Success Without Victory

Lliuya v. RWE Decided

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One of the most striking climate cases has come to a striking end. The Higher Regional Court of Hamm dismissed the lawsuit against RWE on minor factual grounds – yet at the same time confirmed that major emitters can, in principle, be held liable under German private law for climate-related harms. The ruling may ultimately represent a success without victory: A short-term loss for the plaintiff, but one that provides important insights and strategic lessons for future climate liability cases.

The Case

Since 2015, Peruvian farmer Luciano Lliuya has been taking legal action against the German energy giant RWE, seeking proportional reimbursement for the costs of protective measures on his property. He fears that his house, situated below an Andean glacier, could be affected by a so-called Glacial Lake Outburst Flood (GLOF). Lliuya attributes this threat to climate change and the resulting glacier melt, for which he holds RWE partially responsible due to its decades-long history of greenhouse gas emissions. His claim is based on a combination of injunctive relief and the concept of *negotiorum gestio*: Since his property is at risk, he argues that RWE – as a contributor to that risk – should at least cover part of the costs for the protective measures.

After the District Court of Essen dismissed the case in 2017, the Higher Regional Court in Hamm (OLG Hamm) has now also rejected the appeal. The case ultimately failed on a factual point: Although the court found the legal reasoning to be fundamentally plausible, it concluded that Lliuya's property was not under sufficient threat of flooding.

This decision marks the end of what was likely Germany's most prominent climate liability case. Since the OLG Hamm did not permit an appeal to the Federal Court of Justice – and taking the case to the Federal Constitutional Court is virtually impossible – the ruling is final. What is to learn from it?

While it is important not to get too caught up in the factual details of this case, we will first provide a brief overview of some controversies surrounding the expert opinion and explain why Lliuya lost (pp. 91–139 of the judgment). We will then turn to the more compelling legal reasoning on the core issues of climate liability. Here, the court sets out in detail – and for the first time – that major emitters can generally be held liable for climate-related harms under German private law (pp. 32–91). Finally, we conclude with an outlook on the future of climate litigation in Germany.

Why Lliuya Lost

Lliuya's claim for proportional reimbursement is grounded in Section 1004 (1) German Civil Code. This provision allows a property owner to seek injunctive relief (let alone compensation for costs) only if an impairment of their property is imminent. To assess this, the OLG Hamm commissioned two expert witnesses who prepared detailed reports. They estimated the probability that a GLOF would affect the plaintiff's property within the next 30 years to be less than one percent. Furthermore, the expected impact was considered manageable, as Lliuya's property was not anticipated to sustain any significant damage.

Controversial expert reports

However, this analysis is open to question. The court-appointed experts took an unusually restrictive perspective: First, their reports only consider glacier collapses and ice avalanches as possible trigger events for a GLOF, explicitly excluding rockfalls (pp. 101–103)

– even though rockfalls occur in the Andes and their inclusion is supported by scientific consensus. Coincidentally, on the very day the judgment was issued, a Swiss mountain village was buried by a rockfall. This incident calls into question the assumption that the glacier lagoon in question is protected from rockfalls due to local conditions; its apparent stability may simply be a matter of chance.

Second, the influence of climate change was downplayed. To determine the probability of the plaintiff's property being affected by a GLOF in the next 30 years, the court-appointed experts relied on multi-year data series of local glacier collapses and ice avalanches (pp. 104–105). The resulting 1% probability was therefore based on past observations and projected into the future without adjustment. This approach, too, runs counter to scientific standards. The IPCC – *the* scientific authority for climate change – assumes that the probability of GLOF trigger events is going to increase in high mountain areas (and especially in the Andes). It is expected that the melting of permafrost will make glaciers and mountains more unstable and large rockfalls more likely, triggering "potentially high-magnitude glacial lake outburst floods". In response, the plaintiff's private expert witness proposed adjusting the calculated probability using a general "climate factor." However, this suggestion was rejected by the court's experts, who cited a lack of local data on permafrost distribution (p. 128).

The OLG Hamm fully sided with its appointed experts and decided that an impairment of Lliuya's property is not imminent. This is not without controversy: In German civil procedures, private expert witnesses primarily support the plaintiff's arguments, while court-appointed experts support the court's factual appraisal. However, findings from private expert witnesses can – when they are utilised in a plaintiff's intervention – trigger an obligation for the court and its expert to investigate the matter further. The Federal Court of Justice stated that under such circumstances "special care is required of the trial judge"; to uphold a fair trial, the court must present "persuasive and reasonable arguments" as to why it follows one expert opinion instead of the other. Although it is difficult to fault the OLG Hamm for thoroughly considering different perspectives, its rejection of the proposed probability adjustment appears rather unpersuasive, especially as it contradicts the findings of the IPCC. If the lack of local data is the reason for this, it would have been advisable to collect such data from the glacier in question.

Why climate liability won anyway

Theoretically, the OLG Hamm could have left it at that – due to the assumed factual deficiencies of the case, an elaborated reasoning on matters of causation and wrongdoing was not required. Remarkably, the judges opted against that. 60 out of 139 pages of the decision pertain to questions of RWE's liability for climate-related harms. In doing so, the OLG Hamm draws on preliminary work in the literature and convincingly rejects nearly all objections raised against climate liability. For reasons of space, we will outline here only three particularly important points.

Causation Demystified

A common argument against climate liability is the lack of causation. RWE also claimed that even if the plaintiff's estimate of its contribution to global emissions – 0.38% of total global emissions – were accurate, it would be too small to have any meaningful impact on the alleged GLOF risk. Furthermore, the company argued that causation must be dismissed based on the "adequacy-test" since RWE's emissions neither substantially increased the risk nor was the risk foreseeable.

The OLG Hamm rejected these assertions with laudable clarity: Every emission, regardless of where and by whom it is emitted, contributes to climate change and climate-related risks. Consequentially, without RWE's emissions, the alleged GLOF risk would be slightly lower (pp. 46–47). The court also emphasized that RWE's contribution is substantial not because of its absolute share of global emissions, but due to its relative size compared to other emitters – where RWE clearly ranks among the world's largest single emitters (pp. 51–52). Finally, by the mid-1960s at the latest, fossil fuel companies such as RWE could

foresee that greenhouse gas emissions cause climate change and respective risks, as the scientific community's warnings had become impossible to ignore (pp. 49–51).

Not a political question

Unlike in the United States, the German judiciary does not follow a "political questions doctrine" that requires courts to leave politically sensitive issues to the legislature. This did not stop legal scholars as well as the defendant's team from invoking similar concerns. Without much of a doctrinal anchor, they argued that climate change issues fall exclusively within the sphere of the legislature and warned of undue judicial politicisation. Moreover, they expressed the concern that attempting to address climate-related damages in court would inevitably lead to a legal war of "everyone against everyone" since all humans contribute to climate change.

The presiding judge rebutted these objections pointedly during the delivery of the judgment: The fact that German courts address politically sensitive claims within the framework of private law is not a weakness of the legal system but rather a demonstration of its commitment to the rule of law. Similarly, the concern that "everyone would sue everyone" was dismissed by referring back to the adequacy test: Because this test requires substantial contributions and takes a relative perspective, liability can only arise from emissions far above average – such as those from carbon majors like RWE, not from private individuals or farming businesses (pp. 63–64).

No Blanket Legalisation by Public Law

Finally, the OLG Hamm convincingly rejected the so-called legalisation defence. RWE had argued that it could not be held liable because its power plant operations were conducted within the bounds of public law – specifically in compliance with the emissions trading regime. The court considered this a double fallacy: First, the relevant public-law frameworks do not amount to a blanket legalisation of emission activities. Second, conduct that is lawful under public law can still be wrongful under private law. As the Federal Court of Justice has repeatedly affirmed, the principle of the "autonomy of private law", meaning that private law, for the purpose of protecting individuals, can and often does impose stricter obligations than public law (pp. 79–80).

Conclusion: Success Without Victory

Beyond these specific issues, one overarching point is even more important: Immediately after the judgment was handed down, RWE claimed that the plaintiff's team has failed to create a precedent for climate liability in Germany. Nothing could be further from the truth. The OLG Hamm did not issue a general rejection of climate liability – on the contrary. The court explicitly stated that the dismissal of the appeal is based on an extensive and complex evaluation of the evidence presented and therefore constitutes a decision limited to the specific facts of the case (p. 138). Lliuya failed – just as other climate plaintiffs have failed before him – due to death by detail. But details can change. Had the plaintiff not been Lliuya, but a neighbour living closer to the river, the experts (despite their questionable approach) might well have assessed the GLOF risk as significantly higher (pp. 104–109). The same could hold true for climate-affected individuals in other parts of the world, especially for coastal residents facing rising sea levels.

For all of them, what the OLG Hamm has clearly affirmed remains true: In principle, major emitters can be held liable under German private law for climate-related harms.

It is, nevertheless, necessary to carefully examine the effect of a precedent by a Higher Regional Court in Germany. The first caveat is that there is no clear doctrine of *stare decisis* in Germany: Lower courts (and – less surprisingly – other OLGs) are essentially free to form their own legal opinions on matters of climate liability. That said, lower courts generally tend to follow the rulings of their respective appellate courts, if only to avoid unnecessary costs and delays for the parties involved – unless they have compelling new legal or factual grounds to deviate. Likewise, other OLGs have all the liberty to depart from their peers' rulings, but in practice, they often refer to them and

aim for at least a degree of consistency. The well-known diesel litigation against Volkswagen illustrates this dynamic clearly.

Against this backdrop, the judgment by the OLG Hamm represents a significant breakthrough, as it is the first time a higher court has broadly recognized climate liability. Its significance cannot be overstated, especially since European law (Article 4 of the Brussels I Regulation and Article 7 of the Rome II Regulation) enables any individual affected by climate change to bring claims against alleged wrongdoers in German courts under German law. As is often the case with strategic litigation, this judgment may turn out to be a success without victory – a short-term setback for the plaintiff, but one that offers valuable insights and strategic lessons for future climate liability cases.

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