n 4) 11.

for over 95% of the country's national revenue, making them the single most important source of revenue for the Federation.⁵ Although there is a statutory framework for ensuring that oil prospecting companies maintain acceptable minimum standards in oil-related activities,⁶ it has been observed that severe oil spills have become regular occurrences in Nigeria.⁷ Not only is the Niger Delta crisscrossed by over 6,000 kilometres of oil pipelines and flow stations,⁸ it is also reported that about 4,000 oil wells have been drilled in the area since oil operations began in the country, bringing with it severe oil spills totaling twice that created by the 2010 Deep Water Horizon oil spill in the US.⁹ Data from the Nigerian National Petroleum Corporation (NNPC), based on reports by the oil operating companies, suggests that about 2,300 cubic metres of oil were spilt in some 300 separate incidents between 1976 and 1996.¹⁰ However, it is believed that the figures are grossly under-reported, as the real figures can be ten times higher than the reported figures.¹¹ The indigenous people of the Niger Delta are mainly farmers and fishermen whose source of livelihood and economic well-being depend almost entirely on a pollution-free environment.¹² As expected, the frequent oil spills in the Niger Delta have decimated the environment, and this has had a severe impact on the lives of the already impoverished people living in the area.¹³

Oil-related activities of Multi-National Oil Companies (MNOCs) have, over the years, led to numerous litigations in Nigerian Courts.¹⁴ Typically, these disputes are between, on the one hand, individuals and small communities whose agricultural and fishing interests have been severely impacted by the oil-related activities of the MNOCs, and on the other hand, the MNOCs themselves.

The case law in Nigeria reveals that civil liability for oil-related environmental damage is established through two principal channels. The first is the common law principles of tort, consisting of nuisance, negligence and the rule in *Rylands v. Fletcher*. The second channel is that provided by statute law, with the primary statute being the Oil Pipelines Act (OPA) of 1956.

⁵ United Nations Development Programme, 'Niger Delta Human Development Report' (2006) <Human Development Report | Human Development Reports (undp.org)> accessed 05/04/2020.

⁶ See for example, Petroleum Act, CAP P10 LFN 2004 and the Petroleum (Drilling and Production) Regulations [LN 69 of 1969] made thereunder; the Federal Environmental Protection Act, CAP F10, LFN 2004 (now repealed); Associated Gas Reinjection Act, Cap A25 LFN 2004 (now repealed); Environmental Impact Assessment Act, CAP E12, LFN 2004; Oil in Navigable Waters Act, CAP 06, LFN 2004; Oil Pipelines Act, CAP 07, LFN 2004.

⁷ Lauren McCaskill, 'When Oil Attacks: Litigation Options for Nigerian Plaintiffs in U.S. Federal Courts' (2012-2013) 22 Health Matrix 535, 547; Amnesty International (n 1) 11.

⁸ Olalekan Adekola & Gordon Mitchell, 'The Niger Delta wetlands: threats to ecosystem services, their importance to dependent communities and possible management measures' (2011) 7(1) IJBESM 50.

⁹ McCaskill (n 10).

¹⁰ Yaw Twumasi and Edmund Merem, 'GIS and remote sensing applications in the assessment of change within a coastal environment in the Niger Delta region of Nigeria' (2006) 3(1) IJERPH 98, 102.

¹¹ Michael Watts and Anna Zalik, 'Consistently unreliable: Oil spill Data and Transparency Discourse' (2020) 7(3) The extractive industries and society 790, 791; McCaskill (n 10).

¹² Andrew Okoji, 'Social Implication of the Petroleum Oil Industry in the Niger Delta' (2002) 59 IJES 197, 202.

¹³ Emeka Amaechi, 'Litigation Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure Rules 2009), in Ensuring Access to Justice of Victims of Environmental Degradation' (2010) 6(3) Law Env't & Dev. J. 320.

¹⁴ Some include *Amos v Shell Petroleum Development Company Ltd* (1977) 6 SC 9; *Atunbi v Shell Petroleum Development Company Ltd Unreported Suit No. UCH 48/73* (12 Nov 1974) *Ughelli High Court*; *Chief (Dr.) Pere Ajuwa & Another v The Shell Petroleum Development Company of Nigeria Limited* (2011) 12 S.C. 118; *Shell Petroleum Development Company Ltd v Chief Tiebo* (2005) 9 NWLR (Pt. 931) 439.

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Nigerian judges have always assumed jurisdiction to hear and determine claims relating to oil spills emanating from the oil operations of the Multi-National Oil Companies (MNOCs) operating in the country. It appeared immaterial to the courts whether such claims were brought under common law principles (as many of them were), or whether they were brought under the Oil Pipelines Act (OPA) (as some were), or indeed, whether they were brought concurrently under the common law and the OPA (as many lawyers were wont to do). This judicial approach appeared to remain unchallenged until 2014. Before 2014, no arguments arose before Nigerian courts as to whether the OPA has excluded common law claims for damage occurring as a result of oil pipeline operations. The case of *Bodo Community v. The Shell Petroleum Development Company of Nigeria Limited*¹⁵ appears to be the first case where this crucial issue has been fully argued and determined. This case was instituted before the English High Court. As will be seen shortly, the English court interpreted the Oil Pipelines Act as having excluded common law claims in respect of oil spill damage emanating from oil pipelines licenced under the OPA. Although *Bodo's* case was determined by a foreign Court, as will be seen later, its persuasive force in Nigeria has been substantial. In *Nigerian Agip Oil Company Limited v. Ogbu*,¹⁶ the Nigerian Court of Appeal approved without reservation the decision of the English High Court on the point under discussion. Indeed, the Court of Appeal appeared to have gone even further than the English High Court, in essence suggesting that the OPA excludes common law claims for damage resulting from oil-related environmental pollution, irrespective of whether such damage emanated from oil pipelines licenced under the OPA.

This article responds to these judicial decisions. Using the provisions of the OPA as a springboard, the article critiques the decisions in both cases. Through an analysis of the decisions vis-à-vis the provisions of the OPA, the article demonstrates the fallacies inherent in the argument that the OPA excludes common law claims for damage resulting from oil-related environmental pollution.

The analysis contained in this article is crucial for two main reasons. First, there is yet no further appellate decision arising from Ogbu's case. Although the Nigerian Supreme Court has subsequently dealt with oil spill cases that appeared to have been based on common law claims (see for example, *Centre for Oil Pollution v Nigerian National Petroleum Corporation*¹⁷ and *The Shell Petroleum Development Company of Nigeria Limited v. Okeh*¹⁸) the issue decided by the English High Court and approved by the Court of Appeal in Ogbu's case has neither been argued before nor resolved by the Nigerian Supreme Court. Thus, there have been no judicial discussions on the issue. Secondly, as the OPA, and in particular, section 11(5) thereof, continues to remain operative by virtue of section 310(9)(c) of the Petroleum Industry Act 2021 (PIA), the issues addressed in this article remain relevant.

As a prelude to the analysis that will be done shortly, the next section provides an overview of the current status of the OPA, in light of the Petroleum Industry Act 2021, which contains a seemingly comprehensive "legal, governance, regulatory and fiscal framework" for the Nigerian petroleum

¹⁵ [2014] EWHC 1973 (TCC).

¹⁶ (2017) LPELR-45217.

¹⁷ (2018) LPELR-50830(SC)

¹⁸ (2025) LPELR-80874(SC)

industry.¹⁹ The overview is done with a view to establishing the continued relevance of the OPA, and in particular, section 11(5) thereof, which is at the core of the analysis contained in the article.

2. The current status of the OPA vis-à-vis the Petroleum Industry Act 2021

It is to be noted that the English case of *Bodo Community v. The Shell Petroleum Development Company of Nigeria Limited*²⁰ was decided in 2014, and the Nigerian Court of Appeal case of *Nigerian Agip Oil Company Limited v. Ogbu*²¹ was decided in 2017. In 2021, the Government of Nigeria enacted the Petroleum Industry Act (PIA). The PIA was intended to provide a comprehensive “legal, governance, regulatory and fiscal framework” for the Nigerian petroleum industry. It sought to synthesise the myriad of enactments that had hitherto governed the petroleum industry in Nigeria and produce a single statutory framework for the petroleum industry. Thus, with the enactment of the PIA, several statutes became obsolete and were expressly repealed by section 310 thereof.²² However, the Oil Pipelines Act 1956 (OPA) was not repealed. Indeed, section 311(9)(c) of the PIA specifically saved the OPA by providing that the

“Oil Pipelines Act ... and any subsidiary legislation shall, in so far as it is consistent with this Act, remain in operation until it is repealed or revoked and shall be deemed for all purposes to have been made under this Act.”

As of this date, the OPA has not been repealed. As a statute, the OPA remains part of the Laws of the Federation of Nigeria, and its provisions continue to be effective to the extent that they are not inconsistent with the provisions of the PIA. Section 309 of the PIA provides for consequential amendments of pre-PIA enactments. The section provides that

“... where the provisions of any other enactment or law except the Nigeria Oil and Gas Content Development Act are inconsistent with the provisions of this Act, the provisions of this Act shall prevail and the provisions of that other enactment or law shall, to the extent of that inconsistency, be void in relation to matters provided for in this Act.

An examination of the liability provisions contained in section 11(5) of the OPA shows that they are not inconsistent with any provision of the PIA. Indeed, the detailed liability provisions contained in the said section 11(5), which largely incorporate the common law principles of nuisance, negligence and the rule in *Rylands v. Fletcher*, remain untouched. It is to be noted that the liability provisions contained in the OPA are, by their nature, restricted to damage occurring as a consequence of the oil pipeline operations of a holder of an oil pipeline licence. Apart from the sparse, general liability provisions contained in section 101(2) of the PIA, which require a person engaged in petroleum operations not to damage or destroy property, there are no detailed provisions in the PIA that deal specifically with damage occurring as a result of oil pipeline operations. Thus, the provisions of the OPA will continue to be relevant in claims for damages arising from oil pipeline spillages.

¹⁹ See the long title of the Act.

²⁰ [2014] EWHC 1973 (TCC)

²¹ (2017) LPELR-45217

²² For example, the Associated Gas Reinjection Act 1979, the Hydrocarbon Oil Refineries Act 1965, the Motor Spirits (Returns) Act, the Nigerian National Petroleum Corporation (Projects) Act 1993, The Nigerian National Petroleum Corporation Act 1977 and the Petroleum Products Pricing Regulatory Agency (Establishment) Act 2003 were all expressly repealed by section 310 of the PIA.

3. The Bodo Case

The complaints in the *Bodo* case were that crude oil spilt from a 24" pipeline in the Bodo Community area sometime in 2008, and the spill caused damage to land owned and occupied by members of Bodo Community. While the full extent of the spillages and their timing were in dispute, subject to the dispute, Shell admitted liability for the spillages under the OPA, and not under the common law claims made by the Claimants. Amongst others, the issue arose as to whether the enactment of OPA has excluded claims based on common law insofar as the oil spillages emanated from oil pipelines.

As a prelude to the English High Court's consideration of the issue as to whether the OPA has excluded common law claims for damage caused by oil spills from oil pipelines, Justice Akenhead of the English High Court agreed that Nigerian lawyers and judges seemed to have proceeded with oil spill litigations over the years on the understanding that common law claims could be made side-by-side with claims made under the OPA:

"Over the years, there have been numerous court proceedings in relation to oil spills against oil companies, These have been mostly proceedings by individuals, communities and other representative bodies for damages for nuisance, negligence and under the rule in *Rylands v Fletcher* as well as under the compensation provisions of the OPA. A substantial number of the cases have proceeded to appeals, including to the Supreme Court of Nigeria."²³

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Nevertheless, Justice Akenhead found that in the numerous cases where Nigerian courts have heard and determined claims based on the common law, no issue arose as to whether the claimants ought to have made their claims only under the OPA. Consequently, his Lordship felt able to proceed to determine the issue based on Nigerian law presented to the Court by experts called by each side. The English Court's approach to the resolution of the issue is instructive. Justice Akenhead noted that

"There is no express wording in the OPA which actually excludes the common law. Thus, for example, the wording does not say that for oil spillages from pipelines the common law is excluded or that it is the only compensation payable. It is common ground between Justices Oguntade and Ayoola, and rightly so, that what is needed here, therefore, to determine whether the common law or common law rights are excluded by the OPA is a necessary implication from the words used in the statute and possibly also the context. They, and I, accept that there is a rebuttable presumption against legislative interference with the common law and that the same principles of statutory interpretation as apply in England and Wales apply in Nigeria."

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With the guidelines set out above, Justice Akenhead proceeded to consider whether the OPA has indeed excluded claims based on common law insofar as such claims concern oil spillages from pipelines. As a further guide, Justice Akenhead reviewed a number of important Nigerian academic and judicial authorities on the interpretation of statutes. His Lordship referred to Professor A.E.W. Park, who had stated:

²³ See para. 5 of the judgment, *supra*.

“...while it is beyond dispute that Nigerian legislation can override English common law, equity and statutes, it does not automatically follow that such an enactment removes from the law any English rule on the same or a related subject. In each case, it is necessary to examine the enactment and decide from its contents and the surrounding circumstances whether it was intended to supplant or merely to supplement the comparable portion of the received English law.”²⁴

Importantly, Justice Akenhead referred to the decision of the Nigerian Supreme Court in the case of *Adeshina v Lemonu*,²⁵ where the Court rejected the argument that a provision in the Minerals Act 1958 vesting property in all rivers, streams and watercourses in Nigeria in the Crown had overridden the public’s common law right to fish in tidal waters. The Supreme Court held:

“This argument overlooks the presumption against implicit alteration of the law: see Maxwell on the Interpretation of Statutes (10th ed.) p. 81, and Craies on Statute Law (5th ed.) p. 310. Maxwell puts it as follows: ‘One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication...’

...Learned counsel for the appellant has not referred to any provisions of the Minerals Ordinance as pointing to an intention to affect existing rights of fishery by the vesting of rivers etc. in the Crown, and we do not think that the right of public fishing stated in *Amachree v Kalio* (supra) was affected by the Ordinance.”²⁶

Justice Akenhead further referred to statements made by the learned author of *Craies on Legislation*, Daniel Greenberg,²⁷ concerning the presumption against legislative interference with common law:

“The creation of a statutory duty to do something does not of itself abrogate a common law duty to do that thing, unless there is something about the form or content of the statutory duty which is repugnant to the continuation of the common law duty...

“Despite the increasing shift towards control by legislation, there remains a rebuttable presumption that the legislature does not intend to alter a clearly established principle of law –

“Statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare.” *Leach v. R* [1912] AC 305.

“So, in many cases the courts have rejected a possible interpretation of legislation on the grounds that it would involve significant departure from pre-existing common law, without the departure being expressly provided for or a necessary implication from the context of the provision.”

Justice Akenhead then proceeded to consider a number of English cases where the English courts have held the wording of certain statutes as having impliedly excluded common law claims for

²⁴Andrew Park, *The Sources of Nigerian Law* (African Universities Press, Sweet & Maxwell 1963) 50.

²⁵[1965] 1 ALL NLR 233.

²⁶ibid 237-8.

²⁷ Daniel Greenberg, *Craies on Legislation* (1st supp, 10th edn., Sweet & Maxwell 2012).

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nuisance.²⁸ It is remarkable that most of the English cases cited by Justice Akenhead concerned statutes that empower public authorities to carry out public works for the benefit of the community.²⁹ In interpreting such statutes as having excluded common law rights, the courts appear to have been influenced by the reasoning that the exclusion of common law rights was a small cost to be paid by the individual for public works undertaken by the public authority for the benefit of the community. The situation is different with the OPA. The OPA makes provision enabling commercial oil companies to carry out private business for profit (albeit business that is strategically important to the economic well-being of the nation). This difference is significant. It provides a cogent reason for not interpreting the OPA in like manner.

As can be seen above, the question whether the OPA has excluded common law rights is one that is to be determined by reference to Nigerian law. For the English Court, this was a matter of evidence. Two eminent jurists were called to testify as experts on Nigerian law. Both were retired justices of the Supreme Court of Nigeria. Justice Oguntade testified for the claimants, while Justice Ayoola testified for the defendant. Justice Ayoola asserted that the OPA provided a comprehensive compensation regime intended to exclude common law claims for damage resulting from oil pipeline operations. On the other hand, Justice Oguntade, while accepting that the OPA was an important piece of legislation, maintained that it was not an exclusive code for compensation for oil spills arising from oil pipeline operations. For Justice Oguntade, common law remedies could co-exist with the statutory remedies provided by the OPA without any difficulties.

Justice Akenhead preferred the submissions made by Justice Ayoola and thus came to the conclusion that the structure of the OPA is such that it must be interpreted as having impliedly excluded common law claims for damage arising from pipelines licenced under the OPA. A number of factors appeared to have influenced the English judge in arriving at this conclusion. First, Justice Akenhead indicated that if common law rights were intended to still apply, there would have been no need to provide for compensation in the OPA. This is because the existing common law rights were sufficient to address all issues of compensation.

It is submitted that the mere fact that compensation provisions were included in the OPA is not conclusive of an intention to exclude common law rights. As Professor Park noted

“... In each case, it is necessary to examine the enactment and decide from its contents and the surrounding circumstances whether it (in this case, the OPA) was intended to supplant or merely to supplement the comparable portion of the received English law.”³⁰

Secondly, Justice Akenhead appeared to have accepted the view, very strongly put forward by Justice Ayoola on behalf of Shell, that the statutory regime of the OPA is comprehensive, and provides for “a relatively simple and expeditious system of licensing and compensation...”³¹

²⁸ See for example, *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284, where the Court of Appeal in England held that the wordings of section 34(3) of the Land Drainage Act impliedly excluded the common law claims for nuisance.

²⁹ See for example, *Marriage v East Norfolk Rivers Catchment Board* [1950] 1 KB 284 and *Manchester Corporation v. Farmworth* [1930] AC 171.

³⁰ Andrew Park, *The Sources of Nigerian Law* (African Universities Press, Sweet & Maxwell 1963) 50.

³¹ See para. 57 of the judgment.

It can hardly be doubted that the OPA is quite comprehensive as to its licensing provisions. That is unsurprising. After all, the main focus of the OPA is to make provision for the establishment of pipelines for the conveyance of mineral oils. This much is apparent from the long title of OPA:

“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.”

The speech delivered by the Minister of Land, Mines and Power, Mr Muhammadu Ribadu, at the second reading of the Oil Pipelines Bill in the House of Representatives on 2 August 1956, also reveals the main focus of the OPA:

“Mr Speaker, Sir, hon. Members will be aware that large oil companies are energetically exploring Nigeria for oil. Wells have been bored in a number of localities and traces of oil found, but unfortunately, it is as yet too early to say whether it has been found in commercial quantities. But if, though I would much prefer to say when, it is found in such quantities, it is essential that the company finding it should have facilities to convey the oil easily and cheaply to a place of shipment or to its place of utilisation”.

Thus, while it is right to contend that the licensing provisions of the OPA are comprehensive, the same cannot be said of the compensation provisions. They are neither detailed nor expressed in a manner that removes doubts as to their exclusivity vis-à-vis common law claims. In the face of the well-known principle that “statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare,”³² the fact that no mention whatsoever is made of existing common law rights is inimical to the argument that the compensation provisions of the OPA are exclusive.

Further, Justice Akenhead pointed to observed differences between the common law regime for claims for damages and the statutory regime for compensation claims. Under section 20 of the OPA, a claimant who had been awarded compensation by a court may be entitled to return to the court to seek more compensation for further loss or damage if such loss or damage was not contemplated at the time of the initial award of compensation. This opportunity for a second bite at the cherry is not available to a person claiming under common law. By the common law principles of *res judicata* and issue estoppel, all issues arising from a cause of action must be litigated once and for all. Once a judicial decision has been made concerning the issues, no part of them can again be presented to the court for adjudication. Justice Akenhead appeared to accept this difference as a pointer to the exclusivity of the compensation regime of the OPA.

It is submitted that this difference only shows that the compensation regime in the OPA may be more advantageous to a claimant in some aspects, while in some other aspects, common law remedies may be more beneficial. In principle, there is nothing odd about the existence of a range of choices available to a claimant who has suffered damage resulting from pipeline operations.

³² See *Leach v R* [1912] AC 305.

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In any case, it is beyond argument that the compensation regime in OPA applies only in respect of oil spills from pipelines licenced under the OPA. It does not apply to oil spills from oil wellheads, which have no connection to pipelines licenced under the OPA. 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. Thus, 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.

There is therefore an existing difference between claims for damage resulting from an oil spill from pipelines licenced under the OPA, and claims for damage resulting from an oil spill from oil wellheads not connected to a pipeline licenced under the OPA. If it is accepted that the OPA is exclusive, it will then mean that in respect of the former, claims must only be made in accordance with the compensation regime under OPA, while in the latter, claims may be made under the common law. It is submitted that this is indeed a pointer that, in enacting the OPA, no particular consideration was given to the question whether common law rights should be excluded.

Again, Justice Akenhead appeared to have been influenced by his understanding of the provisions of section 21 of the OPA. In relation to the said section, his Lordship stated:

“The court may order compensation payable to individual claimants to be paid to the chief, headman or other community member if the interests injuriously affected are those of a local community. That goes against the norm that an ordinary party who is entitled to compensation by way of damages is entitled to those damages and, if that party is neither insane nor underage (in which case it will be paid to someone on their behalf), the court could not order the damages to go to anyone else. There is at least a potential but serious conflict between a common law claim for, say, nuisance and a claim under Section 11(5)(a) if the damages under one can be paid to only the claimant but under the other, the possibly often self-same quantum of compensation can be paid to the local headman.”

Justice Akenhead completely misconstrued the provisions of section 21. The section provides:

“Where the interests injuriously affected are those of a local community, the court may order the compensation to be paid to any chief, headman or member of that community on behalf of such community or that it be paid in accordance with a scheme of distribution approved by the court or that it be paid into a fund to be administered by a person approved by the court on trust for application to the general, social or educational benefit and advancement of that community or any section thereof.”

(Bold type supplied for emphasis)

As can be seen above, compensation is to be paid to the chief or other representative of the local community only “where the interests injuriously affected are those of a local community.” Contrary to Justice Akenhead’s statement set out above, section 21 of the OPA has not authorised payments for individual claimants to be made to someone other than the individual himself. Thus, the “serious conflict” between the common law and the compensation regime under the OPA highlighted by Justice Akenhead does not exist.

Finally, Justice Akenhead referred to section 22 of the OPA, which raised a presumption that persons in possession of lands affected by the OPA are lawfully entitled to such lands unless the contrary is shown. As quite rightly observed by Justice Akenhead, “that reverses the burden of proof in what would be an action in tort for damage for loss of use or enjoyment of land.”³³ On this basis, the learned judge expressed the view that “if the statutory and the common law remedies were to survive side by side, there would be an evidential presumption in one type of claim but not in the other.”³⁴

To repeat arguments made earlier in this article, the fact that the compensation regime in the OPA is more advantageous in some respects does not mean that the legislature intended it to be exclusive in the sense that common law rights were ousted.

³³ Para. 59 of the judgment.

³⁴ Para. 59 of the judgment.

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Addressing concerns about the absence of injunctions as a remedy under the OPA regime, Justice Akenhead had this to say:

“It is said that some common law remedies must remain, such as injunctions, an example being an injunction sought by, say, a landowner onto whose land oil is continuously pumping out of a negligently constructed or maintained pipeline or a *quia timet* injunction if the damage has not happened but is threatened. Of course, compensation is payable under the statute and, as indicated in Section 20(7), continuing compensation can be ordered for damage caused by the continuing pollution. There are at least three answers to this point:

(a) Once the Court is seised of the compensation claim, it has all the powers of the Court which have not been withdrawn or limited by the OPA. The Federal High Court Act 1973 (as amended) provides by Section 13(1) that the “Court may grant an injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so”. This is an “interlocutory” power, but there is no reason to think that the Court could not grant an injunction to stop the oil continuing to flow onto the claimant’s land.

(b) The Federal High Court, which constitutionally has exclusive jurisdiction over OPA compensation claims, has wide powers to issue injunctions. Section 11 of the Federal High Court Act provides:

‘The Court, in the exercise of the jurisdiction vested in it by or under this Act shall, in every cause or matter, have power to grant, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatever and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters be avoided.’

(c) I would not see any objection in principle if a final injunction was granted against a licence holder as part of or ancillary to a compensation award.”

It is submitted that the argument that the court could go outside the four walls of the OPA to find and make use of an equitable remedy, such as an injunction, contradicts the very essence of the argument that the OPA is a comprehensive regime intended to be exclusive.

4. The *Ogbu* Case

The exclusivity issue that was decided by the English High Court in the *Bodo* case was eventually argued before the Nigerian Court of Appeal and decided by that Court. That was the case of *Nigerian Agip Oil Company Limited v. Ogbu*.³⁵ Although Danjuma, JCA who delivered the lead judgment of the Court of Appeal in *Ogbu*’s case accepted without reservation the decision of the English High Court in the *Bodo* case, it must be stated from the outset that the decision in *Ogbu*’s case is remarkable more for its lack of clarity than for its value as a definitive and binding authority for the

³⁵ (2017) LPELR-45217.

proposition that the OPA excludes common law claims for oil spill resulting from pipeline operations.

First, as the facts of *Ogbu* show, the case was not one that came within the scope of the OPA. To put *Ogbu*'s case in context, it is pertinent to set out the background facts. At the trial Court, the plaintiff claimed special and general damages for loss occasioned 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 polluting the environment and killing crops, economic trees and fish. As indicated earlier,³⁶ in the context of oil spills, the compensation provisions in OPA apply only to oil spills emanating from pipelines licenced under the OPA. An oil waste pit dug to deposit waste oil has no connection whatsoever with an oil pipeline licenced under the OPA. Given the undisputed facts, it should have been clear to the Court of Appeal that the OPA could not apply to the case. Unfortunately, neither counsel to the appellant nor counsel to the respondent realised this point. The whole argument concerning the exclusivity of the compensation regime in the OPA was totally irrelevant.

Secondly, Danjuma, JCA, who delivered the lead judgment of the Court of Appeal, clearly stated in the judgment that "the plaintiff/respondent herein made his claims for compensation under the Oil Pipelines Act."³⁷ If that were the case, what was then the controversy about the exclusivity of the compensation provisions in OPA? The judgment is all the more confounding when his Lordship made the following statement:

"The Appellant's Learned Counsel was therefore right when he contended at page 5 of the Appellant Brief of Argument that 'The Respondent's claim for compensation having not been founded on or pursued under the exclusive regime provided by the Oil Pipelines Act is incompetent and ought to be struck out.'"

More confusing statements follow. Justice Danjuma states:

"Secondly, the Oil Pipelines Act would appear to have taken away the right of action in nuisance and replaced same with a claim for compensation and under the procedure specifically provided in the Act."

The above does not appear to be a categorical statement of the law determinative of the appeal before the Court.

What is more? His Lordship went on to state:

"It should be clear that the reason for the incompetence of the suit is not because it alludes to the common law rule in *Rylands v. Fletcher* ...; No! It is incompetent because the strict provisions of the Oil Pipelines Act analyse the right of action by stipulating the prior presentation of a complaint or damage, and where not agreeable on quantum, then a suit may ensue, in respect of compensation."

³⁶ See earlier discussions in this article on the scope of the applicability of the compensation regime under OPA.

³⁷ See p. 31, para. D of the judgment.

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The above statement appears to indicate that the views expressed by Danjuma, JCA, as they concern the exclusivity of the OPA, were made *obiter*. Indeed, the appellate judges in the latter Dutch case of *Oguru v. The Shell N.V.*³⁸ treated Justice Danjuma's opinion as *obiter dicta*.

Concluding, Justice Danjuma states:

"I have read the English case of *Bodo Communities & Ors v. The Shell Petroleum Development Company of Nigeria Ltd* ... referred to by the Learned Counsel for the Appellant and I find it highly persuasive as it ... rightly captures the essence of the Oil Pipelines Act and the legislative intent to exclude the applicability of the common law rules and to ensure the observance of the rights and remedies only in accordance with the Act, which provided a comprehensive scheme for victims of oil spill"

(Bold type provided for emphasis).

In *Bodo's* case, Justice Akenhead quite rightly recognised that the application of the compensation regime in OPA (even if it is accepted to be exclusive) was limited in scope, and applies only in respect of oil spills emanating from pipelines licenced under the OPA. Justice Danjuma's judgment appears not to have recognised this important limitation, thus making the OPA applicable to all cases of oil spill, whether or not connected to a licenced oil pipeline. As the analysis above has demonstrated, *Ogbu's* case lacks clarity. It cannot be accepted as a definitive authority on the proposition that the OPA has excluded common law claims concerning oil spill damage.

5. Conclusion

As can be seen above, the OPA is the principal legislation for compensation for oil-related environmental damage arising from oil pipeline operations. On analysis, and as indicated by the speech delivered by the Minister of Land, Mines and Power, Mr Muhammadu Ribadu, at the second reading of the Oil Pipelines Bill in the House of Representatives on 2 August 1956, it appears that the structure of the OPA is geared towards maximising the economic benefits that accrue to the country through oil, rather than protecting the environment or victims of oil pollution. Overall, it would appear that the compensation regime available under the OPA puts victims of oil pollution at a relatively disadvantaged position vis-à-vis the MNOCs. The compensation regime is restrictive, both in terms of compensation payable and the procedure for pursuing claims. Judicial discussions on the extent of the compensation payable under the compensation regime of the OPA have been minimal. The forcefulness of the arguments of Shell in the *Bodo* case, that liability for the oil spill complained of must be under the OPA and not under common law, is a pointer that the MNOCs and their legal counsel believe that a claimant is likely to attract less monetary award under the OPA than they might get through common law claims. Under common law, a claimant may claim not only for immediate loss arising from the damage complained of, but also for loss of future income. In addition, a claimant may, in appropriate cases, claim for aggravated and exemplary damages. In the *Bodo* case, Justice Akenhead of the English High Court clearly expressed the opinion that the OPA does not allow for claims for aggravated or exemplary damages, but he accepted that a claimant is entitled to loss of future income under the OPA.

³⁸ Decided by the Hague Court of Appeal on 29 January 2021.

Further, no meaningful provisions have been made in the OPA to preserve and protect the environment. While the OPA imposes penalties for any person hindering a licence holder from taking possession of land subject to a licence, no penalty is prescribed for a licence holder whose negligence results in environmental degradation. Worse still, no provision is made for injunctive relief or remediation and restoration of the environment. Unsurprisingly, as stated earlier, the MNOCs have been in the vanguard of arguments that the compensation regime provided by OPA has the effect of excluding claims for oil spill damage based on common law principles of tort, such as negligence, nuisance and the rule in *Rylands v. Fletcher*. Sadly, the provisions of section 101 of the PIA, which seek to protect the environment from damage as a result of petroleum operations, fall far short of what is required to make polluters pay for the monumental environmental degradation that is the lot of the Niger Delta of Nigeria. The PIA offers little improvement by way of ensuring adequate compensation for the victims of oil pollution caused by oil pipeline operations.

Despite the seeming approval of the English High Court decision in the *Bodo case* by the Nigerian Court of Appeal in *Ogbu's case*, the argument as to whether the OPA has excluded common law claims in respect of oil-spill damage is far from settled. There has been no definitive decision from the Supreme Court of Nigeria on the question. This article has highlighted the problems inherent in the argument that the OPA has excluded common law claims. It is submitted that there is nothing in the OPA, whether expressly or by necessary implication, that has excluded common law claims in respect of damage from oil spills emanating from pipelines licenced under the OPA. It is hoped that the Supreme Court will, whenever the opportunity arises, reject any such argument.