STATUTE OF LIMITATION IN ENVIRONMENT-RELATED HARM AND INJURIES: TIME FOR REFORM?

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Abstract

Many of the effects of environmental pollution take years to manifest and this constitutes a problem when the statutes of limitation have to be applied in such situations. The current statutes of limitation, especially in Nigeria and to some extent, in other jurisdictions, are capable of working substantial injustice on victims of environment-related harm and injury. This is attributable to the problem of computation of limitation periods and short time limits imposed by the statutes vis-à-vis the long latency period of environmental harm. Consequently, actions of such victims can easily be rendered statute-barred. This paper examines statutes of limitations in other jurisdictions and reveal the presence of provisions that can obviate the complexities in the application of statutes of limitation to environmental claims. The paper concludes that adopting a combination of factors gleaned from other jurisdictions will give the claimants in environmental actions a fair and equitable opportunity to institute actions without being caught up by the limitation period. It reveals the need for reforming some aspects of Limitation Laws, both in Nigeria and in other jurisdictions. Given the long latency period of environment-related harm and injury, the paper proposes the introduction into statutes of limitation, the grant of discretionary powers to courts to extend limitation periods and the exemption of environmental claims that are difficult to discover because of latent injuries.

Key Words: *Statute of Limitation, Limitation Period, Cause of Action, Latent injury, Environmental Claims*

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1.0 Introduction

It is trite that every individual has a right to seek redress in the courts for a wrong he suffered. Law on the other hand as a means of social control and re-engineering performs the function of resolving disputes and conflicts between litigants. This fact is reinforced by the legal maxim, *Ubi Jus, Ibi Remedium* meaning "when there is a wrong, there is a remedy". However, the law has put in place a mechanism known as the limitation period, to ensure that a person who is wronged exercises his right to redress promptly. The concept is set in motion when the cause of action in a case arises. The issue as to the date the limitation period starts to run has been found to be problematic, consequently different jurisdictions have engaged in reforms to their statutes of limitation to alleviate the problem. Presently, its application varies from jurisdiction to jurisdiction. In some jurisdictions, time starts to run from the date the cause of action accrued (the traditional mode still maintained), others state that it is the date of the claimant's knowledge and still others provide that the starting date is the earliest date the claimant knew that the damage was sufficiently serious to justify proceedings.[1] The traditional mode of computing limitation period however, poses a challenge in cases of environmental pollution and degradation where, in most cases, a victim may not be aware that dangerous substances are being emitted into the atmosphere or environment until it starts affecting his health or property; by which time the limitation period may have caught up with him. A further problem with environment-related injuries which readily arises in relation to limitation of actions is that even where the damage is apparent, its effect and consequences may not be fully understood thereby raising a critical issue of when the cause of action arose.[2] Sometimes, this lack of knowledge makes it difficult for a victim to make an informed decision to institute an action within the allowed time frame. More importantly, most environment-related injuries take time to manifest. For example, epidemiological Studies indicate that seventy to ninety percent of all cancer is caused by environmental carcinogens and cancer is capable of having a long latency period of up to 30 years.[3] Martin,

[1] Mobil Producing Nigeria Limited v Dadoru Benson Appeal No. SC/216/2012

[2] Olanrewaju Fagbohun and Chinedu Ihenetu-Geoffrey, Environmental Litigation under Nigerian Law ELRI Monograph Series, (ELRI, 2015) 18.

[3] Smith and Ceriello, 'The Fear of Cancer: Legal Issues', [1988] 29 Trauma 5:61, 5:63; A latency period is the period of time between a victim's exposure and the individual's manifestation of disease.

in his article,[4] stated that every day, industries release toxic chemicals and hazardous wastes into the environment that will remain dangerous for decades or even centuries and that human contact with these chemicals is virtually inescapable and creates an accelerating health risk to society.[5] Studies have linked latent chronic diseases such as cancer, respiratory ailments and neurological impairments to several toxicants pervasive in the environment.[6] Manifestations of latent injury generally do not develop until 20 or more years after the initial exposure.[7] The question is: how can a limitation period of three, five, six or even twelve years be applied to an injury that takes so long to manifest? Does this not serve as bar to recovery, which invariably results in denial of justice to the victims? This paper therefore seeks to examine the current position of the municipal statutes of limitation vis-à-vis that of other jurisdictions in relation to personal injury claims arising from environmental degradation. The paper is divided into seven sections. Section 1 is the introduction; Section 2 examines the Statute of Limitation as it is in Nigeria; Section 3 also examines the nature of environment-related harm and injury; Section 4 discusses the problem associated with applying the statute of limitation to personal injury arising from environmental degradation; Section 5 examines lessons that can be gleaned from other jurisdictions regarding their statutes of limitation; Section 6 highlights the recommendations while Section 7 concludes the work.

2.0 Statutes of Limitation

A Statute of limitation is a law that bars claims after a specified period. It is a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered).[8] The purpose of such a statute is to require diligent prosecution of known claims, thereby

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[4] Thomas J. Martin, 'Long-Term Liability for Hazardous Waste Induced Injury in Missouri: Latent Harm Sufferers Beware' [1985] 28 Wash. U. J. Urb. & Contemp. L. 299, 300.

[5] *ibid*

[6] *ibid*, 301.

[7] In a study of 725 asbestos insulation workers, persons that initially had been exposed less than 20 years before the study had normal x-rays. After 20 years had passed from the onset of exposure, most had abnormal x-rays. *United States v Reserve Mining Co.*, 380 F. Supp. 11, 40 (D. Minn. 1974) (study conducted by Dr. Irving Selikoff, one of the world's foremost experts on the health effects of asbestos fibers).

[8] Bryan A. Garner, (ed), Black's Law Dictionary (8th ed), 2004, 4425.

providing finality and predictability in legal affairs and ensuring that claims will be resolved while evidence is reasonably available and fresh.[9] Buttressing the latter point, Belgore JSC in *Nze Bernard Chigbu v Tonimas Nigeria Limited*[10] stated that the purport of laws on limitation of actions is to obviate the inconvenience and embarrassment to defendants whose witnesses, be they members of staff or people having dealings with them may no longer be available; and documents for defence must have been out of circulation, in some cases already destroyed and cannot be found in archives or will otherwise take inordinate length of time to locate. A limitation law is also meant to show that the legal right to enforce an action is not a perpetual right but a right generally limited by statute. The Supreme Court stated further in *Egbe v Adefarasin*[12] that the main purpose of limitation periods is to avoid a defendant having the indefinite threat of a claim. Therefore, based on the premise that the ability of a defendant to prepare a defence is undermined where a claim is revived after a period of time, a statute of limitation sets the maximum time after an event that legal proceedings based on that event may be initiated.[13] Where a statute of limitation prescribes a period within which an action should be brought, legal proceedings cannot be properly validly instituted after the expiration of the prescribed period. This prescribed period is known as the limitation period.

The limitation period governs how long a person has before he or she must start an action in court. It flows from the premise that there should be an end to litigation. The limitation period for any given cause of action is said to commence when the right "accrues" or comes into existence.[14] Unfortunately,

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[9] Carolyn B. Handler, 'Civil Claims of Adults Molested as Children: Maturation of Harm and the Statutes of Limitations Hurdle' [1986] 15 Fordham Urb. L.J. 709, 734; See also Peter Handford, *Limitation of Actions: The Laws of Australia*, (3rd ed. Thomson Reuters 2012) where three similar policy rationales were outlined - to protect defendants from claims relating to incidents which occurred years before about which witnesses may have difficulty recalling events or finding records; to encourage quick resolution of litigation: and to provide finality for defendants.

[10] [2006] All FWLR (Pt. 320) 984 at 998; [2006] 4 SC (Pt. II) 186.

[11] *Ajayi v Adebiyi* [2012] 11 NWLR (Pt. 1310) 137, 169.

[12] [1985] 1 NWLR (Pt 3) *Mobil Producing Nigeria Limited v Dadoru Benson*, Unreported Suit No. SC/216/2012.

[13] *Ibid.*

[14] Handler (n.9), 719.

Nigerian Limitation Laws do not define when a cause of action "accrues." Consequently, it has been left to the judiciary to determine at what point the statutory period begins to run. The courts have pronounced that the period of limitation in any limitation statute is determined by looking at the writ of summons and the statement of claim alleging when the wrong was committed which gave rise to the cause of action and by comparing that date with the date on which the writ of summons was filed. If the time on the writ of summons is beyond the period allowed by the Limitation Law, the action is statute barred.[15]

Despite the judiciary's role in determining when causes of action accrue, it is within the exclusive authority of the legislature to set the specific statutory lengths of time within which legal rights are actionable.[16] However, the legislature rarely proffer a reason as to the differences between statutory periods; and the prescribed statutory periods themselves are, to a certain extent, arbitrary.[17] Limitation periods are provided for in Limitation Laws of States and in the statutes of public corporations. In Nigeria, although all thirty-six States of the Federation have limitation laws but because the provisions are basically the same, this paper will refer to only a few of them - the Limitation Act of Lagos state,[18] Limitation Law of Rivers State,[19] the Limitation Law of the Federal Capital Territory (FCT),[20] Limitation Law of Bayelsa State[21]and the Limitation Law of Delta State.[22] The limitation period prescribed for different actions in the different statutes range from two years to twenty years. For tort actions, under which environmental cases fall, the limitation period is between five years to six years.[23] However, they provide limitation periods separately for actions claiming damages for negligence, nuisance or breach of duty where damages consist of or

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[15] *Egbe* (n 12).
[16] Handler (n.9) 719.
[17] I.J. Weinsten, H. Korn and A. Miller, New York Civil Practice [1986] cited in Handler (n.9), 719.
[18] Limitation Law, Laws of Lagos State Cap. L.67 2005.
[19] Limitation Law, Laws of Rivers State Cap.80 1999.
[20] Limitation Law, Laws of FCT, Cap. 522, 2007.
[21] Limitation Law, Laws of Bayelsa, Cap L.8 2006
[22] Limitation Law of Delta State, 1976; The reason for choosing these legislations are: Lagos is the industrial hub of the nation; Rivers and Delta States are where most oil companies and local oil refineries operate and the FCT is the capital of the country.
[23] See Limitation Law of Lagos State, s.8(4); Limitation Law of FCT, s.7; Limitation Law of Rivers State, s.16 (Rivers State provides for 5 years); Limitation Law of Delta State, s.4.
[24] Limitation Law Lagos State, s. 9; Limitation Law FCT, s.8; Limitation Law Rivers State, s.17

include personal injuries to any person.[24]

3.0 The Nature of Environment-related Harm and Injury

Ritts and Trauberman in their article affirmed that mounting evidence suggests that environmental and occupational exposures to toxic substance pose significant public health risks.[25] Nigeria, have had experiences of atmospheric pollution,[26] land contamination and degradation as a result of oil spills, toxic waste and mine tailings[27] and water pollution arising from oil exploration.[28] All these pollution and contamination are as a result of the release of gaseous, particulate and effluent pollutant into the environment. These toxic substances harm both the physical environment and the health of humans. In the Niger Delta, people have expressed concerns that the level of air and ground water pollution could be the cause of some strange health conditions now prevalent in the region.[29] The raised temperature of the atmosphere where gas is flared is considered to also have adverse effect on human health and of course, the physical environment as evidenced by corrosion of roofs normally witnessed in the Niger Delta. The problem however, is that there is no epidemiological data that has determined the number of people who have developed lung-related diseases, eye defects, dermatological diseases and cerebral meningitis as a result of exposure to the flared gases and the high temperature.[30] Emissions from oil and gas exploration and petrochemical plants have been scientifically proven to lead

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[25] Leslie Sue Ritts and Jeffrey Trauberman, 'Compensation for Environmental Injuries: An Examination of Virginia Law', [1982] 2 (2) *Virginia Journal of Natural Resources Law*, 233.

[26] Recently in Lagos, the Olusosun dumpsite, one of the major dumpsites in Lagos erupted into flames on 14th March, 2018 which continued burning for some days. The whole atmosphere was filled with dark, choking smoke. The dump site receives about 40 percent of the entire Lagos waste. See Olamide Fadipe, 'Olusosun Dumpsite Has Been a Source of Concern – Lagos Government, Resident', *Premium Times* (Lagos 15 March 2018). Also, through a documentary titled 'Collateral Damage of the Air: A Neglect by a Nation', the residents of Port-Harcourt city have recently cried out concerning the black soot that has filled the air for the past one year as a result of illegal refineries being operated in the area.

[27] The contamination of lands and ponds by mine tailings in Plateau State where a lot of mining activities have been carried on for decades is an example.

[28] The incidences of pollution by oil of seas and rivers in the Niger Delta and other oil producing areas have become common knowledge globally.

[29] Aniekan Mendie, 'Right to Life Under the Yoke of Environmental Pollution in the Niger Delta of Nigeria' [2014] 4 (7) Journal of Education and Social Research 14.

[30] Obasogie, S. 'Degreasing Environmental and Climatic Problems of Niger Delta and Associated Health Problems: A Synopsis' [2008] http://www.globalforumhealth.org in Aniekan (n 23).

to brain damage, infertility and the birth of abnormal babies particularly when inhaled over a long period of time.[31] It is obvious therefore that there are a lot of health problems and injuries that are caused by the pollution or degradation of the environment. There are diseases that are asymptomatic and will only manifest decades after exposure. Examples are asbestos-related diseases such as asbestosis, mesothelioma or lung cancer which may be asymptomatic for 40 or more years following exposure. This was the situation in the case of *Margereson v JW Roberts Ltd and in Hancock v JW Roberts Ltd*[32] respectively, it took about 60yrs after the plaintiffs' exposure to asbestos and when the first plaintiff discovered that the illness he was suffering from was as a result of his inhalation of asbestos dust. The plaintiffs issued proceedings against defendants claiming damages for personal injuries. They claimed they contracted mesothelioma from the asbestos dust which the defendants negligently permitted to escape from their factory into the atmosphere surrounding the area where they lived at the time.[33] Added to the fact that the exposure to these toxic pollutants harm human health, is also the fact that their effect takes long to manifest because of the kinds of diseases caused by the pollutants.[34] In the American case of *Locke v John-Manville Corporation*,[35] there was no legal or medical evidence of injury upon inhalation of defendants' asbestos fibers. The medical evidence showed that mesothelioma does not begin to form contemporaneously with exposure to asbestos dust, the malignancy is born afterwards.[36]

4.0 The Problem in Applying Statute of Limitations to Environment-Related Harm

[31] Aniekan (n 23).

[32] [1996] Env. LR.304.

[33] Mr. Margereson was born in 1925 and lived in a house about 200 yards or so distant "from the factory. He died in December 1991 from the lung disease, mesothelioma. Mrs. Hancock was born in 1936 and went to live in a house close by the factory in 1938 until 1951. She is still alive but gravely ill suffering from the condition. Mr. Margereson initiated these proceedings on 18th February, 1991, prior to his death. The action was continued in the name of Mr. Margereson's widow as his Administratrix. Mr Margereson was first diagnosed as suffering from this disease in September, 1990. Mrs. Hancock issued proceedings on 5th September, 1994. She had developed symptoms of mesothelioma from late 1992.

[34] Erik A. Christiansen, '*Sterling v Velsicol Chemical Corp.*: Emotional Distress Damages for the Duration of Toxic Exposure' [1989] Utah L. Rev. 759, 763.

[35] 221 Va. 951, 275 S.E.2d 900 (1981).

[36] *Ibid* at 959.

There are basically two issues the writers identify as being problematic in the application of statute of limitations to environment-related harm. These are when the limitation period ought to start running and the shortness of the limitation periods.[37] They will be examined below.

a) Computation of Limitation Period: The limitation periods are computed from when the cause of action accrues and cause of action accrues from the date the wrong complained of was first committed.[38] The court held in *Akibu v Azeez*[39] that time begins to run from the date the cause of action arose. The courts regard that time starts to run from the moment the act or omission occurs and it will continue to run even if the plaintiff suffered a damage he was unaware of at the initial stage which he subsequently, discovers.[40] In *Cartledge v E Jopling & Sons Ltd*,[41] the court held that the plaintiffs' unawareness that they had suffered any damage did not prevent the limitation period from commencing. The problem with computing limitation period by determining when it starts to run stems from the nature of environment-related harm and injury. Unlike most traditional tort injuries, harms caused by toxic contamination – including cancer and other latent illnesses, as well as concealed property damage in the form of soil and groundwater contamination – may not be discovered for years after contamination first enters the environment.[42] The *Margereson's case*[43] is a demonstration of this. Consequently, the application of traditional limitation periods to actions for the recovery of damages from environmental contamination could result in unfairness. There is general consensus that the traditional approach of limitation periods running from accrual of a cause of

[37] Ritts and Trauberman (n.25) 269.

[38] [2003] 5 NWLR (PT. 814) 643; *P.N. Udoh Trading Ltd v Abere* [2001] 11 NWLR (Pt. 723) 113 at 129; *Adimora v Ajufo* [1988] 3 NWLR (Pt. 80) 1.

[39] [2003] 5 NWLR (PT. 814) 643.

[40] Ehud Guttel and Michael T. Novick. 'A New Approach to Old Cases: Reconsidering Statutes of Limitation' [2004] 54(2) University of Toronto Law Journal, 129, 131.

[41] [1963] AC 758.

[42] CTS Corp. v Waldburger 573 U.S [2014] (SC).

[43] *Margereson's case* (n 27); *Alcan Gove Pty v Zorko Zabic* [2015] HCA 33 – respondent inhaled asbestos fibers in the course of his employment between 1974 and 1977. He experienced the symptom of mesothelioma only around 2013 or 2014.

[44] S.J. Berwin. 'Clarifying the Law on Limitation Periods' at http://www.legal500.com/c/nigeria/developments/9193 accessed 28 April 2018.

action is no doubt problematic.[44]

The issue of continuing damage is not also taken into consideration. In *Gulf Oil Company (Nig) Ltd v Oluba & anor*,[45] the respondents instituted this action in which they claimed for damages or compensation for damage to their lands, fishing ponds, swamps, channels and lakes. The facts are that the appellant commenced oil exploration on the Respondents' land in 1973 and continued until 1989 which caused the damages resulting in loss of income from fishing and farming. The respondents instituted this action in 1986. The appellant contended that the action was statute-barred under s.4(1)(a),(d) & (2) of the Limitation Law of Bendel State, 1976 (now applicable to Delta State) and that, same should have been filed in 1973 when the respondent claimed the damage occurred. The section provided for six years of limitation in tort actions from the date on which the cause of action accrued. The trial judge held that the cause of action was a continuing one because appellant was still operating on the land up until the time the action was filed and only ceased operation three years after in 1989. Consequently, the court held that the action was not statute barred. The Court of Appeal reversed the decision, holding that the damage is not continuing as damage had occurred in 1973 when the act of oil spillage was committed. Rather, the damage was permanent. It is surprising that the Court of Appeal held that the act of damage was not a continuing one when the contaminated and degraded land had not been restored and there was evidence that the appellant was still operating on the lands when this action was instituted in 1986. If the damage experienced by the respondents is not a continuing one, then what is continuing damage? Exploration of oil only ceased three years after the respondent filed the action in the lower court, one wonders why that does that not place the point of accrual of action in this case in 1989.

b) Short Limitation Periods – In examining the Nigerian statutes, the writers observe that the limitation periods provided for tort actions and personal injury claims under which environment-related injuries fall, are too short in view of our foregoing discourse.[46] The five and six years limitation period provided for tort

[45] [2002] 12 NWLR (Pt. 780) 92.

[46] See Limitation Law Lagos State s.8; Limitation Law Federal Capital Territory, s.7; Limitation Law Delta State, s.4; Rivers State, s.16; Limitation Law Bayelsa State, s.16.

actions under the Limitation Law of the states under consideration is too short considering the fact that establishing a causal link between the damage and the act often takes time.[47] A plaintiff must prove that he has suffered actual harm, that the harm arose from a specific pollutant, that the pollutant is of a type discharged by the defendant and that this pollutant arose from the defendant and not from some other polluter.[48] It is even more difficult to trace pollution discharged into a stream back to the pollution source. Still, if there are multiple polluters, it may be very expensive to determine who is responsible for what portion of the contamination in the river and then to ascertain the effect of that contamination on the aquatic ecosystem.[49] There have been opinions to the effect that limitation periods that are too short unfairly limit a person's ability to access the civil justice system to seek recourse for a legal problem and inures for the advantage of the polluters.[50] *In JFS Investment Ltd v Brawal Line Ltd & 2 Ors*,[51] Rhodes-Vivour JSC remarked that the limitation periods provided by statutes of limitation are too short. This is more so that a lot of scientific evidence is required before an action for damages in environment-related injury is filed.

In addition, the time within which a claimant is expected to have knowledge of injury in personal injury cases, is too short. Section.9(4) of the Limitation Law Lagos States provides[52] as follows:

> The Requirements of this subsection are fulfilled in relation to a cause of action if it is proved that the material facts relating to that cause of action were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –
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> (a) either was after the end of the three-year period relating to that

[47] *Shell Petroleum Development Company Nig v Chief Otoko & Ors* [1990] 6 NWLR (Pt. 159) 693: See also Amaka Eze, 'The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria' [2014] NAUJILJ 50, 55.

[48] Donald N. Dewees, 'The Comparative Efficacy of Tort Law and Regulation for Environmental Protection' [1992] 17 (65) The Geneva Papers on Risk and Insurance 446, 451.

[49] *Ibid.*

[50] Godwin Uyi Ojo and Nosa Tokunbor, 'Access to Environmental Justice in Nigeria: The Case of a Global Environmental Court of Justice' [2016] <www.foei.org> accessed 31 May 2018 2, 4; British Columbia Ministry of Attorney General, 'White Paper on Limitation Act Reform: Finding the Balance,' 2010 at www.gov.bc.ca accessed 29 April, 2018, 1.

[51] [2010] 18 NWLR (Pt.1225) 495.

[52] The content is exactly the same with that of s.8(4) the FCT Law.

cause of action or was not earlier than twelve months before the end of that period; and

(b) in either case, was a date not earlier than twelve months before the date on which the action was brought.

The Lagos provision states that the plaintiff must be seized of the knowledge either at the end of the three years limitation period provided in s.9(2) or 12 months before the end of the three years. However, in either case, the action must be brought not more than twelve months earlier than the date on which it was instituted, otherwise, the action for personal injury will be statute barred. The implication is that time starts to run and cause of action arises after the claimant becomes aware of the injury and not when the tortious act takes place. This is supposed to be an advantage in environmental claims but what the provision gives with one hand, it takes with another. The proviso in sub-section (a) and (b) has dire consequences for victims of environment-related injury that are latent in nature and would take more than three years to manifest. It has been established above that some of such injuries can take up to a decade or more to manifest. In an industrialised state such as Lagos, where factories emit pollutants into the atmosphere and effluents into water bodies; where dumpsites are not well managed and chemicals from them have the tendency of leaching into the soil thereby contaminating groundwater,[53] how can such a law be equitable? As earlier mentioned, the Olusosun dumpsite in Lagos erupted into flames sometime in March 2018 and it emitted plumes of black smoke into the atmosphere for days, even after the fire was extinguished.[54] Before that time, it had been observed that obnoxious odour ooze out from the dumpsite, there was regular discharge of smoke, fumes and particulate matters into the atmosphere as a result of

[53] Abdulrafiu O. Majolagbe, Adeola A. Adeyi and Oladele Osibanjo, 'Vulnerability Assessment of Goundwater Pollution in the Vicinity of an Active Dumpsite (Olusosun), Lagos, Nigeria', [2016]*Chemistry International* 2(4), 232 – 241 (The report of the study showed that seepage from the Olusosun dumpsite had 60 percent of the ground water around it polluted); Temilola Oluseyi, Oluwatoyin Adetunde and Emmanuel Amadi, 'Impact Assessment of Dumpsites on Quality of Near-by Soil and Underground Water: A Case Study of an Abandoned and a Functional Dumpsite in Lagos, Nigeria' [2014] *Int. J. Sci Environ Technol* 3(3), 1004 – 15 (this study revealed that water from wells close to the Olusosun dumpsite are not fit for domestic use because of pollution).

[54] The Lagos state government admits that the dumpsite is unsafe and unsanitary being close to residential areas. See Olamide Fadipe, (n.26).

incineration activities on the dumpsite and the general unsanitary condition of the dumpsite.[55] Apart from the initial discomfort that this may cause to residents, business owners and workers around the area, the stench, gas and smoke inhaled over time are capable of causing the onset of cancer, respiratory problems, and neurological issues. If this kind of injuries are discovered later and traced to the activities of the dumpsite, this statute effectively shuts out such claimants, preventing them from accessing justice. It is noted however, that in Nigeria, such environment-related personal injury cases hardly reach the courts but there are many Nigerians who are suffering from these ailments that are caused by the environment. There are more of personal injury cases arising from automobile accidents, medical negligence, defective products and the work place. It is not clear why this is so but it may not be unconnected with the problem of proof, lack of financial resources to prosecute an action, lack of interest as a result of the slow dispensation of justice and a general non-challant attitude towards litigation in Nigeria.[56] The Rivers State provision is a bit better. Section 17(2) of the Rivers State Law states that:[57]

> ...the period of limitation applicable under section 16 in respect of actions to which this section applies shall be reckoned from
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> (a) The date on which the cause of action accrued; or
>
> (b) The date of knowledge, if later, of the person injured

Here, the Rivers State Law allows the limitation period to extend to the date the

[55] Ogunrinola, I. Oluranti and Adepegba E. Omosalewa, 'Health and Economic Implications of Waste Dumpsites in Cities: The Case of Lagos, Nigeria' [2012] *International Journal of Economics and Finance* Vol. 4, No. 4. 239 – 251. 244; 'Olusosun Remains Environmental Nightmare with Toxic Emissions', *Sahara Reporters* (New York 28 April 2018);

[56] *Shell Petroleum Development Company Nig. V Otoko & Ors* [1990] 6 NWLR (PT. 159) 693; Amaka Eze, 'The Limits of the Tort of Negligence in Redressing Oil Spill Damage in Nigeria' [2014] NAUJILJ 56 (although this article is not written in the context of oil spill damage in relation to personal injury, the problem raised about the poor understanding of causal mechanisms for environmental damage, difficulty of proof, the prohibitive cost of engaging expert witnesses which is required in environmental cases and the invitation to courts to draw conclusions from complex and inconsistent body of scientific facts presented before them, are all relevant in personal injury cases as well).

[57] This provision is the same as that of Bayelsa State.

person injured becomes seized of his injuries without any qualification. However, the five-year limitation period provided in s.16 is too short because of the difficulty in establishing causation, as stated earlier. Besides, with such a short limitation period, the opportunity for negotiations and settlement between the parties (which can prevent litigation) is being eroded.

5.0 Lessons from other Jurisdictions

Traditionally, personal injury plaintiffs have had five or six years (both at the national and global levels) from the time when the cause of action accrues in which to bring an action. Like has been observed in this discourse, this computation has considerable problems in cases of latent injury which has a long latency period. The limitation period had usually expired long before the victim became aware of his or her condition.[58] Once the problem was exposed by the House of Lord in *Cartledge v E Jopling & Sons Ltd.*[59] legislation in most jurisdictions attempted to alleviate it.[60] Hanford observed that various devices were used, with some "jurisdictions trying out a succession of legislative expedients."[61] Some states allowed a court to extend the ordinary limitation period in cases where material facts were not apparent before a certain date,[62] others where a court thought it just and reasonable to do so.[63] Alternatively, or in addition, the point of accrual was legislatively redefined to run from when the injury was discovered or became reasonably discoverable.[64] Legislation in three other jurisdictions bars the claim once either a three year period running from the point of discovery or a 12 year period running from the date of the negligent act or omission expires.[65] A close look at some of these 'legislative expedients' follows

[58] Peter Hanford, 'A New Limitation Act for the 21st Century' [2007] 53 UWAL REV 387, 392.

[59] [1963] AC 758.

[60] Hanford (n 58).

[61] *Ibid.*

[62] Limitation Act 1980 (UK); Limitation of Actions Act 1958 (Vic) s. 23 A (added 1972); Limitation Act 1981 (NT) s. 44 (not limited to personal injury cases).

[63] Limitation Act 1980 (UK) s. 33; Limitation of Actions Act 1958 (Vic) s. 23 A; Limitation Act 1985 (ACT) s. 36; Limitation Act 1969 (NSW) ss. 60C, 60G.

[64] Limitation Act 1980 (UK) s.11; Limitation of Actions Act 1958 (Vic) s. 5 (1A) (Limited to personal injuries consisting of a disease or disorder: no longer applicable as from 2003).

[65] Limitation Act 2005 (WA)

below.

(i) The Discoverability or Discovery Rule - The more modern approach to limitation periods advocated by many law commissions in other jurisdictions, and which is now included in their legislation is to base the general starting point at when the damage was discovered or reasonably discoverable.[66] Plunkett stated that the perceived unfairness of a cause of action potentially expiring before the potential plaintiff could reasonably know of its existence led to recommendations that the accrual rule be replaced with a 'discoverability' rule.[67] The inclusion of the rule eliminated the 'accrual of action' phraseology from many statutes of limitation. For example, the Limitation Act, 2012 of British Columbia Province of Canada, provides that a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim was discovered.[68] S.8 of the Act proceeds to enumerate the test for discovering a claim. It provides that a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

a) That the injury, loss or damage had occurred
b) That the injury, loss or damage was caused by or contributed to by an act or omission;
c) That the act or omission was that of the person against whom the claim is or may be made;
d) That having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

The limitation period in s.2 above is known as the 'basic limitation period.' Once a person discovers that he or she has a legal claim, he or she will have 2years from that date to start a court proceeding (unless another provision of the Act applies). The directness of the section without the usual phrase, 'from the date the cause of

[66] Global Institute, 'Limitation of Actions' available at https://hub.globalccsinstitute.com/publications-legalliabilityand-storage-comparative-perspective/64-limitation-actions accessed 8 April 18; See the Alberta and Ontario Limitation Laws

[67] James Plunkett, 'When Does the Limitation Period Commence in Personal Injury Action?', [2009] 92 Precedent, 30, 31; Donald N. Dewees, 'The Comparative Efficacy of Tort Law and Regulation for Environmental Protection' [1992] 17 (65) The Geneva Papers on Risk and Insurance 446, 453.

[68] S.2 of the British Columbia Act; also, S.4 of the Ontario Act.

action accrue' will make for easy understanding and aid interpretation by the courts. Every ambiguity or confusion created by the 'accrual of action' requirement is removed by these provisions. This is where the discovery rule provision in Nigeria's statutes of limitation differ as the 'accrual of action' phrase is still a recurring decimal in those statutes which still creates some confusion. Again, the writers opine that 2 years limitation period is too short for environment-related injuries based on reasons adduced above.

Besides the removal of the phrase, the Act proceeds to explain when a claim is discovered which introduces a good degree of certainty. It is also observed that the Act does not qualify 'injury,' which implies that the type and degree of injury is immaterial. Of course, this should be read within the context of the Act. Additionally, the provision includes 'loss and damage' instead of the emphasis laid by other statutes on personal injury alone. It means the limitation period applies to all injuries, loss or damage whether personal or not. Invariably, environmental harm to both persons and land is covered by these sections. This gives the courts the latitude to include environmental damage, other than personal injury, in this provision. Again, it is observed that the element of knowledge is also included. The implication is that knowledge of injury or damage is key to the determination of when time starts to run. While the person is unaware of the potential action (if a reasonable person would have been unaware of the action), the basic limitation period does not begin to run until the claimant 'discovers' that he or she has a cause of action.[69] It also creates more certainty as to when time begins to run and it results in more predictability because it does not matter what kind of claim is brought. This is an apt provision for the environmental problems which has been studied in this discourse. It takes care of injuries with long latency periods and land contamination problems that take time to manifest. The way the sections are couched leaves no one in doubt of the intention of the legislature. It is noteworthy however, that non- discovery of all those elements will not be allowed to continue ad infinitum as s.21(1) of the Act provides for an ultimate limitation period of 15 years within which a court

[69] British Columbia Ministry of Attorney General (n.44), 11.

[70] The ultimate limitation period describes the maximum time limit past which a basic limitation period cannot extend. This limitation period is useful in cases of continuance of injury where limitation period begins to run from the cessation of the damage or injury.

proceeding must be commenced.[70] If the non-discovery continues for 15 years, the right to limitation period by the claimant will cease. This still creates some problems in cases of latent environment-related injury and continuance of injury where the injury suffered takes longer than 15 years to be discovered.[71] Sections 4, 5 and 15(2) of the Limitation Act, 2002 of Ontario province of Canada is *in pari materia* with the British Columbia provisions discussed above.

(ii) Extension of Limitation Periods - Some jurisdictions took bolder, more humane steps to grant courts the discretionary power to extend limitation periods in some cases. In every other state and territory in Australia, a court has power to extend the ordinary limitation period in a personal injury case.[72] The United Kingdom, Western Australia and the Victoria Province of Canada[75] are in this category. Though the sections are couched differently, the substance is the same. The sections provide that courts are allowed the discretion to extend limitation periods in personal injury cases when they are expired upon the application of the plaintiff. Only the UK provision seemingly allows the court to extend the limitation period *suo motu* as long as it deems it equitable to do so. However, the courts shall have regard to certain specified factors in exercising their discretion. Uniquely, the Alberta province of Canada specifically allows extension of limitation periods by courts in environmental matters even though this is not contained in its limitation law but in an environmental legislation.[76] This is perhaps what Rhodes-vivour J.S.C had in mind in *JFS Investment Ltd v Brawal Line Ltd & 2 Ors,*[77] when he suggested that judges should be conferred with discretion to extend limitation periods when it is just and equitable to do so as a way out of the complaint that the general limitation period for some actions are

[71] See note 7
[72] Peter (n 66).
[73] Limitation Act, 1980, s.33(1); See the case of *Mossa v Wise* [2017] EWHC 2608 (QB) for an interesting application of s.33 to a personal injury case. Even though the Rivers State Law is the same with the UK Act in all material particular, it is surprising that the drafters omitted this section.
[74] Limitation Act, 2005, S. 39(1).
[75] Limitation of Actions Act, 1958, S. 27(k) &(l). In *Spandeas v Vellar* [2008] VSCA 139, the Supreme Court of Canada made pronouncements on this section.
[76] Environmental Protection and Enhancement Act, 2000, S. 218(1). The extension is not contained in its Limitation Act of 2000. It provides that "a judge of the Court of the Queen's Bench may, on application, extend a limitation period provided by a law in force in Alberta for the commencement of a civil proceeding where the basis for the proceeding is an alleged adverse effect resulting from the alleged release of a substance into the environment".
[77] [2010] 18 NWLR (Pt.1225) 495.

too short. It is clearly a welcome suggestion. Allowing judges to exercise discretion to extend limitation periods, either in personal injury cases or environmental matters, will effectively address the latent nature of environment-related injuries. It is hoped that judges would exercise such discretions fairly, equitably and judiciously.

(iii) Exemption of Environmental Claims from Limitation Period - The Limitation Act, 2002 of the Ontario Province of Canada excludes from limitation period, an environmental claim that has not been discovered. Section 17 of the Act provides that "There is no limitation period in respect of an environmental claim that has not been discovered." From the foregoing discussions, it is clear that this refers to harm or injury that has not manifested. It can also be seen that it does not restrict the environmental claim to personal injuries alone. It encompasses all environmental harm that will eventually manifest. This provision is apt for environment-related injuries. It obviates the need for the computation of accrual of cause of action and determination of when time starts to run. Generally, most statutes of limitation exempt other actions from limitation period,[78] it is therefore not an unusual provision.

The drafters of Alberta and Ontario laws obviously recognise the peculiarity of environmental matters and the difficulty involved in discovering an environmental claim where the effect of an act or omission by the polluter does not manifest immediately.

6.0 Recommendation

Rhodes-vivour J.S.C. lamented that there has been no reform of limitation laws in Nigeria.[79] Indeed, the Nigerian statutes of limitation are in need of reform, and it is so recommend. The State legislature needs to comprehensively review the Limitation Laws in line with the proactive provisions being included in the

[78] For instance, the UK Limitation Act 1980 exempts sexual assault from the limitation period; Some provinces in Canada like the Ontario province also exempts sexual assault, some cases relating to assault or battery, among other offences from the Limitation period. In recent times, perpetrators were jailed in 2015, 2016, 2017 and 2018 for offences committed in the 1960s, 1970s and 1980s especially in the UK. See Tom Heyden, 'The US-UK Divide on Sex Cases' *BBC News Magazine* (London 13 July 2015); BBC, 'Bill Cosby Sex Assault Case: Seven Questions Answered', *BBC News* (US & Canada 26 April, 2018).

[79] See *JFS Investment Ltd v Brawal Line Ltd & 2 Ors* [2010] 18 NWLR (Pt.1225) 495.

legislation of other jurisdictions. It is proposed specifically that in order to address all the problems associated with the application of statutes of limitation to environmental claims which are enumerated above, States should adopt a combination of what is obtainable in foreign jurisdictions. State Laws should be reviewed to include detailed elements of the 'discovery rule' leaving no room for guesses and difficulty in its interpretation by the courts, in addition to allowing courts to exercise discretion in extending limitation periods for personal injury cases which invariably includes environment-related harm and injury. In the alternative, they may adopt a more radical approach by exempting environmental claims that have not been discovered from limitation periods, altogether.

Beyond the review of Nigerian laws, the writers propose that limitation laws in other jurisdictions regarding environmental claims need to be reviewed in line with introducing the exemption of environmental claims from limitation period. The peculiarity of environmental claims needs to be recognized at global levels for better environmental protection. When polluters realise that they can always be called into question for their activities, it will serve as a deterrent to the way and manner they carry out their activities with impunity especially in developing countries.[80]

Another area that requires review in both the Nigerian statutes and those of other jurisdictions is the restrictive application of 'personal injury.' In order to accommodate environmental damage, other than personal injury, it is recommended that the British Columbia and Ontario model of using 'injury, loss or damage' should be adopted globally. Furthermore, it is recommended that it should include harm to land and real property following the U.S and Ontario example, whereupon the 'discovery rule' can then be applied.

It is proposed that all jurisdictions should increase the limitation periods for environment-related harm and injury as what is obtainable now is capable of denying many environmental pollution victims the remedy they should enjoy. As

[80] Godwin Uyi Ojo and Nosa Tokunbor, 'Access to Environmental Justice in Nigeria: The Case of a Global Environmental Court of Justice' [2016] www.foei.org accessed 31 May 2018 2, 3.

the review takes place, the drafters should pay attention to the language that will be used. Plainer, clearer and more easily understandable language should be adopted. When courts are required to exercise discretion in environment-related matters, there is need to allow a degree of judicial sensitivity in doing so.

7.0 Conclusion

Having examined the implication of the current form of statutes of limitation on environment-related injuries, the authors believe they have succeeded in an attempt at making a justification for a reform concerning the grant of a special dispensation to environment-related harm and injury in the statutes of limitation. From the foregoing recommendations, it may appear that such a reform will undermine the essence of the statutes of limitation, this paper believes the contrary. The nature of environment-related injuries cannot, for instance, make a claim stale because of the long latency period involved before such actions can be 'ripe' for litigation. The fear of loss of evidence will not also arise because the knowledge of these provisions would cause stakeholders to be meticulous with their record-keeping. And record-keeping is even made easier in this dispensation because of technological growth and innovation where all types of information can be stored in the cloud. Consequently, the problem of space to keep documents for long periods of time does not arise. And where records are easily available and retrievable, the defendant will not be disadvantaged in anyway when there is need to collate evidence for defence. But the premise for limitation period, that litigation must have an end, may not be achievable in this instance because litigation cannot come to an end as long as there is exposure of humans and property to hazardous pollutants that are released into the environment. As long as such exposure continues, harm or injury will keep occurring, leading to more litigation no matter how much courts or defendants desire an end to it.

The need for all stakeholders to identify the peculiarity of environment-related injuries and the need to structure relevant laws accordingly cannot be overemphasized. This paper believes that the realization that action can be instituted against them at any point in time will serve as a deterrent to polluters in

the way they carry out their businesses. It is the conviction of the writers of this work that the law will do greater justice should this reform occur as it will give adequate time and opportunity for the crystallizing of the cause of action and redress the grave injustice the environment and community inhabitants suffer by the unfair technicalities of limitation periods.