Case Note

Higher Regional Court in Hamm (OLG Hamm), 28 May 2025

Lliuya v. RWE

Tracing the Carbon Trail: Emerging Legal Risks for Historical Emissions

01 BACKGROUND

Peruvian farmer Saúl Luciano Lliuya filed a lawsuit against German energy company RWE, arguing that climate change, caused in part by RWE's emissions, was accelerating glacial melt creating a serious flood risk for his property. Lliuya sought injunctive relief and partial compensation for the cost of implementing flood protection measures.

02 CONTEXT

It concerns a "polluter pays" case. Similar claims are pending, notably in the United States, but this is the first decision on the merits.

03 MAIN TAKE-AWAY

The judgment made clear that large emitters can be held accountable for local climate impact, regardless of where in the world this impact takes place.

As a result, large emitters bear not only a forward-looking responsibility for climate mitigation, as affirmed in *Milieudefensie v. Shell*, but also an emerging responsibility to share in the burden of climate adaptation.

04 IMPLICATIONS

The dismissal of Lliuya's claim on evidentiary grounds, should not detract from the substantial legal significance of the Court's reasoning.

This judgment increases climate-related transition risk for large emitters. It opens the door to making major emitters (and potentially also financial institutions) share in the costs of climate adaptation measures related to imminent local impacts, such as sea walls, flood infrastructure and disaster prevention.

The decision contains fundamental reasoning on establishing causality between corporate emissions, global warming and local climate impact, supported by climate and attribution science.

It presents avenues for further climate litigation by international plaintiffs against major emitters headquartered in Germany. Ripple effects across other jurisdictions can also be expected, further expanding corporate climate accountability through collective or coordinated actions, increasingly robust attribution science, and stronger evidentiary frameworks

This is a legal development that should not be underestimated.

New Paradigm

HIGHLIGHTS

LEGAL REASONING (1/5)

01 LEGAL BASIS - IMPAIRMENT OF PROPERTY AND UNJUST ENRICHMENT

The Court applied German nuisance law to the context of climate change. Essentially, art. 1004 (1) BGB holds that the owner of a property can demand that any interference with that property be removed by the disturber.

In this case, the interference (RWE's emissions contributing to global warming and associated glacial flood risk to LLiuya's property) cannot be removed. In that context, **the owner can demand that the disturbance be minimised or that effective safety measures be taken**. Here, Lliuya took these measures himself by installing flood protection at his property. On the basis of unjust enrichment, the related expenses can be claimed back from the RWE. (pp. 35-37)

Strict liablity: Under German law, impairment of property is a strict liability provision, meaning that Lliuya did not have to establish that RWE was legally at fault for its sizeable emissions. This would have been a significant hurdle.

Scope of damages: Under art. 1004 BGB, one cannot claim restoration of the status quo (or damages on that basis), as is the case under tort law. The extent of the compensation is limited to costs associated with ceasing the disturbance going forward or rendering it ineffective towards the future. Entitlement can arise as soon as action to address the disturbance is definitively refused by the disturber (even before expenses have been incurred by the plaintiff). (p. 35-36)

Milieudefensie vs. Shell: This case should be distinguished from the *Milieudefensie v Shell*-case, which concerned a forward-looking action based on tort (duty of care). Here, the Court of Appeal of The Hague affirmed that Shell has a duty to reduce its future emissions. This case did not cover Shell's liability for its historical emissions, although the Court did factor in Shell's history as a large emitter in the weight of its responsiblity to contribute to combatting dangerous climate change.

TRANSNATIONAL APPLICABILITY

The Court considers that the **disturbance by Germany-based RWE of Lliuya's property in Peru can occur from afar**. The distance between the source of the disturbance and the affected property is not considered relevant in the context of art. 1004 BGB. (p. 39)

Germany new climate litigation hotspot? The transnational applicability of art. 1004 BGB may open to the door to similar claims against German-based large emitters, related to (imminent) climate impact around the world.

HIGHLIGHTS

LEGAL REASONING (2/5)

SCOPE OF LIABILITY FOR IMPAIRMENT

The Court qualifies RWE as a "direct" disturber of Lliuya's property and notes that this concept can also extend to *indirect* disturbers (i.e. through third parties). (p. 53)

Scope extends to financial institutions? This raises the question whether also financial institutions with large financed emissions could be scrutinized under art. 1004 BGB.

02

CAUSALITY BETWEEN RWE'S EMISSIONS AND LLIUYA'S DAMAGE

Climate change has challenged the boundaries of existing legal frameworks ever since the *Urgenda*-judgment, with causality between carbon emissions and local impact being one of its most resilient hurdles. In this case, **the Court, for the first time, connected the links of the long and intricate chain of events, tracing corporate emissions through global warming and glacial melt to the localized impact of flood risk to an individual property**. This marks a foundational precedent for future climate litigation.

CAUSALITY THEORY

The Court applied the "theory of adequacy" (rather than the traditional "condicio sine qua non"-test), to establish causality between RWE's actions and the impairment to Lliuya's property. This theory comes down to **the question whether RWE's emissions were foreseeably capable of contributing to global warming and its associated risks** (e.g. glacial flooding). (p. 42)

Foundation for further assessment: By recognizing that partial contributions to global warming can be legally relevant causes of localized climate impact, the Court laid the foundation for weighing the materiality of RWE's individual causal contribution.

Attribution of emissions: RWE itself does not operate power plants. The operations of its subsidiaries are attributed to RWE (parent company) since it manages and controls the group (p. 43).

HIGHLIGHTS

LEGAL REASONING (3/5)

CLIMATE IMPACTS WERE FORESEEABLE

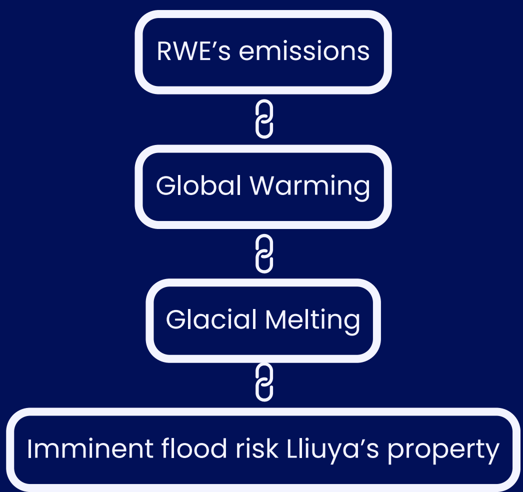
The Court found that RWE could have foreseen the link between its activities, global warming and related damage by the mid-1960s. The Court remarked:

> “*it was already foreseeable in the mid-1960s for an optimal observer in the role of an energy producer that anthropogenic greenhouse gas emissions would lead to global warming and the associated consequences.*” (p. 49)

RWE’S EMISSIONS ARE MATERIAL

The Court found there existed an adequate causal link between RWE's historical emissions and global warming. Its 0,38% share in industrial CO2 emissions is deemed sufficiently material. (pp. 51-53)

- **Science-based causal contribution:** The Court relied on attribution science and probability models to establish causation between RWE’s emissions between emissions, global warming and flood risk.
- **Comparative vs. absolute:** Based on attribution science, the Court was able to compare RWE’s emissions to causal contributions of other companies and countries (e.g. its contribution to global warming is similar in size to that of Sweden or Spain).
- **Causality threshold:** The Court implicitly introduces a materiality threshold, albeit undefined, limiting liability to large direct and indirect emitters. RWE ranks nr. 23.



CAUSAL CHAIN

The Court considered that despite multiple links in the causal chain **RWE knowingly assumed the risk of infringing on third-party rights** by operating power plants (through its subsidiaries) and emitting large volumes of CO_2. If this risk materialises the Court finds that **RWE can be held accountable** (p. 56).

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HIGHLIGHTS

LEGAL REASONING (4/5)

03 CENTRAL ROLE OF CIVIL LAW IN RELATION TO CLIMATE CHANGE

The Court affirmed the pivotal role of the judiciary and civil law obligations.

NOT (ONLY) A POLITICAL QUESTION

The Court rejected RWE’s argument that climate change regulation is solely a political or legislative matter, affirming that **the judiciary is an appropriate forum for assessing individual responsibility for emissions-related harm.**

In fact, the Court labels the argument as an attempt to *“ward[ing] off claims (of emission damage) by affected owners from the outset, without having to enter into a legal examination or even a gathering of evidence on the disputed facts.”* (p. 64)

CIVIL LAW OBLIGATIONS CAN TRUMP REGULATORY DEMANDS

The Court held that **RWE’s civil law obligations towards third parties can go beyond its regulatory obligations and allowances** (such as permits and approvals granted by the German government). It emphasized that civil law duties toward third parties *“can make higher demands and require more care than is standardized in public law provisions”* (p. 79-80).

Parallel with *Milieudefensie v Shell*: The Court’s reasoning bears resemblance to the ruling of the Court of Appeal in the Milieudefensie v. Shell case, where the Court found that Shell’s forward-looking civil law duty of care to combat dangerous climate change may impose stricter emission reduction requirements than those set by regulatory frameworks such as the EU Emissions Trading System (ETS).

GENERAL INTEREST DEFENSE

The Court dismissed RWE’s assertion that it, in essence, can not be held liable for activities (energy production and supply) that serve the general interest, so that LLiuya has an obligation to tolerate any impairment to his property. Even in the exceptional event that an impairment should be tolerated, compensation is due. (p. 80-81)

HIGHLIGHTS

LEGAL REASONING (5/5)

04 THE FINAL LINK: NO SERIOUS THREAT

Article 1004 BGB requires a minimum level of probability for the harm to occur. Experts estimated the likelihood of water from the glacier lake reaching LLiuya's property within the next 30 years at around one percent. The Court considered this figure too low to support the existence of a serious threat to Lliuya's property within the meaning of art. 1004 BGB.

The final causal link (between glacial flooding and Lliuya's property) was ultimately considered too weak by the Court, leading to the dismissal of the claim. This does not alter the significance of the Court's legal reasoning in respect of RWE's accountability, and that of other large emitters, for the consequences of their operations on third party rights around the world.

LET'S TALK ABOUT CLIMATE TRANSITION RISK!

The landscape of corporate climate accountability is evolving rapidly on multiple fronts. We support organisations in understanding emerging transition risks, anticipating legal developments, and strengthening their preparedness for a sustainable future.

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