

Litigation that Holds Government to Account



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“The reality is that our case is overwhelming,” Barry told me. “You look at the photographs of the damage, and you say, What the heck?” (This and the following quotation are paraphrases; indignation not only raises the volume of Barry’s voice, it also makes his language unfit for print.) “Are you out of your mind? They violated the terms of their contract. They broke the law!”

The levee board couldn’t enforce the law. But Barry believed that there was one way around its impotence: It could sue every single oil and gas company that had scarred the marsh in the last century. The complexity of such a case would be daunting, baroque. Lawyers would have to determine who dug every foot of the 10,000 miles of canals and pipelines and then quantify, in dollars, the extent to which each endangered New Orleans’s flood defense. The academic centers and environmental groups Barry contacted, while sympathetic to the cause, lost interest when they estimated how many millions of dollars would have to be spent on expert witnesses and coastal surveys. “We didn’t only need legal ability,” Barry said. “We needed the resources to take on Exxon, Shell, Chevron and BP — all at once.”

He compiled a list of private lawyers who have had success bringing major environmental lawsuits..... It was a very short list.

“The Most Ambitious Environmental Law Suit Ever: A quixotic historian tries to hold oil and gas companies responsible for Louisiana’s disappearing coast.”:
Nathaniel Rich, *New York Times Magazine*, October 3, 2014

As a litigation lawyer and academic I have for some time been both professionally and academically interested in the extent to which litigation may serve as both a *remedial* and *preventative* tool to deal with environmental problems generally and the problem of climate change in particular.

To date, along with a number of co-authors, I have been less than optimistic about the prospect of using litigation generally, and tort law in particular, as a remedy for environmental harm and damage caused by climate change.²

Legal remedies are often circumscribed by, amongst other things, restrictive rules in relation to standing, the necessity to prove individualized fault and constraints on proof of causation.³

¹ Paper presented at NELA Conference 2014: *Transformation or Train Wreck? Environmental and Climate Change Law at the Crossroads*.

² See e.g. Peter Cashman & Ross Abbs, Tort liability for loss or damage arising from human induced climate change: is this what justice requires and fairness demands, chapter in *In the Wilds of Climate Law* (ed Rosemary Lyster), Australian Academic Press, 2010; Ross Abbs, Peter Cashman & Tim Stephens, chapter on ‘Australia’ pp67-11 in *Climate Change Liability: Transnational Law and Practice* (ed Richard Lord et al), Cambridge University press, 2012.

³ See e.g. *Comer v Murphy Oil* where proceedings for losses arising out of property damage caused by Hurricane Katrina were brought against a number of chemical and energy companies alleging that their GHG emissions had contributed to climate change and the intensity of the hurricane. There are a number of decisions: see e.g. 585 F.3d 855 (2009); 607 F.3d 1049 (2010). In 2013 a new suit, filed in 2011, alleging many of the same claims was dismissed and that decision was confirmed on appeal. In *California v General Motors* the State of California unsuccessfully sued leading car manufacturers alleging that the GHG emissions were a public nuisance contributing to global warming and adversely affecting the resources, infrastructure and environmental health in California. The US Court of Appeals for the 9th Circuit in *Native*



As the focus of the present session is on the *changing face* of environmental litigation, I propose to examine two current cases.

These represent an interesting departure from other more ‘traditional’ cases which have focused on environmental assessment standards in respect of proposed projects which may have significant adverse environmental impacts, including on climate change.⁴

The first case examined is symptomatic of emerging climate change litigation which has sought to both hold governments to account and to *reduce* environmental harm from climate change rather than remediate after damage has been done.

The second is a class action being considered, closer to home, seeking compensation and damages arising out of large scale environmental pollution following the Montaro oil spill off the north coast of Australia in 2009 that lasted for 74 days.

Whilst the former case is preventative in nature and the latter remedial, both involve attempts to hold governments or government agencies responsible for environmental damage.

Preventative Litigation Strategies

As some recent developments in the United States have made clear, there are a number of areas where litigation may serve as a useful tool to require governmental or regulatory bodies to take action to reduce carbon emissions.⁵

In the first part of this paper I focus on current litigation, in several European countries, which seeks to hold national governments accountable for their failure to implement more effective climate change policies and to obtain court orders to require them to take more effective measures to *reduce* greenhouse gas emissions. This litigation has been carefully considered, is ambitious in scope and, if successful, may have far reaching international consequences.

The Urgenda climate change case against the Dutch Government

A Dutch NGO, the Urgenda Foundation⁶ and around 900 individual co-plaintiffs have brought proceedings in a Dutch Court in The Hague against the Dutch Government for its alleged failure to take sufficient steps to *reduce* greenhouse gas emissions in the Netherlands that are said to cause or contribute to dangerous climate change.⁷ The Plaintiffs are being represented by Attorney and ‘*climate change litigator*’ Roger Cox⁸ of the law firm Paulussen Advocaten NV in Maastricht.

The proceedings were commenced following a request for ‘crowd pleading’ through which Dutch citizens could support the case and join as co-plaintiffs.

Village of Kivalina v. Exxon Mobil Corp., found that the plaintiffs had not shown causation between global warming damage and the defendants’ actions.

⁴ See e.g. *Gray v The Minister for Planning, Director-General of the Department of Planning and Centennial Hunter Pty Ltd* [2006] NSWLEC 720 (‘Anvil Hill Case’) and the analysis by Anna Rose, *Gray v Minister for Planning: The Rising Tide of Climate Change Litigation in Australia*, 29 *Sydney Law Review* 725 [2007]. See generally: Preston, B, *The Influence of Climate Change Litigation on Governments and the Private Sector* (2011) 2(4) *Climate Law* 485.

⁵ See e.g. *Massachusetts v Environmental Protection Agency*, 549 US 497 (2007). The Supreme Court accepted that whilst regulating motor vehicle emissions may not by itself *reverse* global warming, it did not follow that the Court lacked jurisdiction to decide whether the EPA has a duty of care to take steps to *slow* or *reduce* it. The Court accepted that the EPA had statutory authority to regulate automobile emissions of greenhouse gases. The steps taken by the EPA on remand and the ensuing legal challenges are beyond the scope of the present article.

⁶ The name is an amalgam of the words ‘Urgent Agenda’.

⁷ See, for an overview of the case, Roger Cox, ‘The liability of European States for Climate Change’, [2014] *Journal of Planning and Environmental Law*, issue 9, 961; originally published in (2014) 30 (78) *Utrecht Journal of International and European Law*. Other information about the climate proceedings can also be found on the website of said Dutch NGO via this link http://www.wijwillenactie.nl/?page_id=1097

⁸ The inspiration for the case is said to be the book by Roger Cox, *Revolution Justified*.

The case is of interest for a number of reasons. It is the first case that has sought to hold a national government to account for environmental harm from climate change and to obtain orders to reduce future greenhouse emissions. It is also novel in that it seeks to use human rights protections as part of the legal foundation for the case.

Similar proceedings are presently being proposed in Belgium.

The pre-action letter of demand to the Dutch Government

The litigation was preceded by a letter of demand to the Dutch Prime Minister in November 2012.

The letter refers, inter alia, to various international treaties and agreements⁹ between countries whose purpose is to bring about a worldwide reduction of carbon emissions. The necessity for this was said to be demonstrated by scientific research and the findings of the Intergovernmental Panel on Climate Change (*IPCC*).

The letter contends that the Dutch Government should do all it can to reduce greenhouse emissions by 40%, relative to their 1990 levels, by 2020.

Current Dutch climate change policy is said to be unacceptable and allegedly exposes current and future inhabitants of the Netherlands to major physical and economic risks.

Per capita CO₂ emissions in the Netherlands are said to be amongst the highest in the world and the Netherlands is at great risk of suffering major economic losses and environmental harm due to its low altitude.

The Government was asked to provide an assurance, in the form of a written agreement with Urgenda, that the Dutch State would take all measure necessary to ensure that by 2020 Dutch emission of greenhouse gases would be reduced by 40% relative to Dutch emissions in 1990.

In the absence of the agreement sought Urgenda threatened legal action to ask the court for orders requiring the State to take the requested measures.

Perhaps not surprisingly, no agreement was forthcoming.

On 14 November 2012 the government was called on to take all necessary measures to comply with the 2 degree target of the UNFCC and to reduce CO₂ emissions before 2020 by 40% compared to 1990 levels. On 20 December 2012, six members of the Dutch Parliament voted in favor and 138 members voted against the motion.

Legal proceedings were subsequently commenced in the District Court in The Hague on 20 November 2013.

The Proceedings commenced in the District Court in The Hague

The Parties

The Plaintiffs are the Urgenda Foundation on its own behalf and as representative of all the private individuals who are listed in the Annexure to the Summons.

The Defendants to the proceedings are the Kingdom of the Netherlands (the Dutch State) and the Ministry for Infrastructure and Environment.¹⁰

Standing?

The Dutch *Civil Code*, Article 3:303 provides that a person can file a complaint in a civil court only when that person has a sufficient and personal interest in the claim.

⁹ E.g. the *UN Climate Treaty*, 1992.

¹⁰ The following is based on the 25 June 2014 English version of the original Summons.

However, there is an exception to this standing requirement. A legal entity or association may file a complaint when it seeks to protect a general interest, or the collective interest of other persons, insofar as that interest is encompassed by the purposes of that legal entity. However, the standing to bring a proceeding only arises after the organisation has made sufficient attempts to achieve its demands through constructive dialogue with the target of its complaint.

The relevant science

The Summons sets out in some detail the relevant 'climate science'.¹¹

The law sought to be relied upon

The claim is based on both Dutch national law and on international law said to be directly applicable in the Dutch legal system.

Relevant provisions are said to include Articles 2 and 8 of the European Convention on Human Rights (*ECHR*).

International law provisions which are not binding per se on individuals in the Netherlands are said to be able to be applied by Dutch courts through the principle of 'indicative effect' whereby international law can be used as an interpretative source when applying national norms.

The general principle of international law that liability exists for trans-boundary pollution (the so called 'no harm' principle) is said to be part of customary international law.

It is contended that there is an obligation under international law to prevent significant damage from emissions from one's own territory to the environment and habitat of other states and their inhabitants. This is said to extend to situations where 'significant' damage is not caused by the actions of the state, per se, but by those of private individuals or enterprises within the state.

The causes of action relied upon also appear to include claims based on Dutch involvement in and/or agreements reached at various international meetings at which resolutions were agreed upon for the purpose of reducing greenhouse gas emissions.

In relation to the ECHR it is contended that attribution to the state of violations of human rights by private individuals and enterprises may occur where the ECHR imposes a positive obligation to protect certain rights. This positive obligation is said to extend to an obligation to enact effective legislation.

Based on Articles 2 (the right to life) and 8 (the right to private and family life) of the ECHR: it is contended that the Dutch State has a positive obligation to take preventative measures against climate change, mainly by reducing Dutch emissions to an adequate level, so as to prevent the violation of the rights and freedoms incorporated in Articles 2 and 8.

Under domestic Dutch law, the causes of action relied upon include nuisance, 'endangerment' and principles derived from the Potash Mines litigation.¹²

The Dutch States is alleged to be liable for CO₂ emissions on Dutch territory, including by virtue of Article 21 of the Dutch *Constitution*, the *Environment Protection Act*; Articles 2, 8, 7, 13 of the *ECHR*; and the *Environmental Licensing Act*.

Dutch CO₂ emissions at their present level are said to be 'unlawful' and on this basis causes of action are based on such unlawful act or tort. It is contended that a tort or unlawful act is a breach of a

¹¹ Including at pp 6-21; 30-54.

¹² Dutch growers using water partially sourced from the heavily salinised Rhine River suffered damage. The salt was due to multiple human and natural causes upstream. This included human induced pollution in several countries. Dutch agricultural companies brought proceedings against the owners of French potash mines, who were found to be in breach of their duty of care.

right, an act or omission violating a statutory duty or an act or omission in violation of a general duty of care.

The Summons incorporates data on the greenhouse gas emissions of various countries. It is contended that the Netherlands 'excessively and very substantially contributes to the excessively high global CO₂ concentration in the atmosphere' [357].

Remedies sought

The Summons seeks:

- A declaration that the Dutch State is acting unlawfully in the event that it does not take appropriate measure to reduce the magnitude of greenhouse gas emissions in the Netherlands to a level of 40%, or at least 25%, below the level of 1990, before 2020
- An order that the Dutch State limit the magnitude of greenhouse gas emissions in the Netherlands to a level of 40%, or at least 25%, below the level of 1990, before 2020
- An order that the Dutch State present to Parliament within 6 months of the judgment a program of measures with corresponding budgets, fully assessed and commented upon by the Dutch Environmental Assessment Agency, that would ensure the reduction in greenhouse gases in the Netherlands to a level of 40%, or at least 25%, below the level of 1990 before 2020

The Position of the Dutch Government

Although the Dutch Government allegedly accepts that there is a serious global warming problem, and agrees that there is a need for effective action, it is contended in the Summons that the 'government nevertheless refuses to commit to taking the actions that are necessary. The position of the government seems to be that they only want to act if the rest of the world agrees to do so as well' [at 387].

The likely outcome?

The case is fixed for hearing before the District Court in The Hague on 14 April 2015. As noted above, this novel litigation, if successful, may have far reaching consequences.

I shall leave it to others to speculate on its prospects of success.

Remedial Litigation

The second current matter I want to focus on arises out of the Montara oil spill off the north coast of Australia in 2009.

The Montara Oil Spill

Estimates of the total volume of oil released vary from 400 barrels a day (estimate by the company operating the drilling rig) to 2,000 barrels a day (Australian Department of Resources, Energy and Tourism estimate). In its 2013 Research Report the company states that the spill rate of the crude oil component of the oil spill was initially 400 barrels per day 'as a worst case estimate' (based on AMSA overflight observations of the oil slick on the surface of the water).

The company's estimate of 400 barrels per day is equivalent to 64,000 litres. The flow rate of water from a 100 foot garden hose of ¾ inch diameter, under pressure of 60psi, is 83.3 litres per minute or 120,000 litres per day.

Some commentators have compared the volume of the spill with that arising out of the notorious *Exxon Valdez* incident in Alaska on 24 March, 1989. The Report of the Independent Commission of Inquiry into the incident concluded that the spill may have been around 1,500 barrels a day, but was

critical of the failure of those involved to produce a more accurate estimate of the rate of release given the availability of techniques that could have been used for this purpose. A recently published article estimates the oil spill at approximately 4,750 metric tons (Hunter, 2014 at 587, based on a report prepared by the Australian Maritime Safety Authority).

As the report of the Commission of Inquiry into the oil spill stated: ‘... the blowout is the worst of its kind in Australia’s offshore petroleum history’ ...

‘For a period of just over 10 weeks, oil and gas continued to flow unabated into the Timor Sea, approximately 250 kilometres off the northwest coast of Australia. Patches of sheen or weathered oil could have affected at various times an area as large as 90,000 square kilometres.’ [p 5]

As the Report notes:

‘Blowouts offshore can have major and long lasting effects - including the loss of human life; the pollution of marine and shoreline ecosystems; and substantial commercial losses by the companies directly involved and third parties affected by the spill.’

The area and people affected by the oil spill

It has been contended that oil from the spill flowed into the Indonesian ocean and Timor and Sawu Seas which surround the various islands of East Nusa Tenggara (**ENT**).

ENT is one of the four Indonesian provinces in the Nusa Tenggara (Southeast islands) encompassing Bali, West Nusa Tenggara, ENT and (the formerly Indonesian, but now independent) East Timor. ENT comprises 566 islands, the three main ones being Flores, Sumba and Timor.

Those living in the region apparently have low incomes, high infant mortality and an average life expectancy of 64 years. ENT is one of the poorest provinces in the Indonesian archipelago with many communities eking out a subsistence living derived from fishing in the Timor Sea and seaweed farming.

Small wooden fishing vessels are used to carry crews of up to a dozen fishermen hundreds of kilometres from shore in search of fish. Many traditional fishing grounds have been closed to Indonesian fishermen after having been declared as Australian waters. Access to health and education is apparently dependent upon small incomes from fishing and aquaculture, including seaweed cultivation and collection.

Many subsistence village communities are alleged to have experienced considerable deprivation and there was reported to be widespread hunger following the loss of fish and income from aquaculture. Thousands of school children across the region were allegedly taken out of schools because their parents could not pay the fees. There have also been reported personal injuries, including death, amongst persons eating contaminated fish. Such problems were apparently experienced in both Indonesia and East Timor.

The offshore drilling operation

On 23 July 2008, Clough Thailand (part of an Australian group of companies with international subsidiaries with expertise in engineering and large scale construction) delivered the topside structure for the Montara wellhead platform, a 750 tonne structure, (‘the Wellhead’) to Coogee Resources. It was transported from Clough’s yard at Sattahip on Thailand’s eastern seaboard.

The Wellhead was installed on waiting pylons to complete the Atlas drilling rig (‘the Rig’) in the Timor Sea. The location is approximately 685 kms west of Darwin in the Northern Territory, 630 kms northeast of Broome in Western Australia and 310 kms southeast of the coast line of Indonesia and East Timor. The Indonesian island of Pulau Roti is only 250 kms from the Montara Wellhead platform.

The Rig and crew had been leased by Coogee from Atlas Drilling, an affiliate of Seadrill Management. Coogee operated it until December 2008 when the company was sold and became PTTEP Australasia (Ashmore Cartier) Pty Ltd (**PTTEPAA**).

The operator of the Rig at the time of the spill was the Australian company PTTEPAA.

The Houston based company, Halliburton, had been engaged to undertake cementing work in setting up the Rig. As noted below, this cementing work was critical to the blowout.

Relevant facts summarised by the Report of the Montara Commission of Inquiry (at pp 49-52) are as follows:

- In November 2008, PTTEPAA sought and was granted approval by the NT DoR to batch drill three development wells in the Montara oilfield, one of those being the H1 Well. PTTEPAA later sought approval to batch drill two additional wells. Accordingly, there were five wells at Montara -H1, H2, H3, H4, and G1.
- Between January and April 2009, the *West Atlas* rig (owned and operated by Atlas) was positioned over the Montara WHP, located in waters approximately 77 metres deep, for the purpose of enabling Atlas to drill the wells (as contractor) for PTTEPAA.
- On 27 February 2009, while the derrick of the *West Atlas* rig was positioned over the H1 Well, PTTEPAA applied to the NT DoR to change the course of the H1 Well. The process of changing the course of a well is known as sidetracking. The reason PTTEPAA sought to sidetrack the H1 Well was to enable access to a cleaner section of the reservoir into which PTTEPAA had already drilled a 12¼" hole.
- On 2 March 2009, the NT DoR granted approval to PTTEPAA to sidetrack the H1 Well. The H1 Well thereafter became known as the H1-ST1 Well but, for convenience, will continue to be referred to in this Report as the H1 Well.
- Between 2 and 7 March 2009, PTTEPAA continued to drill the H1 Well to a measured depth of 3,796 metres, as measured from the rotary table on the *West Atlas* rig. The total direct vertical depth of the H1 Well from the rotary table was 2,654 metres.
- On 6 and 12 March 2009, PTTEPAA sought approval from the NT DoR to suspend the H1 Well, with the foot of the 9½" casing in the reservoir, by installing PCCCs on the 9½" and 13½" casing strings (instead of setting a shallow-set cement plug within the 9½" casing string as originally planned).
- The NT DoR granted PTTEPAA approval to suspend the well in this manner.
- On 7 March 2009, PTTEPAA pumped an amount of cement into the 9½" casing shoe (the shoe being located within the bottom-most lengths of the casing). At that point, the casing was located inside the reservoir at a point three metres (10 feet) above the oil-water contact, thereby providing a pathway for hydrocarbons to enter the well through the casing shoe. The cementing procedure was intended to set the casing shoe in the wellbore, and thereby provide a primary barrier against a blowout.
- Following pumping of the cement, pressure was held in the casing to 4,000psi. Upon release of the pressure, 16.5 barrels of fluid returned. The return of this fluid indicated that there was a problem with the float valves in the casing shoe. The 16.5 barrels of fluid were pumped back down the casing, and the top of the casing was then closed-in so as to maintain pressure in the casing whilst the cement set.
- Following so-called wait on cement (**WOC**), and the absence of any unwarranted further backflow of fluids, a 9½" PCCC was installed on the H1 Well, followed by a so-called trash cap.

The derrick of the *West Atlas* rig was then moved (or skidded) from the H1 Well over to the H4 Well.

- On 21 April 2009, the *West Atlas* rig departed from the Montara WHP in order to perform drilling operations in other fields. At that point, or perhaps even earlier in March, the H1 Well was 'suspended'. It was generally believed that a PCCC had also been installed, as required, on the 13 $\frac{3}{8}$ " casing in the H1 Well, but it is now known that this did not in fact occur.
- On 19 August 2009, the *West Atlas* rig returned to the Montara WHP to allow PTTEPAA to (i) commence the tie-back of the casing strings of each of the five wells to the platform; and (ii) 'complete' the wells to the point of production.
- At 4.30am on 20 August 2009, the derrick of the *West Atlas* rig moved over the H1 Well. At 6am on the same day, the 20" trash cap was removed from the H1 Well. It then became clear to personnel from PTTEPAA and Atlas that there was no PCCC installed as required on the 13 $\frac{3}{8}$ " casing of the H1 Well.
- As a consequence of the non-installation of the 13 $\frac{3}{8}$ " PCCC, the threads at the top of the 13 $\frac{3}{8}$ " casing – known as the mud line suspension (**MLS**) threads – had rusted or corroded. In order to tie the 13 $\frac{3}{8}$ " casing back to the WHP on a long-term basis, PTTEPAA personnel on-rig and onshore decided that those threads should be cleaned.
- At around 11.30am, the 9 $\frac{5}{8}$ " PCCC was then removed from the H1 Well in order to allow a tool to be run in to clean the MLS threads on the inside of the 13 $\frac{3}{8}$ " casing. The 9 $\frac{5}{8}$ " PCCC was not thereafter reinstalled.
- At that time, it seems to have been generally considered that there were two barriers within the H1 Well to prevent a blowout of fluids from the reservoir: the cemented casing shoe; and a column of inhibited seawater within the 9 $\frac{5}{8}$ " casing, which was thought to have had a so-called 'kill weight' (being sufficient weight to counter the pressure in the reservoir). Significant work on the H1 Well was placed in temporary abeyance at that point, pending the tie-back of casings on other wells.
- At around 5pm on 20 August 2009, the derrick of the *West Atlas* rig was skidded to the GI Well, and work was carried out on that well between about 6.30pm and midnight on 20 August 2009.
- At midnight on 20 August 2009, the derrick of the *West Atlas* rig was skidded to the H4 Well.
- At about 5.30am on 21 August 2009, workers on the WHP observed a blowout of fluid coming from the H1 Well. The volume was estimated at between 40 and 60 barrels. Gas alarms on the *West Atlas* rig were triggered and emergency response procedures were activated.
- The flow appeared to subside and the *West Atlas* rig's OIM, Mr Trueman, gave the all clear at around 5.55am.
- At about 6am on 21 August 2009, a decision was made to skid the derrick from the H4 Well back to the H1 Well in order to set a mechanical pressure isolation device in the H1 Well to prevent further flow.
- At around 7.23am on 21 August 2009, the H1 Well 'kicked' again, this time blowing a column of oil and gas to the underside of the rig floor. Emergency response procedures were once again activated, and over the next hour or so senior PTTEPAA and Atlas personnel on board the rig and WHP decided to evacuate the 69 personnel. All personnel were safely evacuated.

Potential defendants in any litigation include: (1) The company responsible for the oil drilling operation, Australian company PTTEPAA, a subsidiary of the Thai company NOC PTTEP; and (2) The NT regulatory authority, the Northern Territory Department of the Environment (NT DoR) delegated by the Australian Government to approve, supervise and monitor the drilling operations.

Factual responsibility for the cause of the Blowout

The report of the Independent Commissioner, David Borthwick, dated 17 June 2010, sets out in considerable detail his findings as to the cause of the events in question.

As noted above, the Blowout was the worst of its kind in Australia's offshore petroleum industry (p 5). Oil and gas flowed for a period of 10 weeks and 'could have affected' an area as large as 90,000 square kilometres (p 5).

It is clear, as he notes, that ensuring the integrity of oil and/or gas wells (and preventing blowouts) is a fundamental responsibility of the companies involved in offshore petroleum exploration and production.

At the relevant time there were well known systems and technologies available which were designed to be fail safe and with back up capability built in to prevent blow outs.

After receiving submissions and holding a public hearing the Commission of Inquiry concluded, inter alia, that:

- PTTEPAA did not observe sensible oil field practices and major shortcomings which led to the blow out were widespread and systemic;
- The regulator, the NT DoR (the delegated Designated Authority), was not sufficiently diligent in approving the Phase 1B Drilling Program for the Montara Oilfield in July 2009, given that it did not reflect 'sensible oilfield practice', and had adopted a 'minimalist approach' to its regulatory responsibilities.

The report sets out in technical detail the basis for these conclusions.

It was found that the 'most likely' cause of the failure was the entry of hydrocarbons into the H1 Well through the 9 and five eighth inch cemented casing shoe which then flowed up the inside of the casing.

The well control barriers did not comply with PTTEPAA's own Well Construction Standards (nor sensible oilfield practice).

The cemented casing shoe had not been pressure tested in accordance with the company's Well Construction Standards.

The cement in the casing shoe was likely to have been compromised as it had been substantially over-displaced by fluid, resulting in what is known as 'wet shoe'.

None of these problems were appreciated by senior PTTEPAA personnel at the time even though the company's contemporaneous records, such as the Daily Drilling Report, clearly indicated what had happened.

Multiple problems experienced in undertaking the cement job should have raised alarm bells.

Such problems necessitated a careful evaluation, the instigation of pressure testing and, most likely, remedial action. No such evaluation was undertaken.

The problems that had been encountered were 'not complicated or unsolvable, and the potential remedies were well known and not costly.' According to the Commission of Inquiry: 'This was a failure of 'sensible oilfield practice 101.'

The initial cementing problem was compounded by the fact that although two secondary well control barriers (pressure containing anti-corrosion caps, 'PCCCs') were chosen by PTTEPAA and programmed for installation, only one was ever installed.

Moreover, the one that was installed was never tested and verified in situ, as required by the Well Construction Standards.

The Inquiry found that PTTEPAA's use of PCCCs as secondary well control barriers did not constitute sensible oil field practice.

Moreover, key personnel working for PTTEPAA, both on the rig and onshore, were under the mistaken impression that the fluid left in the casing string was overbalanced to pore pressure - and would therefore act as an additional barrier, even though the fluid was not monitored and overbalanced significantly to pore pressure as required by the Well Construction Standards in order to be regarded as a proper barrier.

The Report of the Commission on Inquiry documents other errors and omissions on the part of PTTEPAA.

Although it was accepted standard practice in the off shore drilling industry at the time to have secondary barriers against a Blowout, at the H1 Well there were no tested and verified barriers in place at the time of the Blowout.

The Report proceeds to set out, in some detail, how this perilous situation arose. It was concluded that the absence of tested barriers was the proximate cause of the Blowout but this was said to reflect 'systemic errors of a deep seated kind within PTTEPAA' (p9). These included:

- Inadequacies in the Management Plan and Well Construction Standards (including ambiguities and inappropriate provisions);
- The limited experience of senior PTTEPAA personnel;
- The inadequate understanding on the part of the companies personnel of the safety requirements;
- Deficiencies in decision making and judgment on the part of PTTEPAA's senior personnel on the rig and onshore;
- Defective records and communication management;
- Systemic failure of communication between PTTEPAA and personnel with the rig operator, Atlas;
- Inadequate onshore management and governance structure and insufficient attention to mechanisms to assess and manage project risks;
- The failure to recognise risks when they should have been recognised and the failure to assess them properly when they were recognised;
- The absence of internal audit or review processes at critical milestones; and
- Manifest failures in communication and interaction with the Regulator.

The Commissioner somewhat colourfully concluded that 'the way PTTEPAA operated the Montara Oilfield did not come within a 'bulls roar' of sensible oilfield practice' (p 11).

This was said to be 'an accident waiting to happen'. In the view of the Commissioner:

"the company's systems and processes were so deficient and its key personnel so lacking in basic competence, that the Blowout can properly be said to have been an event waiting to occur."
(p 11)

In the course of the Inquiry PTTEPAA provided the Commissioner with an Action Plan to prevent a recurrence of the Blowout. This Plan addresses the shortcomings in PTTEPAA's operations as identified by the Inquiry.

In a later part of the Report of the Commission of Inquiry the significant failures on the part of PTTEPAA were summarised as follows:

- both onshore and on-rig personnel from PTTEPAA were directly involved in over-displacement of cement beneath the float valves in the 9½” casing shoe of the H1 Well on 7 March 2009. These personnel acted contrary to sensible oilfield practice in the course of that cementing operation;
- both on-rig and onshore personnel from PTTEPAA were directly involved in the use of an incorrect volume of tail cement in the course of the same cementing operation;
- both on-rig and onshore personnel from PTTEPAA failed to recognise, in the aftermath of the cementing operation on 7 March 2009, that a wet shoe had been created. These failures occurred (i) during the course of preparation of contemporaneous documents by on-rig personnel; and (ii) upon review of those documents by onshore personnel;
- on-rig and onshore personnel from PTTEPAA failed to ensure that a test of the cemented shoe was carried out. This failure was contrary to sensible oilfield practice and PTTEPAA’s own standards;
- on-rig and onshore personnel from PTTEPAA were implicated in deferment of installation of the 13½” PCCC, contrary to sensible oilfield practice. They were also implicated in the failure to install the 13½” PCCC as a secondary barrier against a blowout;
- on-rig and onshore personnel from PTTEPAA were directly involved in the removal and non-reinstallation of the 9½” PCCC on 20 August 2009. Their actions in this regard were contrary to sensible oilfield practice and PTTEPAA’s own standards;
- PTTEPAA failed to carry out a sufficiently detailed risk assessment in relation to the general topic of use of PCCCs as secondary barriers against a blowout, particularly in the context of batched tie-back operations which were to occur at the Montara Oilfield;
- there was widespread misunderstanding on the part of PTTEPAA’s personnel as to the barrier status of the displacement fluid contained within the 9½” casing in the H1 Well. On-rig and onshore personnel from PTTEPAA wrongly considered that the fluid could be relied upon as an effective barrier against a blowout. Their approach to that question was contrary to sensible oilfield practice and PTTEPAA’s own standards;
- too much weight was given by PTTEPAA personnel to the absence of detectible signs of flow prior to and immediately after removal of the 9½” PCCC. Further, there was inadequate monitoring of the well after that removal;
- there were a large number of significant deficiencies in various PTTEPAA documents dealing with well control;
- there were significant deficiencies in PTTEPAA’s management systems for recording and communicating information within the company;
- there were significant deficiencies in the formal and informal arrangements which PTTEPAA set in place between it and Atlas with respect to risk management in the context of well control;
- there were deficiencies in PTTEPAA’s logistics management; and
- PTTEPAA did not have effective internal systems in place to achieve a high level of quality assurance with respect to well operations: first, PTTEPAA personnel were non-vigilant in the performance of day-to-day supervision of subordinates; secondly, there were no random or systematic audits undertaken in the relevant period; thirdly, PTTEPAA adopted a non-systematic approach to acquiring and maintaining levels of knowledge and expertise; and fourthly, PTTEPAA’s governance structures were non-robust. (pp 320-322).

The Report proceeds to document a number of other deficiencies in respect of **all** other wells operated by the company in the Montara Oilfield. Thus, the identified problems at the Montara well were symptomatic of a broader problem.

The Report also concluded that PTTEPAA's investigations into the Blowout were manifestly deficient (p 327).

Its failure to properly investigate the Blowout was found to be irresponsible and inexcusable (p 333).

Moreover, in the course of the Inquiry the company was found to have supplied 'a good deal of false and misleading information' (p 340).

The Inquiry also expressed concern at the possible misuse of legal professional privilege in respect of the report of an investigation by the company into the Blowout (p 341).

The role of the Northern Territory Department of Resources

The NT DOR was the designated authority ('DA') acting on behalf of the Commonwealth Government, with responsibility for approval for the environmental plan ('EP') for the installation and construction activities in off shore waters under the jurisdiction of the Commonwealth pursuant to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* ('OPGGs Act'). This included responsibility for approval of the EP in accordance with the OPGGS(E) Regulations.

In relation to the regulatory role of the NT DOR the Inquiry documented many significant deficiencies.

The Report notes that some of these deficiencies are unlikely to have played a causal role in the Blowout but that others did play a causal role in the lead up to the Blowout (albeit 'indirect and non proximate') (p 147).

The Commissioner concluded that the NT DOR should never have approved the Phase 1B Drilling Program in the first place. At the very least, it should have insisted on the installation of another secondary barrier in the H1 Well in the period between (1) scheduled removal of the nine and five eighth inch PCCC; and (ii) installation of a BOP over the well (p 148).

According to the Inquiry Report, the evidence revealed considerable and disturbing shortcomings in the way in which PTEPAA applications were assessed by the NT DOR, both in the procedure that was adopted and the decisions that were actually made (p 198-199).

Such evidence 'indicated that these shortcomings were systemic rather than isolated incidents' (p 199).

The inadequacies in the regulatory assessment processes are documented in detail in the Inquiry Report. The Inquiry concluded that there had been 'a significant failure to fulfil good contemporary regulatory practice' (p 204).

There was also evidence before the inquiry from other Australian regulatory bodies to the effect that they would not have approved a drilling program that left a well with only one protective barrier in the present circumstances (p213).

The inquiry concluded that the NT DOR should not have approved the drilling program in the circumstances.

Moreover, having approved the program there was no real attempt to monitor PTTEPAA's compliance with approved programs and good oilfield practice (p 214).

Overall, the NT DOR was found to be deficient insofar as there were insufficient means of discovering inadequacies in PTTEPAA's operations bearing upon well integrity.

Of interest are the findings relating to the regulators failure to properly satisfy itself that the company had adequate insurance cover in respect of possible claims for loss or damage (pp 204-206).

In view of the serious and systemic findings against the NT-DOR made by the Commission of Inquiry there may be good grounds for including this entity as a defendant in any proceedings.

Cases of alleged negligence arising out of ignorance, inertia or inaction are arguably different from the present case where the regulator appears to have been grossly negligent in its approval of the offshore drilling operations and its failure to consider adequately or at all various important matters such as the safety of the drilling operation and the adequacy of insurance of the drilling company. The relatively damning evidence of other Australian regulators, in evidence before the Montara Commission Inquiry, that they would not have given regulatory approval in the circumstances is indicative of a strong case in negligence against the NT DoR.

The role of the Australian Government in the response to the blowout and oil spill

The necessary remedial response to the blowout and oil spill was apparently beyond the capacity of PTTEPAA and thus the management of the response was handled by the Australian Maritime Safety Authority (AMSA) for a period of 10 days from 21 August until 3 December 2009. This is examined in detail in chapter 6 of the Inquiry Report.

The initial objective was the protection of Ashmore Reef but this was later amended to include protection of Cartier Island and the Western Australian coastline.

An important issue is the use of chemical dispersant to deal with the oil spill. Six types of chemical dispersant were used : Slickgone NS, Slickgone LTSW, Ardrex 6120, Tergo R40, Corexit 9500 and Corexit 9527.

Dispersants accelerate the weathering and breaking up of oil at sea but do so by moving the oil below the surface and into the upper 5 metres of the water column (p282). This reduces the exposure of sea birds to oil but may cause other environmental problems.

Dispersant operations commenced on 23 August and continued until 1 November 2009. During this time 184,000 litres of dispersant were deployed.

As the inquiry Report notes, dispersants represent a human health hazard and can cause eye, skin or respiratory irritation with prolonged exposure. Various submissions to the Inquiry questioned the use of dispersants.

The Inquiry accepted that there were valid concerns about dispersants given their impact on the environment generally and subsurface organisms such as fish larvae and coral spawn in particular.

Notwithstanding such concerns, the Inquiry concurred with the decision to use dispersants.

As part of the response to the oil spill a wildlife survey was conducted between 25 September and 4 October 2009 by three independent marine biologists. Further monitoring for a period of 5 years was recommended by them.

Both Operational Monitoring and Scientific Monitoring programs were initiated as part of the response. The Operational monitoring was found to be inadequate to assess the environmental impact of the spill. Arrangements for long term scientific monitoring were not agreed until 49 days into the response operation. A Memorandum of Understanding was eventually agreed to on 9 October 2009 providing for studies to be funded by the company for up to eight years.

However, the Inquiry concluded that the prolonged delay in undertaking Scientific Monitoring of the impact of the oil spill was unacceptable and such delay restricted the scope for assessment of the impact of the environmental damage (p 291).

In its submission to the Inquiry AIMS noted that Australia did not have legislation that requires ecological damages to be assessed and there was no statutory basis for damages to be claimed for environmental damages assessment (p 291).

As noted in the Report, the Claims Manual of the *International Oil Pollution Compensation Fund 1992* provides for contributions to be paid for the cost of post spill studies to establish the nature and extent of environmental damage caused by an oil spill and to determine if reinstatement measures are necessary and feasible. However, these arrangements apparently do not extend to oil spills from offshore petroleum developments (p 293).

The Designated Authority (DA) has the power under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGGS) to direct the title holder to clean up or remediate the effects of the escape of petroleum (ss 574(2) and 782(1)). However, the Inquiry did not see any evidence to suggest that the use of this power was considered (p 295).

The Commission of Inquiry was of the view that the actual impact of the Blowout on wildlife and the environment will never be known given, inter alia, the vastness of the area and the lack of firm data against which pre and post spill comparisons can be made.

However, it was concluded that the extent of the pollution was significant and that both oil and oil dispersants can have a toxic effect on sea birds, marine mammals and other megafauna, corals, coral larvae and fish larvae, affecting photo synthesis, respiration and reproduction (p 306).

The Oil Company's Position?

The forensic position likely to be adopted by the PTTEPAA in any legal proceedings may be apparent from recent press releases by the company and from the reports of scientific investigations undertaken by the company following the oil spill.

In summary, the company appears to take the position that there was minimal environmental impact generally and no environmental or other economic impact in Indonesia (or East Timor) because the oil spill never intruded, other than marginally, into Indonesian waters.

The scientific research initiated by the company is summarised in the report by PTTEP: *Montara Environmental Monitoring Program: Report of Research* (Edition 2, September 2013). The earlier first report is dated August 2012. These reports and other research reports are available on the PTTEP website.¹³

Studies undertaken by or on behalf of the company were conducted from soon after the incident in August 2009 and were 'mostly concluded' in mid-2013. The studies arose out of the abovementioned agreement between PTTEP Australasia (PTTEP AA) and the Australian Government in October 2009 whereby the company agreed to fund a monitoring program to determine 'any impacts on the environment'. Independent academic and research bodies, including the Australian Institute of Marine Science, Monash University and Charles Darwin University were involved in the research program.

Independent scientific studies

Ten types of study were carried out:

- Shoreline ecological assessment aerial surveys
- Assessment of fish for the presence of oil
- Olfactory analyses of Timor Sea fish fillets
- Assessment of the effects on Timor Sea fish

¹³ www.au.pttep.com/wp-content/.../2013-Report-of-Research-LR72.pdf and/or the website of the Department of Sustainability, Environment, Water, Population and Communities (SEWPaC): www.environment.gov.au/coasts/oilspill/scientific_monitoring.html



- Offshore banks assessment survey
- Shoreline ecological ground surveys (corals)
- Shoreline ecological ground surveys (turtles and sea snakes)
- Shoreline ecological ground surveys (seabirds and shorebirds)
- Oil fate and effects assessment-trajectory analyses
- Oil fate and effects assessment-dispersant oil monitoring

On page 4 of the abovementioned 2013 report the sampling locations for each of the abovementioned studies are shown on a regional map. Of particular significance for present purposes is the fact that none of the sampling locations are in Indonesian waters or in the Indonesian Exclusive Economic Zone to the north of the Montara oil well.

Although shoreline sampling was done on the Australian coastline no sampling was done in Indonesia or in the territory of Timor Leste.

Although over 5,000 kilometers of Australian coastline was surveyed (from Darwin to Broome) no Indonesian or Timor Leste shoreline was surveyed.

The Australian coastline surveyed for oil damage ranged from 685 kilometers to the south east of the Montara oil well (Darwin) and 630 kilometers to the south west (Broome). By way of contrast, the Indonesian island of Rote was not surveyed although it is only 250 kilometers to the north of the Montara oil well. Others parts of the Indonesian coast line (West Timor) and East Timor are just over 300 kilometers north of the Montara well.

Sampling was done at Montgomery Reef, just off the West Australian coast, some 350 kilometers south-west from the Montara oil well but none on the Indonesian coastline (e.g. the island of Rote).

The absence of research or sampling outside of Australian waters may have been due to the absence of agreement from Indonesian authorities.

Notwithstanding the limited territorial ambit of the research, the results of several of the studies (and the abovementioned 2013 report) purport to conclude that:

- The main area affected by the spill was within a 23 kilometre radius of the spill (based on trajectory modelling and real time observations)
- The slick beyond this area was predominantly a lighter waxy film and surface coverage was significantly less
- The largest *single* area affected at any one time was 11,183 square kilometers
- Sixty two percent of the total surface area was affected for two hours or less
- No hydrocarbons were detected in the marine environment after 94 days
- Most of the *toxic* elements from the oil spill were in a gaseous form and released into the atmosphere
- No oil from Montara was detected after 15 November 2009 (the well having been closed down on 3 November)
- Most of the freshly spilled oil remained within 23 kilometres of Montara. The oil which occurred outside the containment area was mostly evident as sheens or waxy films. Sheens are typically less than 10 microns or 0.01mm thick, about one seventh the thickness of a human hair. Although it could be regarded as visual pollution, a sheen is 100 times lower than the level at which it would be rated as being of environmental concern.

The assessment of the extent of the oil spill was based on aerial surveillance monitoring (130 surveillance flights) conducted by the Australian Maritime Safety Authority (AMSA), together with satellite imagery and 'trajectory modelling'.

However, none of the aerial surveillance flights entered into Indonesian airspace.

The report concludes that **no** oil reached the Indonesian (or Australian) coast and that the closest recorded was 94 kilometers from Indonesia.

Some 'patches' of oil were said to have drifted into deep waters off the Timor Trench 'where fast moving currents associated with the Indonesian Throughflow current carried weathered oil patches in a south westerly direction away from the Indonesian coastline' (p 6, 2013 Report).

Given the geographical limitations of the data collection the results of a number of the abovementioned studies may be of little if any relevance to those in Indonesia or East Timor seeking compensation for losses said to be suffered by them as a result of the allegedly dramatic decline in seaweed production and fish catches.

The conclusions purportedly derived from the two studies of the oil fate and its effects, based on trajectory analyses and dispersant oil modelling, if correct, would make potential claims by persons in Indonesia or East Timor difficult if not impossible to pursue. Obviously, if the oil and/or oil dispersant combination did not in fact travel to the Indonesian/East Timorese coastline at all then the seaweed framers would have no claim and the fishermen's claims may be problematic depending where they were fishing.

However, the purported conclusions of the studies (referred to above) carried out by or on behalf of the company, insofar as they seek to deny any significant environmental impact of the oil spill in Indonesian/East Timor waters, stand in marked contrast to the wide array of statistical data, observational evidence, scientific research data and expert opinion allegedly available in Indonesia and East Timor.

Moreover, the various analyses relied upon by the company which are derived from aerial photography and satellite imagery take no account of the fact that the application of the dispersant to the oil has the effect of transferring the oil and dispersant mixture to below the surface level of the sea.

For some time the Indonesian Government has been seeking compensation in the sum of over \$US 2 billion from the oil company.

At present a legal team from two law firms is gathering further evidence from Indonesia and East Timor with a view to the possible commencement of class action proceedings in Australia on behalf of those who suffered substantial economic losses in Indonesia and East Timor.

This potential case gives rise to some challenging legal and factual questions including in relation to (a) the law applicable to events occurring in Australia's Exclusive Economic Zone, (b) applicable causes of action, (c) proof of causation, and (d) recovery of damages for economic loss. It is not proposed to consider these questions in detail in the present paper in part because they may become the subject of controversy if legal proceedings are commenced.

Stay tuned!

Other analogous cases

The present paper has not sought to review in detail other analogous oil pollution cases, including the *Exxon Valdez* and *Deepwater Horizon* litigation.

It is however of interest to note the following two recent cases.

Proceedings in the Netherlands against Shell

Litigation for alleged oil pollution damage against Shell was commenced in the District Court of The Hague by Nigerian claimants and a Dutch NGO, Milieudefensie (*Oguru, Efanga & Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Co Nigeria Ltd* No. 330891/ HA ZA 09-579 2009). The Court rejected Shell's contentions that it did not have jurisdiction and that there had been an abuse of procedural law in suing the Shell companies in the Netherlands. The substantive law applicable to the causes of action is Nigerian law.

On 30 January 2013, three separate judgments were handed down by the District Court of the Hague in relation to oil spill pollution cases brought by Nigerian individuals against the Shell Petroleum Development Company of Nigeria ('SPDC') and Royal Dutch Shell Company ('RDS'). Claims were brought by Akpan, Oguru and Efanga, and Dooh. They were each joined by the environmental association Vereniging Milieudefensie, which is an NGO which seeks to protect the environment worldwide.

Each claim was brought in response to oil spills in Nigeria from oil pipelines and oil facilities. A key issue was whether the oil spill pollution, caused by sabotage, could nonetheless under Nigerian law bring a claim for negligence, nuisance, trespass to chattel or the rule in *Rylands v Fletcher*?

The common issues across the judgments were the following:

- The District Court of the Hague had jurisdiction under s7 of the Dutch *Code of Civil Procedure* against the RDS and also the Nigerian legal entity SPDC
- Under Dutch conflict of laws principles, the law to be applied was that of Nigeria
- That under Nigerian law, each claimant was in possession of the affected land and fish ponds for which damage was sought
- That each oil spill complained of was factually caused by sabotage
- The parent company (RDS) did not assume any obligation to intervene in response to SPDC's policies in the prevention and response to sabotage of oil pipelines and therefore could not be held responsible for any negligence
- SPDC could not be held responsible for any tort of negligence against Milieudefensie in Amsterdam, as damage to third parties (whom Milieudefensie 'represented') could not be taken to be damage to Milieudefensie itself
- It was not possible to claim damages from SPDC under the rule in *Rylands v Fletcher*, as codified in s11(5)(c) of the *Oil Pipelines Act 1956* ('OPA'), as the damage was directly caused by sabotage, which was directly excluded by the rule
- The tort of nuisance cannot be made out where the oil spill was caused by an act of sabotage by a third party
- The tort of negligence of SPDC against Akpan in the response to the oil spills and its remediation of the oil contamination was not made out

Ultimately, only Akpan was successful in part in his claim against Shell.

- In Akpan's case, the court found that for legal systems based on common law (including Nigeria's system), there is no general duty of care to prevent other parties from suffering damage as a result of the practices of third parties.
- However, Akpan could claim damages from SPDC under the tort of negligence (as codified in s11(5)(b) of the OPA) for the occurrence of the oil spills. In this case, it was foreseeable that harmful consequences could result for people living in the vicinity of the location where the oil spill originated and farming or fishing of that location. The wellhead consisted of an

aboveground “Christmas tree” valve structure which was unprotected and easily accessible to saboteurs “with a few turns of a monkey wrench” (at 4.43).

- Thus, SPDC could easily have reduced the risk of sabotage by securing the the wellhead using a concrete plug, which was actually done after proceedings commenced in 2010. SPDC violated its duty of care in respect of Akpan.

By contrast, the other claimants (Oguru and Efanga, and Dooh) were not successful in their claim for damages from SPDC for negligence for the occurrence of the oil spills. The pipelines had also been sabotaged but, unlike in Akpan’s case, the pipelines were not easily accessible and could only be accessed by digging into the soil and sawing the pipe. There were no special circumstances that would justify the imposition of a duty of care in respect of SPDC for this damage.

Proceedings in England against Shell

Proceedings are also pending in the Technology and Construction Court in the Queens Bench Division of the High Court in London against Shell brought by a Nigerian fishing community in Ogoniland for environmental damage caused by oil leaks (*Bodo Community v Shell Petroleum Development Company of Nigeria* Case No HQ11X01280).

A number of preliminary questions were determined at first instance ([\[2014\] EWHC 1973 \(TCC\)](#)) and the plaintiffs had limited success. A further decision of Justice Akenhead on costs was handed down on 4 July 2014. The remaining issues are presently scheduled for trial in early 2015.

This is a Group Action proceeding with approximately 15,000 individual claimants who seek damages at common law and statutory compensation under the law of Nigeria in relation to oil spills from pipelines said to have been caused by Shell Petroleum Development Company of Nigeria. The claims were based on private and public nuisance, negligence, *Rylands v Fletcher* and under the *Oil Pipelines Act 1956* (Nigerian legislation) (“OPA”).

The initial judgment was in relation to the following preliminary issues:

1. Whether the Claimants are only entitled to claim compensation in respect of the 2008 spills under the OPA?
2. Whether Shell can be liable under the OPA for damage caused by oil from its pipelines, released as the result of illegal bunkering/refining?
3. Whether compensation for shock and fear, discomfort, exemplary and aggravated damages etc are recoverable under the OPA?
4. Whether the amount of compensation under the OPA will be assessed in accordance with the diminution in value of the land?
5. Whether awards of just compensation under the OPA or for general damages at common law should be valued by reference to previous awards made by the English courts or by reference to the value of land and/or the cost of living in Nigeria?
6. Whether the Court lacks jurisdiction to try some of the claims?
7. Whether pecuniary and non-pecuniary damages are recoverable in claims for damages for public nuisance?
8. Whether interest is recoverable at common law for past losses?

It was not disputed that the applicable law on all liability aspects was the law of Nigeria (at [18]).

Akenhead J in answering Issue 1 found that the OPA was designed to be the *only* mechanism for compensation, effectively excluding claims under the common law.

As there is no OPA equivalent in Australia, one key issue of interest is Issue 7. As stated at [167], his Honour's decision in respect of this question was technically hypothetical, in light of his decision that the OPA replaces the common law. In any case, public nuisance was defined as 'an act or omission which is an interference with, disturbance of, or annoyance to a person in the exercise or enjoyment of a right belonging to him as a member of the public' (at [168]). However, damages are only recoverable where the plaintiff has suffered some direct or substantial damage over and above those sustained by the public at large (at [169]). If this is shown, damages for personal injury and pecuniary loss are recoverable (at [176]).

The claims by the Bodo Community are currently fixed for trial in the UK early next year. A further mediation is soon to take place in London.

Some concluding thoughts

Environmental lawyers have shown considerable creativity in using civil litigation as both a preventative and remedial strategy to deal with major environmental problems, including climate change.

Such strategies have sought to both utilize and adapt existing legal theories in a manner which has sometimes been beyond the capacity of the legal system to cope.

The current bold forensic attempt to hold the Dutch Government to account for its failure to implement more effective means of reducing CO2 emissions in the Netherlands represents part of the changing face of environmental litigation, with a focus on prevention rather than remedial measures once damage has been done.

However, even more traditional attempts to obtain a remedy for major identifiable environmental damage and economic loss caused by a single tortfeasor has its own legal and evidentiary challenges, as the current Montara matter demonstrates.

To return to the quoted extract at the beginning of this paper:

He compiled a list of private lawyers who have had success bringing major environmental lawsuits..... It was a very short list.

For the full set of papers and presentations from the NELA Conference 2014, go to www.nela.org.au/NELA/Events/National_Conference_2014_Presentation.aspx