

TOWARDS A NEIGHBOURHOOD ENVIRONMENTAL PROTECTION REGIME: AN APPRAISAL OF NIGERIAN AND INTERNATIONAL ENVIRONMENTAL PROTECTION LAWS*

1.1 INTRODUCTION

The neighbourhood's test propounded by Lord Atkin in the locus classicus case of *Donoghue Vs Stevenson*¹ was intended for consumer protection. The facts of the case were that the appellant brought an action against the respondent because she had suffered injury as a result of drinking and seeing contaminated contents of ginger beer containing decomposed remains of a snail. The beer was manufactured by the respondents and bought from them by the owner of a café who was a retail seller from whom the appellant bought. In finding for the appellant the House of Lords in England per Lord Atkin held:

In law there must be and is, some general conceptions of relations giving rise to a duty of care of which the particular cases found in the books are but instances... The liability for negligence whether you style it such or treat as in other systems as species of culpa is no doubt based on general public sentiments of moral wrong doing for which the offender must pay. But acts or omission which any moral code would censure can not in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour: and the lawyer's question who is my neighbour receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to those acts or omission called in question.

The above holding of lord Atkin stipulates a legal duty of care toward one's neighbour i.e. persons who are so closely and directly affected by one's acts that one ought reasonably to have them in contemplation as being so affected when directing one's mind to the acts or omissions called in question.

Given the facts of *Donoghue Vs. Stevenson*,² two things are clear. First, the neighbourhood's test propounded here is intended for consumer protection. and secondly,

the persons to whom the duty of care is owed by virtue of this neighbourhood's test are persons in some special relationship with the person owing the duty and not the random public. Beneficiaries of the duty of care may be said to be persons contemplated to be the objects of the harm causing product wherever such persons may be. Being the persons for whom the product is made, then harm to them should be contemplated while producing the product.

The neighbourhood test so propounded affords a broad legal proposition for consumer protection for which it was intended. However, this broadness in proposition also renders it amenable to being extended to environmental protection. The holding, "persons closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to those acts or omission called in question" can be expanded to cover environmental media that are so closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to those acts or omissions called in question. Neighbourhood in this context will be literal neighbourhood conceiving of geographical proximity rather than the metaphorical formulation of Lord Atkin that conceives of neighbourhood in terms of relationships. This paper examines the promise of the proposed literal neighbourhood test for environmental protection particularly in the area of corporate negligence and also highlights certain provisions both in Nigerian and international legal instruments bearing indications of a tendency towards the proposed neighbourhood test environmental protection regime.

2.2 THE ENVIRONMENTAL NEIGHBOURHOOD TEST AND CORPORATE NEGLIGENCE

The neighborhood test, in the literal and environmental sense it is proposed, will subject industries producing, discharging or dealing with hazardous substances or water to a general duty of care to avoid acts or omissions likely to affect the host community and its environment. Such a duty if breached will provide a general basis of liability against negligent conduct of corporate capital such as happened in Union carbide Corporation of India in 1984

In that case, through the negligence of the company staff water found its way into an M.I.C. Storage tank setting in process an exothermic reaction which led to a build-up of excess pressure such that a cocktail of gases including M.I.C. hydrogen cyanide, nitrous oxide and carbon monoxide to burst past the tank's ruptured disk through the relief-valve-header, past the vent-gas scrubber into the atmosphere. Over 200,000 local people were exposed to the toxic fumes; some 60,000 were seriously affected, more than 20,000 were permanently injured, and as many as 10,000 died. The environment was so

badly polluted that 15 years after the disaster environmental carcinogenic, mutagenic and teratogenic effects of the disaster were still being felt. One study showed that of 2,700 pregnancies in Bhopal in the year following the disaster 452 ended in abortion or stillbirth, 32 died soon after birth and 30 were malformed.³

It is this horrendous devastation of the Bhopal disaster that moved Anthony Mazzochi to express the universal sentiments, revulsion and condemnation of the disaster in the following words:

It is a catastrophe which has no parallel in industrial history. This is the Hiroshima of the Chemical industry... we are angry, we are angry with union carbide for its negligent policies and practices. We are angry with the chemical industry which plays roulette with our lives each day of the year through its mad rush to produce toxic after toxic. We are angry at government for not protecting us. And we are angry with ourselves for not doing more to control the production of toxics.⁴

The Bhopal disaster and its environmental fallout exposed the rump of India's legal system revealing inadequate legal provisions that could not curb with the monumental menace that was the Bhopal disaster. Such was the dearth of legal authority in India on discovery that the Indian government and people preferred that the case be tried in the United States of America where the parent company was because the United States Law in the area was more developed and will therefore lead to adequate compensation for victims of the disaster. The company on the other hand very much aware of the wretched state of Indian law in the area preferred the case to be tried in India arguing among other things that witnesses to the disaster, the victims, the key players, documentation and evidence were all in Bhopal where the Union Carbide corporation subsidiary was managed, operated and maintained exclusively by Indians more than 8,000 miles away from the United States. In the end the case was settled out of court with the Indian government getting a paltry sum of \$470 billion as against its earlier claim of \$3.3 trillion.

This paper promotes the thesis that the Indian government would not have been so badly off if the law of Negligence in India contains a broad duty of care formulation such as the one proposed in this paper. With such duty of care formulation, Union Carbide corporation of India comes under a duty of care to the Bhopal environment which is closely and directly affected by its acts that it ought reasonably to take it in contemplation as being so affected when it is directing its mind to the acts or omissions called in question. Why? Because it is its literal neighbour. Having breached this duty of care, the company can be held liable on the basis of the ordinary rules of negligence.

Industrial disasters such as the Bhopal disaster which an extended neighbourhood test can apply to provide a general basis of environmental liability are

replicated in different parts of the world. Here in Nigeria, they include the Idimangoro Agege Lagos industrial effluent disaster of 1979, the Kaduna Petroleum Spillage of 1987, and the Onne Port Harcourt Industrial effluent discharge of 1988. On the international scene, disasters such as the Minamata methyl mercury poisoning of rice of 1971 comes in for easy mention. All these make an application by courts of law of a neighbourhood test as proposed in this paper an imperative of urgent proportion. Already the legislature is leading the way in this regard.

Indications of municipal and international legal tendencies towards a neighbourhood test environmental protection regime are replete in Nigerian and international legal instruments protecting the environment. Signatures of this tendency will be traced presently first, in Nigerian legal instruments and secondly in international legal instruments.

3.3 NIGERIAN LEGAL INSTRUMENTS

The Environmental Impact Assessment Act 1992 is the principal Nigerian legislation that betrays a tendency towards an environmental neighborhood test formulation vide the following provisions.

S.1(c) provides that:

The objectives of any environmental impact assessment... shall be.. to encourage the development of procedures for information exchange, notification and consultation between organs and persons whose proposed activities are likely to have significant environmental effects on boundary of another state or on the environment of bordering towns and villages.

and section 50(1) provides:

where a project for which an environmental impact assessment is not required under S.5 of this decree is to be carried out in Nigeria or on federal lands and the President and Commander in Chief of the armed forces is of the opinion that the project is likely to cause serious adverse environmental effects outside Nigeria and those Federal Lands, the Agency and the Minister for Foreign Affairs may establish a review panel to conduct an assessment of the international environmental effects of the project.

Both these provisions in recommending environmental impact assessment for certain projects do so on the basis of an allusion to a literal neighborhood test. Indeed S.13(1) of the Environmental Impact Assessment Act which establishes a mandatory environmental impact assessment regime in respect of projects listed in the only schedule

to the Act does so on the same basis. The permissive philosophy of the environmental Impact Assessment Act seems to be a requirement for environmental impact assessment based on perceived fears of probable damage to the neighboring environment. Proponents of industry are therefore subject to a duty of care not to harm the neighboring environment by first requiring them to carry out an environmental impact assessment and secondly requiring them to put in place such mechanism that will forestall the occurrence of the probable environmental damage assessed. If they breached any of these duties they will be liable.

4.4 INTERNATIONAL LEGAL INSTRUMENTS

Various international legal instruments on environment seek to prohibit states from embarking on activities within their territories that will have negative environmental repercussions in other states. In this regard principle 21 of the Stockholm Declaration on the Human Environment 1972 provides that:

States have in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.

The resolution on the Charter of Economic Rights and Duties of States 1974 in article 30, the Law of the Sea Convention of 1982 in article 194(2) and the Rio Declaration on Environment and Development of 1992 in principle 2 contained similar provisions. All these provisions subject states, at least by allusion, to a duty of care not to harm other states' environment in the pursuit of their economic activities. Such states in danger of harm are the states to which the state generating activity ought reasonably to have in contemplation as being so affected when directing its mind upon the acts or omissions called in question.

The Vienna Convention for the Protection of the Ozone Layer of 1985 on its part provide in article 2(b) that states should

Adopt appropriate legislative and administrative measures and cooperate in harmonizing appropriate policies to control, limit, reduce or prevent human activities under their jurisdiction or control – should it be found that these activities have or are likely to have adverse effects resulting from the modification or likely modification of the ozone layer.

And the Framework Convention on Climate Change 1992 seek to prohibit states from embarking on activities that could exacerbate global warming.

Both the Vienna Convention for the Protection of the Ozone layer and the Framework Convention On Climate Change are more ambitious in their tendency towards formulating a duty of care that could make each state of the international community the other's neighbour and therefore under a duty to refrain from activities that hold possibilities of environmental harm to it.

5.5 CONCLUSION

The neighbourhood test as proposed in this paper is a principle that hold a lot of promise for environmental protection. It provide a broad framework for the promulgation of particular rules prohibiting environmental degradation. It is submitted that both the legal and techno-economic climate are ripe for the institution of such an environmental protection regime. The importance of the neighbourhood test principle of environmental protection can hardly be over emphasised considering that environmental pollution can hardly be confined to one neighbourhood due to the contignation of the environment and the pollutants themselves. At any rate, and metaphorically speaking, globalization has reduced the world into one huge village and it is therefore imperative that the village character of the world be reflected in a neighbourhood principle of environmental protection.

ENDNOTES AND REFERENCES

- * A. K. Usman, Lecturer, Dept. of Commercial Law, A.B.U., Zaria.
- 1. 1932 AC 562
- 2. Ibid.
- 3. B. Dinham, B. Dixon and g. Saghal: "The Bhopal Tragedy one year later." Refereed to in U.S. Capital Vs. the third World" by Frank Pearced and Steven Tombs Published in Global Crime connections.
- 4. Forward Toward Morehouse and M. Aruno subramuniam: The Bhopal tragedy Published in New York council for international Affairs 1986.