https://doi.org/10.12697/JI.2023.32.01

Astrid Stadler

Professor, Dr. Dr.h.c.
University of Konstanz

Can Civil Courts Save the Climate? Strategic Climate-change Litigation Before Civil Courts[*1]

Abstract. Climate change is an urgent global problem, and national legislatures must enhance their efforts to reduce carbon dioxide emissions drastically. Individuals and NGOs have filed public law actions against national legislators before international courts (prominently the ECHR) and several constitutional courts to allege violations of constitutional and human rights. In a more recent development, civil courts too are being seized with climate-change litigation. In 2021, a Dutch court ruling on an action by an NGO against the Royal Dutch Shell Group held that Shell is obliged to reduce its CO_2 emissions considerably. This judgment, based on the Dutch Civil Code's general tort regulations, has triggered a wave of similar actions before German courts. Such cases of individual plaintiffs, supported by NGOs, suing private companies for damages or for an immediate reduction of emissions are examples of 'strategic litigation' aimed at bringing about broad societal changes beyond the scope of the individual case at hand. The article analyses the political implications, tackles the question of whether general tort law is a suitable instrument to address the climate-change problem, and discusses how civil courts may handle these cases. Climate change is a complex, multi-stakeholder issue that requires a difficult process of balancing social, legal, and economic interests – which is the task of democratically legitimised parliaments, not primarily a task of courts.

Keywords: climate-change litigation, tort law, causality of emissions, human rights, political questions doctrine

I. Introduction

As the world's first carbon market and a major one, the EU is a key contributor when it comes to greenhouse gas emissions. After years of unheeded warnings from scientists, people in Europe have finally become aware of the need for an immediate response to the world's most threatening problem. Besides global efforts via recurring climate protection conferences, individuals and NGOs in increasing numbers

[1] The text is based on a presentation given at Tartu University on 10 May 2023 on the occasion of the conferment of an honorary doctorate.

are demonstrating dissatisfaction with national efforts and are becoming active in so-called climate-change litigation. The phenomenon covers all kinds of lawsuits, before various types of courts.

Today, there are hundreds of lawsuits against public entities, all over the world, based on the allegation that they do not actively participate in a global effort for reduction of the carbon impact and thus violate constitutional and human rights.[*2] The European Court of Human Rights and several constitutional courts have dealt with actions to force national legislatures to enhance their efforts.[*3] It is, however, a more recent phenomenon for NGOs and/or individuals to sue private companies. This paper focuses primarily on these private lawsuits, which follow two distinct patterns:

(1) A few cases follow from actually suffered damages or costs, and claimants sue companies for compensation. This is the situation in, for example, a lawsuit initiated by a Peruvian farmer against big German energy supplier RWE (Rheinisch-Westfälische Elektrizitätswerke), with its seat in Essen, Germany. The farmer is asking for compensation for costs because he needed to protect his house against the increasing amount of melt water from the surrounding glaciers in Peru. He holds that the defendant company is responsible for the climate change because RWE is the single largest contributor to greenhouse emissions in Europe. In 2016, the court of first instance dismissed the action, citing lack of causality, but in 2021[*4] the Court of Appeals (Oberlandesgericht Hamm) decided to take evidence and to travel to Peru for an on-site inspection together with several experts. We do not know what the Court of Appeals will decide in the end.

(2) The second group of cases are of a preventive or pro-active nature and are brought against big companies with the objective of obtaining a court order that obliges the defendant companies to reduce carbon dioxide emissions in order to prevent future harm. The most famous judgment in this regard is probably the decision of the Hague District Court of 26 May 2021 against the Royal Dutch Shell Group.[*5] The court considered the action, by Dutch NGO Milieudefensie, to be well-founded. According to the judgment, Shell has the obligation to reduce the carbon dioxide emissions of the Shell group's entire energy portfolio by 45% net by the end of 2030 relative to the 2019 level. The judgment was based on the general tort law regulations of the Dutch Civil Code.

We have seen similar civil proceedings before German courts recently. Since autumn 2021, the managing directors of Greenpeace and Deutsche Umwelthilfe, a very active environmental interest group, have launched five separate actions before German courts against the big car manufacturers BMW, Mercedes, and Volkswagen. In September 2022 and more recently, in February 2023, the district courts in Stuttgart[*6] and Braunschweig[*7] dismissed the actions against Mercedes and Volkswagen in the first instance. The plaintiffs had requested that the defendant be prohibited from selling vehicles with internal combustion engines after 2030 – definitely earlier that the time discussed at EU level (2035). The plaintiffs referred to a significant impact on his personal rights if drastic climate protection measures were not taken immediately. The first instance courts found that the consequences alleged by the plaintiff are still completely uncertain today.

In a similar lawsuit, before the District Court of Detmold, an organic farmer sued Volkswagen and requested an order obliging it to sell considerably fewer vehicles with internal combustion engines until 2029 and to refrain completely from selling gasoline-powered cars from 2030 on. On 24 February 2023, the court held that general tort law does not provide a legal basis for the claim and dismissed the action.[*8] The appeals court where the action is pending now is the same court that decided to take evidence in the Peruvian farmer's action (Oberlandesgericht Hamm). Hence, claimants may hope that the court will act in the same way here.

2 For an overview, see Marc-Philippe Weller and Mai-Lan Tran, 'Klimawandelklagen im Rechtsvergleich – private enforcement als weltweiter Trend?' [2021] ZEuP 573; Bernhard Wegener, 'Menschenrecht auf Klimaschutz? Grenzen grundrechtsgeschützter Klimaklagen gegen Staat und Private' (2022) NJW 425, 426.

3 For example, *Verein Klimaseniorinnen Schweiz v Schweiz*, no 53600/20 (ECHR, 17 March 2021) Communicated Case. Some databases collect data on ongoing litigation: Sabin Center for Climate Change Law, Columbia Law School, 'Global Climate Change Litigation' <http://climatecasechart.com/non-us-climate-change-litigation/> accessed 13 May 2023.

4 The delay in taking evidence was due to the pandemic, which did not allow travelling to Peru.

5 Rechtbank Den Haag ZUR 2021, 632 (*Shell*); see also Rechtbank Den Haag C/09/456689 / HA ZA 13-1396 (*Urgenda I*); Gerechtshof Den Haag, 9 October 2018 (*Urgenda II*) and Hoge Raad, 20 December 2019, 19/00135 (*Urgenda III*).

6 District Court Stuttgart [2022] NVwZ 1663.

7 District Court Braunschweig [2023] KlimR 88.

8 District Court Detmold, 24 February 2023, 1 O 199/21, becklink 2026249.

We can close the list of examples with the island of Pari: In February 2023, four islanders from Indonesia filed a complaint before a local court in Switzerland.*[9] The island, with 1,500 inhabitants, is in danger of sinking under the sea because of climate change. The defendant cement company, one of the world's largest emitters of carbon dioxide, is requested to reduce its emissions more quickly and more effectively.

Despite the dismissal of some of the actions in Germany, scholars have different opinions. Some argue that such cases have some or even good prospects on their merits*[10]; others believe that civil litigation is the wrong remedy as a matter of principle.*[11]

II. Civil courts as a forum for fighting climate change

Are civil courts the appropriate forum in which to fight climate change? The obvious answer seems to be 'no', but it is, of course, not that simple.*[12]

1. Strategic litigation – a misuse of civil courts?

The actions described are often labelled as 'strategic litigation' and are good examples of an increasing politicisation of civil litigation. They also sometimes face the criticism that they misuse or even abuse the civil court system for political or ideological purposes. Actions like the one brought by the Peruvian farmer against the German energy supplier RWE use individual claims to get access to courts while the real objective is to obtain media attention for a highly political topic and to pillory selected defendant companies. But the matter is not only about media attention and fuelling public debate; NGOs and climate activists will argue that successful private actions may indeed contribute – step by step – to a reduction of climate-damaging emissions and the carbon impact. The primary goal, however, still is to draw the public's attention to a problem that must be solved elsewhere. The European Center for Constitutional and Human Rights (ECCHR), which supports the lawsuit against RWE, states on its website:

> Strategic litigation aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics.*[13]

It is a widely accepted concept across Europe that the objective of civil litigation is the protection of individuals' rights, but that does not preclude plaintiffs from pursuing individual-level interests and at the same time a public interest. Anyone who has alleged a claim against the defendant can bring an action before civil courts. Civil courts are not allowed to question the claimant's motivation; they simply have to examine the statement of claim for its admissibility and merits. Let me give a simple example: If a landlord sues his tenant for pending rent payment, the court must not take into account whether the landlord does so because he needs the money or whether he simply wants to annoy his tenant. Therefore, in the case of the Peruvian farmer it is simply irrelevant whether the claimant and the NGOs behind him also have political or ideological motives to sue the German company. Therefore, the action is admissible, in principle.

---

9 'Inselbewohner verklagen Zementkonzern Holcim' <https://www.srf.ch/news/international/wegen-klimaschaeden-inselbewohner-verklagen-zementkonzern-holcim> accessed 15 May 2023.

10 Nils Schmidt-Ahrendts and Viktoria Schneider, 'Gerichtsverfahren zum Klimaschutz' [2022] NJW 3475 (criticising the decision of the Stuttgart District Court); Jan-Erik Schirmer, 'Haftung für künftige Klimaschäden' [2023] NJW 113; to some extent also Meik Thöne, 'Klimaschutz durch Haftungsrecht – vier Problemkreise' [2022] ZUR 323.

11 See, for example, Gerhard Wagner, 'Klimaschutz durch Gerichte' [2021] NJW 2256; Weller and Tran (n 2) 603 (on it not being justifiable with reference to climate change); Gerhard Wagner and Arvid Arntz, 'Liability for Climate Damages under the German Law of Torts' in Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (Nomos 2021) 405. – DOI: https://doi.org/10.5040/9781509948741.ch-020; Lutz Friedrich, 'Gemeinwohl vor Gericht: Chancen und Risiken öffentlich-rechtlicher 'Public Interest Litigation' [2021] DÖV 726; Bernhard W Wegener, 'Urgenda – Weltrettung per Gerichtsbeschluss?' [2019] ZUR 3, 10ff; Wolf Friedrich Spieth and Niclas Hellermann, 'Not kennt nicht nur ein Gebot – Verfassungsrechtliche Gewährleistungen im Zeichen von Corona-Pandemie und Klimawandel' [2020] NVwZ 1405, 1407.

12 Thöne (n 10) emphasises correctly that a distinction between admissibility and unsuitability of the actions is necessary.

13 ECCHR, 'Strategic Litigation' <https://www.ecchr.eu/en/glossary/strategic-litigation/> accessed 15 May 2023.

The situation before constitutional or administrative courts is somewhat different with respect to legal standing. Actions by individuals against agencies or public regulators are only admissible if the claimant is individually and currently affected by a public act or wrongdoing. Popular actions that exclusively pursue a public interest are normally not admissible, and only some associations and other organisations may bring lawsuits in a public interest – in limited cases and situations. Accordingly, constitutional courts across Europe have come to different results with respect to climate-change lawsuits against national legislatures. In 2021, the German Constitutional Court in a landmark decision affirmed the legal standing of a group of juvenile claimants and derived from the German Constitution an obligation of the legislator to limit global warming and climate change in order to protect human rights,[*14] while the court denied legal standing of an environmental protection group for reason of lack of individual-level concern. On the other hand, the Austrian Constitutional Court[*15] and the Swiss Federal Supreme Court[*16] completely dismissed complaints by individuals and NGOs as inadmissible, for lack of legal standing.[*17]

2. The political questions doctrine and judicial self-restraint

One popular argument against climate-change litigation runs as follows: 'One country alone cannot save the climate, let alone a single court decision.' This is, of course, correct, but it seems also to represent surrender to the insolubility of the so-called tragedy of the commons. However, this argument does point to the real heart of the problem. The effects of climate change are a mass example of the tragedy of the commons[*18], describing a situation in which individual users who have open access to a resource without being hampered by shared social structures or formal rules (such as fees or taxes) can act independently and, on the basis of their self-interest only, in a manner contrary to the common good of all users. The earth, being the commons, suffers globally through activities of individuals, companies, and governments. Mitigation of the long-term impacts may require strict controls or other solutions but in any case a joint effort of all countries. Public international treaties such as the Paris Climate Agreement adopted in 2015 at the UN Climate Change Conference provide only general political targets such as the long-term goal to keep the rise in mean global temperature to well below 2 °C above pre-industrial levels, preferably below 1.5 °C.

It is up to the signatory states to decide on action plans for reaching the agreed goals. Climate change is a complex, multi-stakeholder issue that requires a difficult process of balancing social, legal, and economic interests – which is the task of democratically legitimised legislatures and parliaments. Courts can only exercise control; they cannot take the initiative. This is the traditional distribution of tasks and power in the modern constitutional state.

Whether the global and quite complex problems of climate change are best dealt with exclusively by public law or, on the contrary, the non-climate-specific tort law could be invoked also, as exemplified by the Dutch Court in the *Shell* case, is the subject of global discussion. The Hague District Court explicitly denied the defendant's argument that the required decision goes beyond the lawmaking function of the court and that a solution must be provided instead by the legislator and politics.

14 German Constitutional Court (BVerfG) [2021] BeckRS 8946.

15 Austrian Constitutional Court (VfGH) 30.9.2020, G 144-145/2020. A new complaint was filed by children and young people (Fridays for Future) in February 2023, 'Neue Klimaklage: Zwölf Kinder und Jugendliche klagen beim Verfassungsgerichtshof gegen das unzureichende Klimaschutzgesetz' <https://www.ots.at/presseaussendung/OTS_20230221_OTS0008/neue-klimaklage-zwoelf-kinder-und-jugendliche-klagen-beim-verfassungsgerichtshof-gegen-das-unzureichende-klimaschutzgesetz> accessed 15 May 2023.

16 Schweizer Bundesgericht, 5.5.2020 – 1 C 37/2019. The European Court of Justice also denied the individual-level concern of private claimants in March 2021 in the context of actions for annulment against EU legal acts on reducing greenhouse gas emissions. Case C-565/19 P *Armando Carvalho v European Parliament and Council of the European Union* [2021] ECLI:EU:C:2021:252; Case T-330/18 Carvalho *v European Parliament and Council of the European Union* [2019] ECLI:EU:T:2019:342.

17 Although the human rights concept is originally one of individualistic legal protection of a private person against the state power, many authors accept the climate policy use of human rights and do not conclude that these are frivolous lawsuits. Instead, they sometimes talk about a 'human rights turn'; see Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation' [2018] Transnational Environmental Law 37. – DOI: https://doi.org/10.1017/s2047102517000292.

18 Named after an article by Garett Hardin published in *Science* in 1968.

In the US, where environmental groups have fought against global warming before federal courts for quite some time,[*19] courts may rely on the political questions doctrine.[*20] This doctrine is a somewhat shapeless concept. In essence, it can be understood to express the principle that some issues are either entrusted solely to another branch of government or beyond the competence of the judiciary to review. It limits the ability of federal courts to hear constitutional questions even in cases where requirements such as standing etc. are fulfilled. In 2020, the Ninth Circuit Court in *Juliana v. United States*[*21] had to decide on a climate-change action filed against the United States by an NGO and 18 young people claiming a violation of their constitutional rights to life, liberty, and property. The plaintiffs applied for an order compelling the United States 'to prepare and implement an enforceable national remedial plan, a comprehensive scheme, to phase out fossil fuel emissions and [...] stabilize the climate system'.[*22] Defendants argued that the action raised only political questions, and the court reversed on a similar argument. Courts cannot order injunctive relief unless constrained by 'limited and precise' legal standards. A constitutional directive or legal standards must guide the courts' exercise in equitable power.[*23] Prior Supreme Court rulings had also described prudential limitations on judicial discretion and had emphasised that courts must respect the separation of powers.[*24]

Much to the contrary, in 2021 the German Constitutional Court accepted a constitutional complaint by several individuals and environmental groups alleging that the German Climate Protection Act as enacted in 2019 was insufficient and that, thereby, the state had violated its obligation to protect constitutional rights.[*25] The Court identified a violation of fundamental rights in the fact that the legislator had not taken sufficient precautions to meet the emission reduction goals for the time after 2030. On account of the emissions permitted by law up to 2030, one will need very high reductions in later periods. The restrictions to be expected for everyone are in violation of the constitutional rights of the complainants today.

The political question doctrine is, for good reasons, domiciled in the common law world, where the case law system has led to a difficult relationship between courts and legislatures anyhow. It is therefore no surprise that thus far it has been adopted neither by the European Court of Justice[*26] nor by national courts on the Continent, at least not in Germany[*27].[*28] Particularly often, constitutional courts have the function of reviewing legislative acts, which always entail also political aspects.[*29]

One may conclude thus: courts in Germany and probably elsewhere in Europe cannot dismiss climate-change actions by relying on a political question doctrine.

19 Note, 'Juliana v United States, Ninth Circuit Holds That Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court, Comment on 947 F.3d 1159 (9th Cir. 2020)' [2021] Harvard Law Review 1929. There is an estimated number of 700–800 lawsuits, most of them aimed at a review of public regulators' acts, see Weller and Tran (n 2) 578.

20 The doctrine has its roots in the Supreme Court case *Marbury v Madison*, 5 US 137 (1803).

21 *Juliana v United States*, 947 F 3d 1159 (9th Cir 2020).

22 First Amendment Complaint for Declaratory and Injunctive Relief, *Juliana v United States*, F. Supp. 3d 1224 (D Ore), No 15-cv-01517 at 7.

23 Observers in the US pointed out that the outcome in the *Juliana* case did not come as a surprise. 'The question was less whether the [claimants] might win, and more how [they] would lose' wrote Jonathan Adler, 'Is Kids Climate Case Coming to an End?' <https://perma.cc/XN28-AYP2> accessed 15 May 2023; Note (n 19) 1933.

24 *Rizzo v Goode*, 423 US 362, 380 (1976); *O'Shea v Littleton*, 414 US 488, 501 (1974).

25 BVerfG [2021] BeckRS 8946.

26 Graham Butler, 'In Search of the Political Question Doctrine in EU Law' [2018] Legal Issues of Economic Integration 329. – DOI: https://doi.org/10.54648/leie2018020.

27 The German Constitutional Court implicitly rejected applying the doctrine, in a very early decision: BVerfG 8.12.1952, BVerfGE 2, 79, 96; see also Rüdiger Zuck, 'Political-Question-Doctrine, Judicial-self-restraint und das Bundesverfassungsgericht' [1974] JZ 361.

28 In 2010, the Swiss Federal Supreme Court dismissed an action filed by the Republic of China against the International Organization for Standardization (ISO) for the allegedly wrong way the name 'Taiwan' was used by ISO. The Swiss Court held that it was a political question not subject to civil jurisdiction: Federal Supreme Court of Switzerland, 9 September 2010, 5A_329/2009 <https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F09-09-2010-5A_329-2009&lang=fr&type=show_document&zoom=YES&> accessed 15 May 2023.

29 That was already the position of Zuck (n 28) 364.

3. Whether a successful lawsuit based on tort law is useful at all

Without a tool like the political question doctrine, civil courts have to look at the general requirements for admissibility and, if they are met, at the merits of the case. Before we address these issues, however, it is worth pondering for a moment on the question of whether these lawsuits are a strategically useful instrument at all. By contrast to climate protection lawsuits brought against states or public entities, private companies are limited to adapting their own behaviour – unlike the state, they are not in a position to plan and implement co-ordinated climate protection measures. Courts can only decide on the individual cases presented to them. If they impose obligations to reduce greenhouse gas emissions with regard to individual companies, we do not merely face a risk that there is no positive effect for the climate at all; the results may also imbalance the strategy of national legislators and the competition between companies.

The Dutch court imposed obligations arising from international treaties on an individual private company. Competitors may welcome the decision and benefit from it in several ways. The EU emissions-trading system (ETS) is one of the cornerstones of the EU's policy to combat climate change.*[30] It operates on the 'cap and trade' principle for approximately 10,000 entities in the power sector and manufacturing industry (and was expanded a few weeks ago to other sectors). Covering roughly 40% of the EU's greenhouse emissions, there is a cap that gets lowered over time. To cover its emissions fully, a company participating in the trading system must obtain emission allowances, and companies can trade these allowances with one another. If a company has reduced its emissions either voluntarily or in response to a court decision, it can sell them to another participant in the system, one that is short on allowances. National courts probably cannot restrict participation in this trade system on the basis of EU law. In the *Shell* case, the Dutch court did not accept the defendant's argument that the company was acting within the EU emissions-trading system and was therefore not acting illegally.*[31] In consequence of the Dutch decision, Shell's competitors may have considerable advantages as they need only comply with a less strict standard of emissions and they may even be in a position to increase their emissions on account of Shell's reduction, because the ETS looks only at the total amount of emissions in a particular sector. The climate protection effect of pro-active tort actions is therefore highly questionable.*[32]

III. International jurisdiction

Courts will normally not be in a position to dismiss climate-change actions for reason of lack of international jurisdiction. In the examples given, the claimants have selected companies domiciled in the forum state, so jurisdiction follows from Articles 4 and 63 of the Brussels I (Recast) Regulation.*[33] It is even possible to sue not only parent companies with a statutory seat or central administration in a Member State of the EU. Claimants can also add as a defendant EU-based subsidiaries, by appealing to Article 8(1) of the Brussels I Regulation. For wholly owned subsidiaries with a seat **outside** the EU, one may argue that their central administration is nevertheless in the EU, more precisely at the place where the parent company takes the decisions for the subsidiary.*[34] The Dutch judgment, however, demonstrates that it is often sufficient to sue the parent company if it is liable for emissions of the entire group. It is worth mentioning that Shell announced shortly after the judgment in The Hague that they planned to move their headquarters from the Netherlands to the UK (and meanwhile they indeed did so) – allegedly for tax reasons.*[35]

30 In Germany, the system has been implemented in national law by the 'Treibhausgasemissionshandelsgesetz' (TEHG).

31 Rechtbank Den Haag (n 5) n 4.4.1 ff.

32 Alexandros Chatzinerantzis and Markus Appel, 'Haftung für den Klimawandel' [2019] NJW 881, 885 suggest that if an operator or another organisation fulfilled the obligations under public law, including the emissions-trading system, there has been no negligent conduct.

33 And for the action in Switzerland from the corresponding regulations in the Lugano Convention.

34 This question has been raised for wholly owned subsidiaries particularly before English courts, and the answer requires taking a look at where the operational decisions for the subsidiary are actually made. See *Vava & Ors v Anglo American South Africa Ltd*, England and Wales High Court (Queens Bench Division) [2013] EWHC 2131 (QB) as well as *Young v Anglo American South Africa Ltd* [2014] EWCA Civ 1130 (31 July 2014).

35 'Aus Steuergründen: Shell zieht um nach Großbritannien' <https://de.euronews.com/2021/11/15/aus-steuergrunden-shell-zieht-um-nach-gro-britannien> accessed 15 May 2023.

In the cases at hand, however, it is not very important where the defendant's headquarters are. Jurisdiction can also be based on the tort rule of Article 7(2) of the Brussels I Regulation, which allows claimants to sue defendants in the place where the damage occurred or is likely to occur in the future. Thanks to the global effects of carbon dioxide emissions, there is an option for European and almost worldwide forum shopping.

IV. Key issues under national tort law

1. The applicable law

Article 7 of the Rome II Regulation provides a rather victim-friendly conflicts rule for environmental damage: the applicable law is the law of the state in which the damage occurs (per Article 4), 'unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred' (Article 7). Claimants before German courts may therefore opt for German tort law if this is also the place where the fundamental decisions on the defendant company's climate strategy are made. The question of the applicable law is of some importance. Although the difficult questions that arise are to some extent the same in all jurisdictions, a jurisdiction with a general tort rule is more flexible.

If we turn to the merits of climate-change litigation, we can focus on three main issues: the violation of personal rights, causation, and illegality.

2. Violation of personal rights

In all jurisdictions, claimants must demonstrate that the defendant's emissions impair their rights. In Germany, this is a very strict requirement, because the German Civil Code has rejected the French approach of a general tort rule according to which a claimant can ask for compensation for any damage caused by the illegal and culpable conduct of the defendant. German tort law requires a violation of so-called absolute rights: life, health, property, or personal privacy rights. Claimants must demonstrate that the emissions have led or will lead to health problems, destroy property, or impair their personal life. In the *Shell* case, on the other hand, the Dutch court was easily satisfied with the fact that 'interests of current and future Dutch residents' could be bundled into the class action filed by the NGO Milieudefensie. Dutch tort law follows the French tradition and operates on the basis of a broad and general tort provision. Shell's obligation to reduce emissions could, therefore, stem from a general duty of care.

The same principles apply for preventive injunctions. Claimants must normally demonstrate an imminent impairment of their legally protected rights (Sec. 1004 GCC), and it is not sufficient for there to be only a potential or theoretical risk. In many cases, one key question, therefore, consists of whether there is an increasing health risk for individuals if we do not succeed in keeping the rise in mean global temperature to well below 2 °C or 1.5 °C. Moreover, it is a typical feature of global warming that the planet reacts with delay to an increase of climate-damaging emissions. If the persons affected were to wait until the earth has warmed up and impairments are imminent, it would be too late: If Earth is to be prevented from warming to above a certain level in the future, action must be taken now, so the threshold to demonstrate imminent impairments must not be too high. This is exactly what the German Constitutional Court held in its landmark decision of May 2021. Decisions made today on the amount of emissions can have an 'intervention-like preliminary effect' for the future on the claimants' fundamental rights. Consequently, it is easier for claimants in Germany to convince civil courts that a future impairment of their legally protected rights is likely.

3. Causation

The most complex issue in climate-change litigation is, of course, causality.[*36] If we take, for example, the actions brought against German car manufacturers, the key question is the following: Is there a sufficient causal link between the production of combustion-powered vehicles and the future health problems of the claimants? The Peruvian farmer must demonstrate a scientific causal connection between the defendant's behaviour in Europe and the damage occurring in Peru.

The starting point of any causality test is, naturally, the 'conditio sine qua non' (or 'but for') formula. Is the defendant's behaviour an indispensable condition without which the claimant's rights could not have been violated? In this sense, every cause is relevant if it cannot be eliminated without elimination of the tortious effect in its concrete form. However, a cause-and-effect relationship is by no means easy to establish in climate-related liability cases. In view of the complexity of ecological processes, the ubiquity of pollution, and the interaction of a wide variety of causes, already this first step of the causality test is not trivial. Plaintiffs must demonstrate a multi-link causal chain: from emissions to climate change, from climate change to particular weather events or long-term effects, and from these to the personal impairment.[*37] However, there are no linear causalities in climate science. Scientists distinguish between 'slow-onset events' (e.g., the melting of glaciers and rise of the sea level) and 'extreme events' such as hurricanes that occur occasionally. There is a huge amount of scientific research, and there has been progress in recent years in terms of predicting to what extent extreme events become more likely and more often in response to greenhouse gas emissions.[*38] It is still difficult to attribute the consequences individually to the defendant's behaviour, though. Liability is even more complicated to demonstrate if we do not focus only on so-called Scope 1 emissions (those directly caused by the defendant) but also consider Scope 2 and 3 emissions, which are indirectly caused by a company via use of energy and emissions by their suppliers (upstream) or through the use of the products downstream.[*39] It is not clear how German courts will handle the problem. The Dutch court explicitly included in Shell's obligation to reduce emissions those caused by Shell customers and end users – a very far-reaching conclusion.

Under German tort law, a second test is needed, to limit unreasonably broad liability, the so-called adequacy test. The idea here is that the risk of damage must have increased considerably because of the defendant's action and the causal relationship must not present itself as a chain of extraordinary, quite improbable circumstances that an objective observer in the situation of the damaging party could not have recognised *ex ante*. To some extent, statistics may help, but they are not always conclusive. In the case of the Peruvian farmer, it can apparently be demonstrated that the defendant company (and its predecessors) contributed over a span of almost 250 years (1751–2010) to the total amount of carbon dioxide emissions by 0.47%. One can hardly argue that such a contribution has increased the claimant's risk of suffering damage 'considerably'.[*40]

Finally, we have to ask whether the tortious act did lead to the realisation of a risk against which the norm of behaviour violated was intended to protect. For some authors, this is the main argument for denial of liability: they argue that climate change is a general risk of life for everyone and should not be attributed to particular companies.[*41]

Probably the most complicated question in climate liability cases follows from the fact that countless small and large emissions typically lead to individual-level harms over a long time, over a large distance, and only in aggregate. Courts all over the world are, of course, used to handling traditional tort cases where damage is caused by more than one wrongdoer, and we distinguish between cases in which the contribution of each wrongdoer was sufficient for the violation of the claimant's right and those in which the individual contributions caused injury or damage only if aggregated.[*42] Both of the perpetrators are liable

36 For a detailed discussion on the question of causality, see Thöne (n 10) 324ff.

37 Ibid 325.

38 Schirmer (n 10) 115ff.

39 Schirmer makes a case in favour of causality for indirect emissions (ibid 116ff).

40 Chatzinerantzis and Appel (n 33) 883; Schirmer (n 10) 116 is of a different opinion with respect to 'adequacy' in the Volkswagen case decided by the court in Detmold (n 8).

41 Chatzinerantzis and Appel (n 33) 885; Wagner and Arntz (n 11) 405; Moritz Keller and Sunny Kapoor, 'Climate Change Litigation – zivilrechtliche Haftung für Treibhausgasemissionen' [2019] BB 706, 709ff.

42 For details, see German Federal Court of Justice (BGH) [1990] NJW 2282, 2883; [2008] NJW 1309; [1970] VersR 814.

if each contribution is in itself sufficient to produce the particular harm (in so-called 'alternative causality'). Even if the contribution by each of the wrongdoers is not sufficient to cause damages, we consider each of the contributions to be causal in order to prevent none of the wrongdoers becoming liable (in so-called 'cumulative causality'). These cases demonstrate that causality is a matter not only of logic but also of legal assessment.

In the context of climate change, the inevitable result of cumulative causality is that each and every one contributes to global warming and can theoretically be liable.[*43] Although in the pending lawsuits the plaintiffs have picked defendants that are large emitters on a European or even a global scale, our traditional doctrinal approaches in tort law are not suitable for addressing global effects. The decisions of the first instance courts in Germany, dismissing climate liability actions are in line with a decision of the German Federal High Court of the early 1980s wherein the court denied tort liability in a situation similar to what climate change represents[*44]: a forest owner had sued for a state institution to pay damages for forest damage caused by air pollution, on the basis of principles of state liability. Here, too, the focus was on long-term, aggregated, and distance damage. The court held that individual-level impairments cannot be assigned to a particular causer.

All in all, the courts cannot reject causality from the start. They will have to take into account scientific studies, need to consider expert opinion[*45], and must find a solution for an unprecedented global problem. It does not seem very likely that German courts will follow the example of the Dutch court and affirm the merits of the pending claims.

4. Illegality

Let's finally and briefly turn to the question of illegality. In the *Shell* case, the court rejected the argument that Shell and its subsidiaries acted within the European legal framework of emission trading and did not violate the law. Most defendants in private climate-change litigation operate on the basis of effective permits and otherwise comply with all climate-related public law regulatory regimes. Car manufacturers may, for example, rely on the European Regulation on emission performance standards for cars and vans[*46], which specifies a maximum amount of carbon emissions of a manufacturer's vehicle fleet per kilometre. Can defendants be held liable even if they do not violate the applicable public law rules?

Once again, we come up against a difficult and controversial question in tort law: do public regulations have a directly binding effect in private law? The decision of public regulators may be a result of a general balancing of interests, but nevertheless compliance with the public law regime does not automatically exclude the possibility of individuals being impaired or suffering from injury. The prevailing opinion in German tort law is therefore that compliance with the public law regime does not automatically exempt them from tort liability.[*47] A case-by-case analysis and balancing of the interests involved is required. Despite the fact that human rights do not apply directly in private law, courts must take into them into account when balancing these interests.[*48] Where European or national rules set only a minimum standard for the reduction of carbon dioxide emissions, individuals may argue accordingly that only a stricter standard applied to an emitter may protect them from personal harm.[*49]

The district court in Braunschweig[*50] in dismissing the climate-change action against Volkswagen emphasised that compliance with public law requirements does not automatically lead to an obligation

43 Thöne (n 10) 326.

44 BGH [1988] NJW 478.

45 The question of burden and standard of proof are discussed in the article by Thöne (n 10) 323ff.

46 Consolidated text of Regulation (EU) 2019/631 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles.

47 Gerald Spindler, s 823 BGB n 91 in Beate Gsell and others (eds), *beck-online Großkommentar zum BGB* (BeckOGK/BGB) (CH Beck 2022); Gerhard Wagner, s 823 n 80, 505 in Jürgen Säcker and others (eds), *Münchener Kommentar zum BGB* (MünchKomm/BGB) (8th edn, 2020); Thöne (n 10) 329; Schirmer (n 10) 116 and 117. Permissions granted abroad may be relevant on the basis of the Rome II Regulation, art 7; for details, see Eva-Maria Kieninger, 'Das internationale Privat- und Verfahrensrecht der Klimahaftung' [2022] IPRax 1, 8ff.

48 Chatzinerantzis and Appel (n 33) 885 argue that companies acting within the public law regime for greenhouse emissions do not act illegally or in breach of duty.

49 Schirmer (n 10) 117.

50 See above, n 7.

to tolerate impairments, but it may indicate that adverse impacts are insignificant and acceptable. That court also explained that a private company's obligations cannot go beyond the state's obligation to protect individuals against climate change, and it referred to the decision of the German Constitutional Court of 2021 wherein the court expressed the conclusion that the German legislator has currently fulfilled its duty to protect individuals today against climate change.*[51] A future line of argument by courts may therefore be the following: pro-active climate actions can only be successful if the claimants can demonstrate that their future impairments will exceed the normal concern of the average citizen.*[52]

V. Conclusions

Climate-change actions before civil courts may not be successful on the merits from a legal point of view. Many of them will fall at either the causality or the illegality hurdle. Even if the actions are not successful in the end, though, they have an important complementary function in a political sense and contribute to common awareness. It takes a lot of courage for politicians to state clearly that we all have to accept losses in our standard of living – not on an abstract but on a very personal level. Most of them do not have that courage. Maybe it helps if we are pointed to the problem again and again, from different sides. Civil actions are definitely not the most effective or promising tool to directly and significantly reduce global warming, but they are a legitimate approach to gain attention. The very fact that we discuss judgments like the one in the *Shell* case all over Europe now raises the level of awareness in the public arena. Those actions may increase the pressure on companies to improve their emission strategies on a voluntary basis before they become the next target for climate activists. While civil courts, of course, cannot save the climate, civil litigation may fuel the debate in a positive way.

51 BVerfG [2021] NJW 1723 n 143ff; BVerfG [2022] NJW 844.

52 Also the position held by Schirmer (n 10) 117ff.