

## **Causes of Action and Remedies in Provocative Telecommunication Mast Installation: The Nigerian Experience**

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### **Abstract**

*This paper examines provocative telecommunication mast installation and remedies available to victims under civil law in Nigeria. Using doctrinal research method, the paper raises issues of the constituent of this nuisance act and what the court will consider in awarding damages thereto. The paper also highlights the fact that the Nigerian court's experience on this crime under tort is on the low ebb because majority of the cases end up being settle out of court or through Alternative Dispute Resolution without standard reporting form thus not helping the development of case law in Nigeria. To check this shortcoming, the paper recommends for the creation of a special court that will be handling cases of provocative telecommunication mast installation in Nigeria.*

**Keywords:** Causes of Action; Remedies; Provocative; Telecommunication; Mast Installation.

### **Introduction**

The impact of Information Technology (IT) can be felt deeply on social and economic activities around the globe and it has actually transformed the whole world into a global village or better still a global room. Telecommunication has contributed immensely to the growth and development of many nations in every respect; that is, socially, culturally and economically. There is no doubt that the advent of mobile telecommunications in Nigeria has brought about a lot of developments which are innumerable. For effective and efficient deployment, use and growth of mobile telecommunication services, service providers must deploy, erect and install in and around the country what is called telecommunication masts, towers and base stations to disseminate information and data services to end users of these services.

The provision and installation of these towers across the country is no doubt a *sin qua non* to the availability of telecommunication and internet services for fast tracking business and government cum social services. In nearly every instance, the complainants brought were based upon specific right to wit: safe and sound environment and right upon life, property, health, information, family, home and life. All these are concerns from various quarters. Apart from the legal and administrative issues arising from the control over its citing, the existence of telecommunication mast has brought about serious issues bothering on health, business and environmental concerns; hence several causes of action as well as remedies available to the plaintiff in different circumstances.

Divided into five sections, theoretical and conceptual frame work of the paper follows this introduction. Section three constitutes the nucleus of the paper wherein the causes and remedies of provocative telecommunication mast installation are discussed. Section four of the paper highlights the Nigerian experience with regards to dispute settlement modalities in provocative telecommunication mast installation. The paper ends in section five with conclusion and recommendation.

### **Theoretical and Conceptual Framework**

#### *Theoretical Framework*

Nuisance literarily means anything or person that causes annoyance, irritation, trouble or inconvenience. In the legal parlance, the word nuisance has a less wide meaning and this is because in tort, is not every inconvenience, irritation or annoyance that is actionable as a nuisance. Theoretically what is nuisance is often subjective, depending on the facts of each case. As a result of this flexibility as to what amounts to a nuisance, various claims have been pursued as a nuisance. In short, what amounts to a nuisance is subjective

and varies from situation to situation (Malami, 2013:448). A typical example of nuisance act that relates to this work are the noise from generating plants which power telecommunication masts as well as the spilling of diesel from the mast generator to the nearby wells and water ways in the country.

Apart from nuisance, strict liability is another form of action that may arise in provocative telecommunication mast installation. If this occurred telecommunication operators may be sued under this tort too. Strict liability is a liability that attaches to a person once a wrong occurs, without actual negligence, or intention, because there has been a breach of an absolute duty not to do the thing that is prohibited. Strict liability is also known as absolute liability. Theoretically therefore, the tort of nuisance can be explained as the unlawful interference with a person's use or enjoyment of his property by another. Going by the decision of the court in the case of *Samaris v. Maja* (1996), 7 NWLR (pt 460 at 336) and *Abiola v. Ijoma* (1970), 2 ALLNLR 268 tort of nuisance can manifest in the form of noise vibration, smoke, fume, smell, pollution, flooding, fire etc.

### **Conceptual Framework**

Provocative telecommunication mast installation is a mast installed wrongly without taking into considering the environmental hazard such installation could cause to the people living around the mast location. When a mast is installed provocatively, it has a high percentage and higher chances of causing havoc to the people living around the mast. A wrongly installed mast which does not conform to legal requirement of safety provision is also said to be provocatively installed. In this study therefore a provocative telecommunication mast installation is one which its installation breach right of other people and made the telecommunication company liable in tort of nuisance.

Causes of action on the other hand are the legally recognized actions that he who is offended can institute against the offender. In tort of nuisance, causes of action are mainly civil and remedies are basically in terms of damages which may be general or specific damages. Remedy in this study is what those offended are entitled to in order to ameliorate the damages done to them since; for every offence in law, there is a remedy *ubi jus ibi remedium*.

### **Causes of Action and Remedies in Provocative Telecommunication mast installation in Nigeria**

In Nigeria, victims of provocative telecommunication mast installation have civil causes of action that will entitle them to the benefit of an appropriate remedies. Telecommunication operators under civil procedure are liable in tort which could either be Nuisance or Strict Liability as enshrined in the case of *Rylands v Fletcher* (1886), LR,1. This however depends on the nature of civil action instituted against the defendant by the plaintiff or claimant.

#### *Nuisance*

In law, nuisance may be defined as any conduct that interferes with the convenience and comfort of the public or a section of it. Also, nuisance is any conduct that is obstructing the public or a section of it in the exercise and enjoyment of a common right. It can also be defined as any unreasonable interference with another person in the use and enjoyment of land or a right attached to it. Nuisance is any unreasonable conduct that interferes with the convenience, lives, safety, comfort or enjoyment of others. It is also any condition on land or unreasonable use of land, or property to the detriment of a neighbor or general public. On the whole, nuisance is any inconvenience interfering with the ordinary physical comfort of human existence (Malami, 2013).

According to the court in the case of *Oladehin v Continental Textile Mills* (1978) All NLR 31, the discharge of effluent and or neighbor's unreasonable loud music constitutes nuisance. Similarly, discharging of liquid or other waste in the neighborhood or into a river or well and destroying the fisheries and other aquatic life therein is also a nuisance act. In the same vein, discharging of diesel from generating plants powering telecommunication masts into another person's well is a nuisance act. Noise from the generating plant which powers telecommunication mast equally constitutes a nuisance act (Imam, Mustapha and Olokooba,

2011:317).

The basic principle of nuisance is captured in the Latin maxim “*sic utere tuo ut alienum non laedas*” which means “use your property as not to injure your neighbors”. Therefore, the whole idea of the law of nuisance, is that a person should conduct himself and use his own property so as not to injure, or cause discomfort, inconvenience, or nuisance to another person. The tort of nuisance is designed primarily to prohibit nuisance, that is to prohibit a person from disturbing, inconveniencing or injuring other persons by his conduct, or use of his property. Tort of nuisance is also designed to stop a defendant from continuing a nuisance, and the award of damages, injunction or any other remedy, if any is secondary. Thus, nuisance maintains a balance between the right of a person to do what he likes on his property and the right of his neighbor or other persons to be free from interference or inconvenience. This was rightly captured by Lord Wright in the case of *Sedleigh-Denfield v O’Callaghan* (1990), AC, 880, when he stated thus:

A balance has to be maintained between the right of the occupier to do what he likes with his own, and the right of his neighbor not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in the society.

Springing from the above, it is certain that, if a mast is installed in a particular location in such a way that it could disturb the convenience of another, then such installation has caused nuisance act and the owner of the premises is entitled to remedy under tort.

#### *Strict Liability*

The torts of strict or absolute liability exist in various degrees, amongst which are include the Rule in *Rylands v Fletcher*, Liability for animals *etcetera*. The Rule in *Rylands v Fletcher* is a common law principle which was restated by Blackburn J in the celebrated case of *Rylands v Fletcher*. In that case, the defendant appellant who was a mill owner engaged independent contractors to build a reservoir on his land to supply water to his mill. During construction, the contractors found disused mine shafts and passages which unknown to them linked the plaintiff’s mines on the adjoining land. The contractors failed to block the shafts and when the reservoir was filled with water, it escaped and flooded the plaintiff’s mine inflicting damages. The plaintiff sued. Blackburn J. the trial judge summing the existing principles of the common law, held that the defendant was liable. On appeal, the House of Lords upheld the judgment of the trial court and affirmed the liability of the defendants. In the House of Lords, Lord Cairns added the requirement, that the thing which escapes and causes damage should be a non-natural user of the defendant’s land for liability to attach under the Rule in *Rylands v Fletcher*. In other words, the thing which escaped and caused damage must not be something that was naturally on the land. In the words of Malami, (2013:493), a tortuous act by a person is when:

A person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequences of its escape.

The concept behind the tort known as *Rylands v Fletcher* is that everyman must use his land not to harm another person. Also, one is bound to use anything that is his so as not to hurt another person by such use and that he whose stuff it is must keep it that it may not trespass. Thus, a person is free to own such property as he may, provided that he must use it so as not to cause harm to another person. Explaining the scope of the law in *Rylands v Fletcher* (1886) LR,1, Blackburn J. a judge in the case held further that:

The general rule, as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose cellar is invaded by the filth of his neighbor’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbors alkali works, is damnified without any

fault of his own; and it seems reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his own act in ringing it there, no mischief could have accrued, and it seems just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water or filth or stench

Thus, if a person brings or accumulates on his land anything which if it should escape, may cause damage to his neighbor, he does so at his peril. If the thing does escape, and causes damage, he is liable, no matter how careful he may have been, and whatever precautions he may have taken to prevent the damage.

The Rule in *Rylands v Fletcher*, apply aptly to telecommunication operators in Nigeria. This is because the diesel that is used to power their generating set most times do escape to neighbor's well and sources of water on daily basis. The telecommunication masts ought to be installed so as not to affect other neighbors negatively, where it does, the operators become liable in tort.

### **Available Remedies**

In respect of remedies available to victims of provocative telecommunication mast installation as earlier stated, the choice of any legal remedy is necessarily conditioned by the nature of civil action the affected person is interested in pursuing in court and the abundance credible evidence to sustain his case. Once this is successfully done, victims of provocative telecommunication mast installation are entitled to various remedies ranging from damages, compensation, and injunction *etcetera*.

### *Damages*

Damages are compensatory remedies at common law, which are awarded in form of monetary compensation to a person who complains of the violation of his legally protected right by defendant (Amokaye, 2014:957). The aim of damages is to place the plaintiff as far as possible in the position in which he would have been had the wrongful act not occurred. Damages are of various types which include exemplary or punitive damages, nominal damages, aggravated damages as well as general and special damages. The distinction between general and special damages is important not only for the purpose of the form of an award but also in relation to pleading and proof.

A special damage is a damage which the claimant must prove as part of his action and for which the claimant ought to give notice in his pleadings in order that there may be no surprise at trial. Nominal damages are awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage, as in case of rights of bodily immunity or right to have one's material property undisturbed by direct invasion. The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated.

General damages are those damages which the law implies in every breach and in every violation of a legal right. It is the loss, which flows naturally from the defendant's act, and its *quantum* need not be pleaded or proved as it is generally presumed by law. The manner in which damages is quantified is by relying on what would be the opinion of a reasonable person in the circumstances of the case.

Exemplary damages are awarded in special circumstances and such circumstances are usually in three folds. Firstly, a plaintiff who has suffered from oppressive, arbitrary and unconstitutional action by a servant of the government may be awarded exemplary damages. Secondly, where the defendant's tortuous act has been outrageous or scandalous and was done with a guilty knowledge, the motive being that the chances of

economic advantage to him outweigh the compensation payable to the plaintiff; thus, the act of the plaintiff was a deliberate one and intentional and actuated by selfish economic advantage. Thirdly, where a statute provides that an exemplary damage be awarded in a given circumstances. The aim and essence of this form of damages is to punish and thereafter bring about deterrence in respect of such conducts, which are adjudged to be blameworthy in future. It is often awarded in circumstances where the defendant had acted recklessly, maliciously and deceitfully.

In respect of installation, it has been deduced that telecommunication operators in Nigeria act deceitfully and convince Nigerians to allow them to install telecommunication masts within their premises and even extremely close to their buildings which is against the statutory provisions of the laws guiding such installations. There are instances where telecommunication mast erected is less than 1 meter to residential areas, schools and hospitals whereas such installation according to the National Communication Commission (NCC) should be at least 5 meters away from the fence of a building and 10 meters away according to National Environmental Standards Regulation Enforcement Agency (NESREA). The questions are: Is this not deliberate? Is this not done out of selfishness on the part of telecommunication operators in Nigeria? Is this not reckless and deceitful? These are the issues. Thus, where such a telecommunication mast brings about any problem in the neighborhood, the telecommunication operators should be made to be responsible and dance to the music of the consequences of their acts by payments of heavy damages. The idea of awarding exemplary damages was rightly supported by the case of *AB v South West Water Services Ltd*, (1993), 1 ALL R, 609.

Generally, in tort a defendant is liable for any type of damage which is reasonably foreseeable. In respect of the assessment of damage for environmental actions based on torts principles, two questions may arise. First whether damage is a pre-requisite for liability and secondly the type of damage which may be recoverable. Environmental pollution may contaminate land and water and cause physical damage to property, personal injury, or even death. In such cases, damages will be assessed on ordinary principle, and will be limited to the principle of foreseeability. The fact that damage is greater than that foreseen, but still of the relevant type will not afford a defense. In the instance, where nuisance results in damage to personal property, such damages could be recovered as consequential. Where nuisance involves interference with the use of land only, for instance, toxic contamination of farmland rendering it unfit for cultivation, the normal damages is the amount of the diminution of the value of the land. This will be the cost of replacement or the repair or the cost of clean-up operation necessary to restore the property to its previous position.

However, in the case of *Marquis of Granby v Bakewell UDC* (1923), 87 JP 105, it was acknowledged that the two principles of calculation above are not particularly very clear. In that case, the defendant operated a gas work which discharged poisonous effluents into a river over which the plaintiff had a fishing right. The poisonous effluents killed all the plaintiff's fish in the said river. The plaintiff claimed damages from the defendant for interfering with his fishing rights and also received compensation equaling the cost of restocking the river in addition to the loss of large amount of the food supply for other stock (Amokaye, 2014:954).

### *Injunction*

In addition to the remedy of damages just discussed, there is another remedy called injunction which is available to victims of telecommunication mast installation who have suffered one form of damage or the other which includes but not limited to pollution in respect of telecommunication mast erected within their premises. In certain cases, a remedy by way of injunction to prevent the commission of pollution activities which are threatened or anticipated or in cases of continuing injury, to restrain their continuance. The major problem with interim injunctions is that they require the applicant to give an undertaking in damages. Injunctions are extra ordinary remedies and the courts rarely grant it. The grant of an injunction depends on the existence of a legally enforceable right. There are certain conditions that must be fulfilled before courts can grant injunction which includes that an applicant must establish that he has a right which is recognized

and enforceable either in law or in equity (Amokaye, 2014:964). Also, he must show clearly that irreparable loss has occurred and that the best remedy in the instance is an injunction.

In environmental litigation, the grant of an injunction by a court will depend on the nature of harms to be prevented. Where an on - going activity is bringing about pollution in an environment, which will result in a nuisance for instance contamination of the aquifer, an injunction restraining the continuation of that action may be appropriate and effective in such a situation. In the case of *Pride of Derby and Derby Derbyshire Angling Association Ltd v British Celanese Ltd* (1953), Ch, 149, both injunction and damages were granted against the defendant for industrial effluents, untreated wastes and thermal wastes discharged into the watercourse. Lan Kenedy J. in *Cambridge Water Works v Eastern Leather Plc* (1994), 1 ALL ER, 57 had no doubt that if there were continuing spillages, there should be an injunction to restrain their continuance, indeed in appropriate circumstances, a *quiatimet* injunction. The fact that no actionable damage had occurred will not prevent, in appropriate cases *quiatimet* injunction being granted. An appropriate case would be one where there is a real possibility of relevant damage being caused in time. An injunctive order may in this case be obtained to stop a public agency from approving a project or to order a private person or a public authority to stop work on a project (Amokaye, 2014: 964).

In respect of telecommunication mast installation, an injunction could be granted where it is established that erection of the mast will bring about the damage which may not be adequately compensated. Considering the harm, danger and injuries ascribed to the installation of telecommunication mast, the remedy of an injunction should be granted as quickly as possible whenever such is sought by an applicant who has foreseen danger, to restrain telecommunication operators from erecting telecommunication masts indiscriminately and without absolute compliance with the relevant laws.

It has been confirmed scientifically that electromagnetic frequencies from telecommunication masts are dangerous and hazardous to human health, causing adverse effects on DNA, thereby causing cancer of different kinds (Kehinde,2017:127), this is extremely dangerous as no amount of compensation can heal a person suffering from cancer; that is why it is important that injunction is granted in this regard. This position was reiterated by the court in the case of *Morris v Redland Bricks Ltd* (1970), AC. (652 at 665). In that case, some principles were laid down for the grant of a mandatory injunction. The principles as laid down are as follows:

- a. The jurisdiction of the court should be used cautiously and only in cases where extreme or at least very serious damage would be likely to ensue were the injunction withheld;
- b. The damage which would follow refusal of the injunction must be such that any damages awarded in respect of it would be an inadequate remedy
- c. The defendant must be able to comply legally
- d. The cost to the defendant must be taken into account relative to the risk of damage; and
- e. The defendant must know exactly what he has to do to comply, so that he may give precise instructions to his contractors.

### *Compensation*

Apart from the remedies of damages and injunction, there exists a special statutory compensatory regime for victims of environmental pollution as well as victims of provocative telecommunication mast installation (Amokaye, 2014:966). Generally, compensation means to recompense for the loss suffered by an aggrieved party. It ensures that the injured victim is not worse off after the injury complained of or if his property is destroyed, a fair market value is paid for the loss or deprivation of his property. In cases of telecommunication mast installation in Nigeria, there are instances where installed telecommunication masts fall on houses and other property destroying the said houses and properties. In such situations, compensation may be relevant and appropriate.

### **Provocative Telecommunication Mast Installation Issue: The Nigerian Experience**

Cases involving Telecommunication mast installation are very few in our courts in Nigeria as most of the telecommunication operators prefer to settle any complaint against them amicably out of court or through Alternative Dispute Resolution (ADR) before such becomes a subject of litigation. This act is significantly preventing the appellate courts in Nigeria from making pronouncements on them and same is not helping the development of case law in Nigeria. In *Engr. Charles Jimoh v Globacom Ltd and Sonnet Nigeria Ltd* (Suit No: KWS/OM/21/2014), a case of water pollution caused by a telecommunication mast installation close to the premises of the claimant instituted before the the Kwara State High Court, the affected telecommunication operator after series of court session, the defendant (telecommunication operator) pleaded with the Court to allow them resolve the matter through the use of Alternative Dispute Resolution (ADR) which was granted due to non objection by the claimant in the case.

In another development, a matter before the Oyo State High Court, *Oluwadare James, Dr. Ogundipe Kamoru and Mrs Ogundipe M.A v MTN Nigeria Communications Ltd* (Suit No 1/1048/08), a Medical practitioner, Dr. Ogundipe in Ibadan and his neighbors have dragged one of the telecommunication industries, MTN Nigeria Communications Ltd to court over what they consider as the issue of abuse/illegal erection of telecommunication mast very close to their premises; he stated the envisaged effect of telecommunication masts on human health and stated some of their experiences in that neighborhood as a result of the said installation. Also, Alternative Dispute Resolution (ADR) is being employed presently to resolve the matter amicably out of court.

However, in some cases, we have seen when the Nigerian courts pronounced full and final judgment and even laid down certain principles or condition to be fulfilled especially where death or personal injury occurred in awarding damages (Okonkwo, 2014:582). Thus, in respect of death or injury to a person which includes any disease and any impairment of physical and mental condition, the court will award damages. The Supreme Court in *Ediagbonya v Dumex (Nigeria) Limited and Another* (1986), 3 NWLR (Part 31:753) held that the two factors to be considered are (a) the financial loss resulting from the injury and (b) the personal injury involving not only pain and suffering but also the loss of the pleasures of life. The Supreme Court further held that in personal injury, damages should be full and adequate (Okonkwo, 2014).

To illustrate clearly the way and manner the Nigerian Courts assess general damages in personal injury cases, the opinion of Taylor CJ (as he then was) in the case of *Anumba v Shohet* (1962), 2 ALL AR (183 at 186) will be relevant. In his words, he said in respect to general damages, the settled principle to be applied is that where injury is to be compensated by damages, the court should, as nearly as possible get at that sum of money which will put the party who has been injured (or who has suffered) in the same position as he would have been if he had not sustained or suffered the injury for which he is now to get compensation. In the case in hand, he ought to take into account the pain that the plaintiff suffered, the injury to his leg, and the handicap which he now suffer, in calculating the damages which, as far as money can do it, he should be paid for the loss he has suffered as the natural result of the wrong which has been done to him. He said he has considered the fact that the plaintiff suffered the fracture of the left femur, as a result of which he was hospitalized for nearly three months, during which period he suffered pain. He said he has also taken into consideration the fact that the plaintiff still suffers pain and that it is not advisable for him to drive his own car. The burden now rests on the plaintiff to procure the services of a professional driver. He said the plaintiff also told him that he used to swim, play tennis, and football prior to the incidence; He said he could no longer do all those things for the reason of the injury to and the shortening of his leg. He concludes by saying that he thinks that the plaintiff here must be given compensation which, so far as money can do it will make up for his loss, proportionate to his injury, and such as will be a fair assessment in the opinion of the reasonable man (Okonkwo, 2014:582-583).

In the case of *Omole and Sons Limited v Adeyemo and Others* (1994), NWLR (Part 336:48), the court laid down the principle for the assessment of damages in tort resulting in death as well as in personal injury cases. This case involved death arising out of a tortuous act. The court held inter alia: (a) to estimate the lost earning,

that is, the sum which the deceased would have earned but for the death (b) to establish the lost benefit that is, the pecuniary benefit which the dependants would have derived from the lost earnings and to express the lost benefit as an annual sum over the period of the loss of earnings and (c) to choose the appropriate multiplier which when applied to the lost benefit expressed in an annual sum. The court held also the starting point in the calculation of an amount of annual dependency of a deceased on tort causing death has always been the amount earned by the deceased before his death; then the portion of his earnings, not used for the support of his dependants will be deducted from the total annual earnings(Okonkwo, 2014).

In essence, a victim who has suffered loss by an act of telecommunication operators in Nigeria and who brings an action under the tort of nuisance or Rule of *Rylands v Fletcher* under strict liability will be entitled to damages and this will depend on the cause of action which the plaintiff adopts and the circumstances of the case.

### **Conclusions**

From the Nigerian experiences as analysed in this paper, it is glaring that cases involving Telecommunication mast installation are very few in our courts as most of the telecommunication operators prefer to settle any complaint against them amicably out of court or through Alternative Dispute Resolution mechanism before such becomes a subject of litigation. Doing this is not contributing to the development of case law and same is preventing the superior courts in Nigeria from making pronouncements on them. Unfortunately, as good and effective as out of court settlement and Alternative Dispute Resolution (ADR) are, it is noteworthy that there is no standard reporting form of the matters being resolved through these means especially when it comes to settlement of disputes arising from provocative telecommunication mast installation in Nigeria.

### **Recommendations**

To check this situation and to enhance the development of case law on resolution of disputes arising from provocative telecommunication mast in Nigeria, this paper recommends for the establishment of a special court that will be handling matters relating to provocative telecommunication mast installation in Nigeria. Doing this will not only guarantee safe environment, quick dispensation of justice in tort of nuisance but will also aid the development of case law on resolution of disputes arising from provocative telecommunication mast installation in Nigeria.

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