Annual Survey of International & Comparative Law

Volume 17 | Issue 1 Article 9

2011

U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public

Madeleine Tolani

U.S. Punitive Damages Before German Courts: A Comparative Analysis with Respect to the Ordre Public

Cover Page Footnote
17 Annual Survey of Int'l & comp. Law 185 (2011)

U.S. PUNITIVE DAMAGES BEFORE GERMAN COURTS: A COMPARATIVE ANALYSIS WITH RESPECT TO THE ORDRE PUBLIC

MADELEINE TOLANI*

INTRODUCTION

This paper deals with the problem of the recognition and execution of American punitive judgments before German courts. Punitive damages belong to one of the most controversial areas of tort law and are interesting for foreign lawyers because they are a special feature in the American law and are not employed in civil law systems. The issue of the recognition of punitive judgments in foreign law systems that are unfamiliar with the category of punitive damages is problematic and occurs with reasonable frequency in the international legal relations.

The Federal Supreme Court of Germany (BGH) rendered a leading decision on June 4th, 1992 ("California-Judgment")[1] concerning the question of the recognition of American judgments. In this judgment

* Dr. Jur. Madeleine Tolani obtained her LL.M. in US Legal Studies from Golden Gate University in 2010 and her Ph.D. from the Ernst-Mortiz-Arndt-University of Greifswald in Germany. (Dissertation title - *"Partial Legal Personality" of Associations. Necessity of a Balance Between the Further Judicial Formation of Law and the Written Law* (Teilrechtsfähigkeit" von Personenvereinigungen. Zur Notwendigkeit einer Balance zwischen richterlicher Rechtsfortbildung und geschriebenem Recht), published by Duncker & Humblot, Berlin 2009) Furthermore, the author has published several articles in well-known German law reviews concerning such topics as German banking secrecy, temporary injunctions, and comparative corporation law. In 2008 and 2009, she served as an adjunct Professor at the University of Greifswald. Now she is planning a second Ph.D. (Habilitation) in the field of Comparative Civil Procedure.

1. BGHZ 118, 312 = NJW 1992, 3096.

different aspects of the German-American conflict of laws were discussed. One major problem was whether exemplary and punitive damages in the amount of $ 400,000 could be enforced in Germany. The underlying American decision was rendered on April 24, 1985 by the Superior Court of the State of California in the County of San Joaquin.[2] In this case the awarded damages resulted from a sexual abuse of the fourteen-year old victim. Without having paid damages that had been assessed against him, the defendant, who had German and American citizenship, moved to Germany where he owned some property. The question raised in this case was whether the American judgment was enforceable in Germany where the assests were located.

Before a holder of a foreign judgment can obtain enforcement of that judgment in Germany, the holder is required to obtain a German judgment of enforcability of the judgment or a declaration of enforcability. In the case at hand, the BGH did not recognize the punitive damages, because it would violate the ordre public.[3] One main argument was that the German law of damages is governed by the principles of compensation and restitution while punishment is strictly reserved for criminal law.[4]

The non existence of punitive damages is significant for civil law systems, even though the Roman Law was not unfamiliar with punishment under private law and therefore awarded at least the *duplum (poena dupli)* in certain *actiones*.[5] Later on, in the time of the enlightenment (Aufklärung) in the eighteenth century, punishment through private law was almost abolished. This change is due to the increasing development of the public penal law and the idea of the state's monopoly on penalisation on one hand. On the other hand, the aspect of compensation became the main consideration for the law of damages.

Today, civil law countries do not award punitive damages. Besides Germany, examples are Switzerland[6], Italy[7] and Japan[8]. One consequence

2. This judgment is not published. The facts are available in the German judgment, compare footnote 1.

3. Ordre public (public order) relates to the fundamental values of a state's system of justice. Thus ordre public is narrower than "public policy" in common law systems.

4. BGHZ 118, 312 (343-344) = NJW 1992, 3096 (3104).

5. Compare: Wieling, Interesse und Privatstrafe (1970), p. 240; von Jhering, Schuldmoment (1879), p. 174.

6. Drolshammer-Schärer, Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen "punitive damages-Urteils" (Urteilsanmerkung), in: SchwJZ 1986, 309.

7. Scarso, Punitive damages in Italy, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 106, 107.

of the non existence of punitive damages in those countries is that American judgments for punitive damages have been denied enforcement based on the ordre public. The Italian Corte di Cassazione, for instance, pointed out that the objective of punishment and of sanction is alien to the system. For that purpose, the examination of a wrongdoer's conduct would be irrelevant.[9]

The primary aim of this article is to propose an answer if U.S. punitive damages judgments should be recognized in Germany. First, the article will give an overview about punitive damages under American Law and then will analyze the German doctrinal framework of damages. On this basis, the paper will provide an overview of the proceeding of the recognition and execution of foreign judgments in Germany, including the German ordre public. The comparative analysis of this paper will identify parallels between U.S. punitive damages and German damages and will show penal elements within the German civil law. The enforceability of punitive damages in Germany depends on the German point of view towards punitive damages. Thus, this article will identify penal elements in the German civil law. Even if the German civil law would be unacquainted with punishment, it could be imaginable that the German law could tolerate the objectives of punitive damages. Therefore it will be discussed, if the German law or jurisprudence contains aspects that correspond to the intention of American punitive damages.

I. PUNITIVE DAMAGES UNDER AMERICAN LAW

A. DEFINITION

The American system of tort damages recognizes a number of categories of damages. Compensatory damages (actual damages) are based on the actual loss and are designed to place the party in the position the party would have been before the actions of the wrongdoer. Compensatory damages can be quantified under two categories: special damages and general damages. Special damages compensate the claimant for the quantifiable monetary losses suffered by the plaintiff. Examples are the repair or replacement for damages to property, costs for medical treatments and lost earnings. General damages compensate the claimant for non-monetary aspects of the specific harm suffered, which usually refers to physical and emotional pain and suffering.

8. Sano, Exemplary Damages, Not punitive damages. A Japanese Perspective (unpublished manuscript).

9. Cass. 17 January 2007, no. 1183. Compare also: Scarso, Punitive damages in Italy, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 106, 107.

Punitive damages (exemplary damages) are different from compensatory damages, because they are not based on actual damages. Punitive damages are awarded in addition to other damages. They aim to set an example, to teach the wrongdoer to behave his or her self in the future and not to do the wrong again. The plaintiff can be awarded punitive damages in most of the states in the U.S.[10]

Punitive damages are defined as damages, other than compensatory or nominal damages, awarded against a defendant to punish him for his conduct found to be outrageous and to deter him (specific prevention) and discourage others (general prevention) from similar conduct in the future.[11] Punitive damages are awarded only for particularly egregious behaviour and are usually awarded in addition to compensatory damages. But some jurisdictions permit an award of punitive damages even in the absence of compensatory damages.[12] Punitive damages are based on the theory that the interests of the society and of the individual that was harmed can be met by imposing additional damages on the tortfeasor. Punitive damages are a well established part of civil law and – despite their function of punishment and deterrence – not qualified as criminal law.[13] The majority of the courts and legislatures believe punitive damages have a necessary place in the legal system.[14]

Requirements for an award of punitive damages are special circumstance on the wrongdoer's side (aggravated circumstances) like an intentional or reckless, willful or wanton behaviour. Typically punitive damages are awarded in intentional tort cases, but also occur in product liability cases when the manufacturer knew of a defect in the product and also knew the

10. Other termini are: added, imaginary or vindictive damages. Often the term „smart money" is used. Fuller, 17 W. St. U. L. Rev. 305-324 (1990); Louisiana, Massachusetts, Nebraska, New Hampshire and Washington prohibit common law punitive damages. Sebok, Punitive Damages in the United States, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 155.

11. Restatement (Second) of Torts § 908 (1979); Prosser, Handbook of the Law of Torts, p. 9, 20; Prosser, Exemplary damages in the law of Torts, in: 70 Harvard Law Review (1957), 517 (520 following); Kionka, Torts in a nutshell, p. 371 and p. 364 following. Sometimes also the following functions are mentioned: The victim should be awarded for the enforcement of law that is based on the victim's initiation. Also the victim should receive an award additionally to compensatory damages, which sometimes are insufficient. Owen divides the functions into five points: (1) education, (2) retribution, (3) deterrence, (4) compensation, (5) law enforcement. Owen, A Punitive Damages Overview, 39 Vill. L. Rev. 363 (373) (1994).

12. Burnham, Introduction to the Law and Legal System of the United States, 4th ed., p. 452.

13. Junker, Discovery im deutsch-amerikanischen Rechtsverkehr, p. 255; Kionka, Torts in a Nutshell, p. 373. Due to this qualification as a part of civil law, the US Supreme Court denied a violation of the Double Jeopardy Clause by punitive damages. *US. v. Halper* 109 S.Ct. 1892 (1989).

14. Sebok, Punitive Damages in the United States, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 171.

potential for serious injury or death and decided not to correct the defect.[15]

One famous example of the award of punitive damages is the 1994 product liability lawsuit *Liebeck v. McDonalds*[16], also known as the "McDonald's coffee case". The seventy-nine-year old plaintiff attempted to add sugar to her coffee at a McDonald's drive through restaurant. She placed the coffee between her knees but accidentally spilled the entire cup of coffee on her lap. She suffered third-degree burns, had to remain in the hospital and underwent two years of medical treatment. Her lawyers found that McDonald's coffee was 30-50 degrees hotter than coffee in other restaurants. Doctors testified that it only takes 2-7 seconds to cause third-degree burns. The jury awarded $ 200,000 in compensatory damages, which was reduced by the trial court to $ 160,000. In addition, the jury awarded punitive damages of 2.7 million which the trial judge later reduced to $ 480,000.[17]

Another famous case dealing with punitive damages is *Grimshaw v. Ford Motor Co.*[18] The facts of this case were that the gas tank of a Ford Pinto automobile exploded when the car was rear ended by another car proceeding in the same direction. The driver of the Pinto suffered serious burns and died. The passenger in the same car suffered severe and permanently disfiguring burns on his face and entire body. The passenger and the heirs of the driver sued the defendant on the theory of strict liability for a design defect in the car's gas tank. Evidence showed that the Ford Company was aware of the defect before the car was placed on the market, but did not remedy it. The jury awarded compensatory damages in the amount of $ 3.5 million and punitive damages in the amount of $ 125 million. The amount of punitive damages was reduced by the trial judge to $ 3.5 million.

B. THE AMOUNT OF PUNITIVE DAMAGES AND RELEVANT FACTORS FOR THE DETERMINATION

The amount of punitive damages is left to the discretion of the jury and is subject to review by a judge.[19] Like it is demonstrated in *Grimshaw v. Ford Motor Co.*, the amount can be reduced by the judge by a remittitur,

15. Burnham, Introduction to the Law and Legal System of the United States, 4th ed., p. 453.

16. *Liebeck v. McDonald's Restaurant*, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).

17. The decision was appealed by both parties, but the parties settled for an undisclosed amount less than $ 600,000.

18. 174 Cal. Rptr. 348 (Cal.App. 1981).

19. Burnham, Introduction to the Law and Legal System of the United States, 4th ed., p. 453.

which frequently occurs when the defendant requests a new trial because he regards the verdict as excessive.

The jury may consider different factors and the circumstances of the case. Differences can be found in the different states.[20] However, relevant are facts regarding the level of intent in committing the wrongdoing,[21] the defendant's behaviour before and after the wrongdoing and in the majority of the states the financial condition of the defendant.[22] Often the amount is calculated based on the defendant's wealth or the profit that he made by omitting protection. Furthermore, in many states it is required that the amount of punitive damages be related to the compensatory damages.[23] In *Grimshaw v. Ford Motor Co.*, the Court of Appeals held that the award of punitive damages in the amount of § 3.5 million was not excessive.

In deciding if an award is excessive, certain factors should be weighed such as the particulars of defendant's conduct, the defendant's wealth, the amount of compensatory damages, and the amount which would serve as an effective deterrent to similar conduct.[24]

In 1996 the U.S. Supreme Court restricted the amount of punitive damages in the case *BMW of North America v. Gore.*[25] The plaintiff sued BMW of North America because he bought a new car but later on learned that the car had been repainted. The plaintiff asserted that his repainted car was worth less than a car that had not been repainted. In this case compensatory damages of $4,000 were awarded. The plaintiff proved that the value of a repainted car was approximately 10 percent less than the value of a new car. Furthermore, the plaintiff sued for punitive damages based on the evidence that in 1983 BMW had sold 983 refinished cars as new, including 14 in Alabama. The plaintiff used the actual damage of $4,000 per vehicle and argued that punitive damages of $4 million would be an appropriate penalty for selling approximately

20. Sebok, Punitive Damages in the United States, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 184, 185.

21. *Mock v. Castro*, 105 Hawaii 374, 393, 98 P.3d 245, 264 (2004).

22. For instance in Alaska, Delaware, Iowa, Utah and Wisconsin. Compare: Sebok, Punitive Damages in the United States, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 186, footnote 206.

23. For example in Colorado punitive damages that exceed the amount awarded for compensatory damages are prohibited, Col. Rev. St. Ann § 13-21-102(1)(a). Compare: Sebok, Punitive Damages in the United States, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 187.

24. 174 Cal. Rptr. 348 (Cal.App. 1981).

25. 517 U.S. 559. (1996). In 2003 the U.S. Supreme Court affirmed the restrictions, *State Farm Mutual Automobile Insurance Company v. Inez Preece Campbell et al.,* 538 U.S. (2003).

1,000 cars for more than they were worth. The jury in this case awarded $4,000 compensatory damages and assessed $4 million in punitive damages. The Alabama Supreme Court later held that punitive damages in an amount of $2 million would be constitutionally reasonable.

The Supreme Court of the United States held that this amount of punitive damages was excessive and disproportional when compared to the plaintiff's actual loss. The Supreme Court held that the award violated the due process clause of the V and XIV Amendment to the U.S. Constitution. It was the first time that the Supreme Court gave guidance to courts and legislatures about the appropriate standards for evaluating punitive damages awards. According to this jurisprudence the following three factors are relevant:

> 1) the degree of reprehensibility of the defendant's conduct is the most important indication in measuring punitive damages;
>
> 2) the ratio between the compensatory damages and the amount of punitive damages. In the mentioned case the punitive damages of $ 2 million were 500 times higher than the compensatory damages of $ 4,000 and thus too high;
>
> 3) the disparity between the punitive damages award and the civil and criminal penalties that could be imposed by state law for comparable misconduct.[26]

All in all, it can be stated that there is a strong movement in the United States to limit the award of punitive damages. Many state courts and legislatures have already adopted standards and procedures to limit the jury's discretion in awarding punitive damages. For instance, some legislatures have enacted statutes limiting the amount of punitive damages (caps on amount of awards).[27]

C. THE DEBATE AND CRITICISM ON PUNITIVE DAMAGES

The awarding of punitive damages has been subject of deep disputes over the past 25 years in the United States. Supporters of punitive damages argue that one function for such an award is to provide

---

26. In the case at hand the maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practises Act is § 2,000.

27. Some of the statutes specify a ratio between compensatory damages and punitive damages. E.g. Fla. Stat. § 768.73 (1) (1997) contains a presumption that an award of more than three times actual damages is excessive, but greater awards are permitted if „clear and convincing evidence" supportes them. Thompson/Sebert/Gross/Robertson, Remedies, Damages, Equity and Restitution, 3. ed., p. 161.

retribution to the victim of the defendant's reckless or wanton conduct. Especially in product liability cases, the deterrence argument has motivated support for punitive damages. Scholars have pointed out that punitive damages are designed to create incentives ex ante to produce conformity with the tort law.[28]

Critics of the awarding of punitive damages base their arguments on constitutional concerns. One main criticism is that punitive damages violate the Double Jeopardy Clause of the 5th Amendment to the U.S. Constitution. The tortfeasor would be punished in a civil proceeding without the protections guaranteed by a criminal proceeding. Finally, the boundaries between civil and criminal law would be blurred.

In *United States vs. Halper*,[29] the Supreme Court did not share the mentioned constitutional concerns and argued that the Constitution in this context would only protect the relation between a private person and the state and not the relation between private persons. Another criticism is that punitive damages violate the Excessive Fines Clause of the VIII Amendment to the Constitution, because jurors tend to be guided by the "deep pocket" theory and award excessive amounts. In this context, the Supreme Court held that the excessive fines clause is only applicable for criminal law and therefor would be irrelevant when dealing with the subject of punitive damages.[30]

Finally, it is argued that punitive damages violate the due process clause of the 5th and 14th Amendments of the Constitution. In the case of *Pacific Mutual Life Insurance Co. v. Haslip,*[31] the Supreme Court did not see any violation of the due process clause, but held that allowing open-ended discretion of the jury and punitive damages that "run wild" would be unconstitutional. In the *BMW* case, the Supreme Court developed criteria to assure that the ratio of punitive damages bore a reasonable relationship to the general damages awarded.

28. R.D. Cooter, Economic Analysis of Punitive Damages, S. Cal. L. Rev. 56 (1982) 79. 94-97.

29. 109 S.Ct. 1892 (1989).

30. *Browning-Ferries Industries of Vermont, Inc. v. Kelko Disposal Inc*., 492 U.S. 257, 280 (1989).

31. 111 S.Ct. 1032 (1991).

II. PUNITIVE DAMAGES UNDER GERMAN LAW

A. THE DOCTRINAL FRAMEWORK OF THE GERMAN LAW OF DAMAGES

The German Law of damages (§§ 249-254 of the German Civil Code, BGB) is based on the concepts of compensation and restitution. §249 I BGB says that a person who is liable for damages must primarily restore the injured person or damaged property to the position that would have existed had the wrong not occurred (restoration of the status quo ante, Natural restitution). Under §249 II BGB, the victim is allowed to demand the required monetary amount instead of the restitution, if the body of the victim is injured or if his property is damaged. According to §251 I BGB, monetary indemnification is allowed if genuine restitution is impossible, or under §251 II BGB if genuine restitution would be unreasonable. Under §253 BGB, a monetary indemnification for non-economic losses requires an injury of the body or health, or an infringement of the victim's freedom or sexual self-determination.[32]

Under the German Civil law, the injured person may not be enriched as a result of the damages awarded. The drafters of the BGB intentionally decided against the use of moral or penal considerations.[33] Hence, there is a belief that the German law of damages is dominated by the function of reparation for injury and the compensation for losses.[34] Furthermore scholars state that with its predominance of restitution and compensation, the German civil law takes an extreme position within the European law.[35]

B. RECENT CHANGES

Interestingly German courts award damages that are not purely compensatory. Furthermore particular rules of the German Civil Law allow awards of damages that are different to compensation.

1. Damages in the Context of the Protection of Personal Rights

The case law in damages for the invasion of personal privacy is the main field where the award of damages aims at something more than compensation. Since the 1950's, case law by the Federal Supreme Court (BGH) has emphasized that satisfaction is important besides the

32. Jansen/Rademacher, Punitive Damages in Germany, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 75.
33. Motive II, p. 17, 18.
34. Lange, Schadensersatz, 2. ed., (1990), p. 9.
35. Magnus, Unification of Tort Law: Damages (2001) p. 188, 189.

compensation of financial losses.[36] In this period, the sensitivity to claims of the violation of personal rights became more relevant. This is due to the increasing role of the media and the experiences of the infringement of personal rights during the time of National Socialism. Thus, prevention became a factor in assessing the amount of damages.

The first famous judgment in this context was rendered in 1958 ("Herrenreiter-Entscheidung"). The court awarded damages for the plaintiff whose personal right was damaged by the media. In 1961, the German Federal Supreme Court emphasized for the first time that prevention is a factor in cases of the infringement of personal rights.[37] In 1973, the German Constitutional Court confirmed the function of sanction and prevention in the German law of damages. In the so called Soraya-Decision,[38] the court held that the motive of profit can only be confronted with the risk of a noticeable material loss. This case dealt with a fictitious interview of the princess Soraya that was published in a German magazine.

Famous are the so called Caroline-Judgments, which were rendered in 1995.[39] The facts of the judgment ("Caroline von Monaco I")[40] are that in two German magazines the Princess Caroline of Monaco was on the cover, which showed the text that the princess was fighting against breast cancer. Inside the magazine, it was mentioned that the Princess herself did not suffer from cancer, but was pleading for preventive medical checkups. The Princess sued for a correction which should have made clear that the perception she suffered from cancer was wrong. Furthermore she sued for 50,000 Euros[41] damages for the invasion of her personal rights. In the first instance, the court held that the Princess would have the right of correction. The court awarded damages in the amount of 7,500 Euros.[42] The Court of Appeals of Hamburg affirmed the judgment, but the Federal Supreme Court of Germany reversed.[43] The court held that the amount of damages that the first instance court had awarded was too low.

---

36. BGHZ 26, p. 349 (353).
37. BGHZ 35, pp. 363 following = NJW 1961, pp. 2059 following.
38. BVerfGE 34, p. 269 following = NJW 1973, p. 1221 following.
39. BGHZ 128, p. 1 ff. = NJW 1995, p. 861 ff.
40. The so called "Caroline von Monaco II-judgment" (BGH, LM H 5, p. 96 § 823 (AU) BGB Number 122 = NJW 1996, p. 984 following) does not deal with the amount of damages and therefore is irrelevant for this paper.
41. At that time the currency was Deutsche Mark, and the amount the plaintiff sought for was 100,000 Deutsche Mark.
42. At that time the currency was Deutsche Mark, and the amount the court awarded was 15,000 Deutsche Mark.
43. BGH, in: NJW 1995, p. 861 following.

According to the Supreme Court, the traditional method for determining damages would not be sufficient since the damages awarded by the court were far below the typical profits resulting from such an infringement of personal rights. According to the court, it has to be considered that the wrongdoer misused the infringement of the personal rights to raise his profit. Relevant factors for the determination of the damages should be the impact and the consequences of the infringement, the reason and the motive of the tortfeasor and his degree of his negligence. The court emphasized the aspect of satisfaction and prevention. It held that the amount awarded should have the effect of deterrence and would only be appropriate and noticeable for the wrongdoer, if the amount would be correspondent to the profit the wrongdoer made.[44] The case law awarding damages in the situation of the infringement of personal rights for those persons who are in the focus of the media had been criticized as a jurisprudence for the "rich and beautiful" people. But there is a tendency of higher awards also for the infringement of personal rights of people who are not famous. For instance, a court awarded 25,000 Euros for a woman whose naked photos had been published in the internet.[45]

2. Damages for Pain and Suffering (Schmerzensgeld)

"Damages for pain and suffering are the traditional battlefield for debates on punitive damages in German law."[46] As already mentioned, according to § 253 BGB a monetary indemnification for non-economic losses requires an injury of the body, health, or an infringement of the victim's freedom or sexual self-determination.[47] It was also mentioned before, that through case law § 253 BGB (formerly § 847 I BGB) became applicable for infringements of personal rights. Interestingly, before the enactment of the BGB in 1900, authors had refused the payment of money as a possible compensation for immaterial losses.[48] Pain or honor was

44. BGH, in: NJW 1995, 861 (865).

45. LG Kiel, 27.4. 2006, AZ: 4 O 251/05.

46. Jansen/Rademacher, Punitive Damages in Germany, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 77.

47. Jansen/Rademacher, Punitive Damages in Germany, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 77, 78.

48. Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht – Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, in: NJW 1996, p. 1935 ff.

considered as incommensurable.[49] Thus, money for pain and suffering was understood as a punishment under private law.[50]

Despite these concerns, the German legislature enacted §847 I BGB and later on implemented the rule without any change into the 2. Book of the BGB, now §253 BGB. Today, money is generally considered as an adequate compensation for pain and other immaterial losses and is especially awarded in cases of strict liability (Gefährdungshaftung).[51]

However, the courts are faced with the question of how to determine the compensation for pain and suffering adequately. In practice, courts use indexes to arrive at a proper amount of damages.[52] Usually the amount awarded for plaintiffs by German courts for pain and suffering are not comparable to amounts that U.S. courts award. But there is a tendency for the award of higher amounts in cases of severe injuries. For instance, 500,000 Euros and a monthly payment of 500 Euros had been awarded to a three-and-a-half-year old child that got paralyzed and lost the capacity to speak by a car accident.[53] As a consequence of the raise of the amounts, the class of insurance recommends to seek a settlement and not a judgment.[54] Factors for the determination of the level of the indemnification for the impact on the life of the victim are the size, duration and intensity of the pain as wells as the suffering and the deformation.[55] The Federal Supreme Court held that the level of the tortfeasor's negligence and his economic situation should be considered as well.[56]

In a case where a plaintiff was injured seriously in a car accident and as a result of the accident suffered from psychological problems, the insurance company of the defendant delayed the payments. The State Appeals Court (OLG) Karlsruhe raised the amount of damages due to this delay.[57] The court held expressly that the insurer has a public task. Such an award would be to compensate the victim in a clear situation of

49. F. Mommsen, Beiträge zum Obligationenrecht. Zweite Abteilung: Zur Lehre von dem Interesse (1855), p. 122 ff.; Windscheid, Lehrbuch des Pandektenrechts II/1 (1865), p. 303 (§ 455, number 31).

50. Windscheid, Lehrbuch des Pandektenrechts II/1 (1865), p. 302 f. (§ 455).

51. Jansen/Rademacher, Punitive Damages in Germany, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 78.

52. For instance Hacks/Ring/Böhm, Schmerzensgeld-Beträge 2008, 26. ed. (2007).

53. LG Kiel, 11.7.2003, AZ: 6 O 13/03, in: VersR 2006, p. 279.

54. Deisler, Aktuelle Entwicklungen beim Ersatz des immateriellen Schadens – Quo vadis Schmerzensgeld?, in: Versicherungswirtschaft 2006, p. 989 following (990).

55. BGHZ 18, 149 (154) = NJW 155, p. 1675.

56. BGHZ 18, 157-159 = NJW 1955, 1675.

57. OLG Karlsruhe, in: NJW 1973, p. 851 ff.

responsibility since the victim is usually in an inferior position. According to the court, the jurisprudence should deter the insurance companies from such a misuse.[58] In this case, the raise of the award for pain and suffering had a clear function of prevention. Interestingly, some U.S. courts award punitive damages in cases of bad faith litigation against insurers.[59] Thus, it can be concluded that the award of money for suffering and pain is something more than pure compensation. Also in the case law of pain and suffering there are judgments that clearly emphazise the function of prevention.[60]

3. Damages in the Context of Discrimination Under Labour Law

Based on secondary EU-Legislation,[61] the Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG)[62] was enacted 2006. The predecessor of this act was § 611 a BGB and was also based on the mentioned EU-Law. According to §7 AGG, an employer is not allowed to discriminate against a prospective employee due to racial or ethnic grounds, gender, religion, ideology, disability, age or sexual identity. §15 AGG orders that the employer has to pay damages for material and immaterial losses to the prospective employee who was refused a job position on the mentioned illegitimate reasons.

As mentioned above, §611 a BGB was the first enactment of the EU-Legislation against discrimination. The German rule had to be changed twice since the ECJ regarded earlier versions as insufficient. The original version of §611 a II BGB declared that the employer had to pay those damages that resulted from the fact that the applicant trusted that the employment won't be refused based on the mentioned reasons. The result was that applicants could usually only recover their expenses for the application, e.g. the postage.[63] The ECJ demanded higher amounts of damages to be awarded and held that the sanction needs to be truly deterrent for employers.[64] With reference to this jurisprudence, a German labor court awarded a sum of six times of the potential salary to

58. OLG Karlsruhe, in: NJW 1973, p. 851 ff. (853).

59. For instance *Contintal Assurance Co. v. Kountz*, 461 So2d 802, 807 (Alabama 1984); Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht – Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, in: NJW 1996, p. 1935 ff., II. 2.

60. Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht – Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, in: NJW 1996, p. 1935 ff. (II. 2.).

61. EU-Richtlinen 2000/43, 2000/78, 2002/73.

62. BGBl. I, p. 1897, 1910.

63. BAG, NZA 1990, p. 21 (22).

64. EuGH, Slg. 1984, p. 1891 = NJW 1984, p. 2021 (2022).

a discriminated prospective employee.[65] However, the German legislature changed §611 a BGB and ordered, that an appropriate compensation in the maximum amount of three times of the potential salary could be awarded. It can be concluded from this, that the German legislature acknowledged the function of deterrence of § 611 a BGB.[66]

Interestingly these cases have parallels in the U.S. law. Some U.S. courts award punitive damages in cases of discrimination.[67]

4. Prevention in Contract Law, Intellectual Property Rights, Corporate Law

Some German scholars recommend – with reference to punitive damages – sanctions that are more than compensation in the area of German contract law.[68] Particularly in cases of contractual prohibition of competition sanctions would be appropriate to ensure the prohibition. In these situations, the plaintiff would usually have difficulty in proving his actual damages and the defendant would know about that difficulty and thus would not be deterred by a sanction of an actual compensation. It is important to note that the German Civil Code is familiar with the idea of penalty clauses in contracts. §339 of the German Civil Code (BGB) provides that "if the obligor promises to pay a sum of money as a penalty in the event that he could fail to perform his obligation, or that he should not perform in a proper manner, such penalty shall be forfeited upon the obligor's default. If the obligation to be performed consists of an omission, then the forfeiture takes place as soon as an act contravening the obligation is omitted." §343 BGB states: "If a forfeited penalty is disproportionately high, the court may upon the obligor's request reduce it to an appropriate amount. In determining the question of what is appropriate, every rightful interest of the obligee, not just his monetary interest, has to be considered ..."[69] For the determination of the amount,

65. ArbG Hamm, DB 1984, p. 2700 (2701).

66. Palandt/Putzo, BGB, 54. ed., § 611 a, number 17.

67. Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht – Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, in: NJW 1996, p. 1935 ff. (II.3.); the same, Punitive damages und ihre Anerkennung und Vollstreckung in der BRep. Deutschland (1994), p. 107 and 108.

68. Köndgen, Immaterialschadensersatz, Gewinnabschöpfung oder Privatstrafen als Sanktionen für Vertragsbruch? Eine rechtsvergleichende ökonomische Analyse, in: 56 RabelsZ (1992), pp. 696 following.

69. Translation from: Schesinger's Comparative Law, 7th ed. (2009), p. 888 and 889. § 340 BGB states: "... If the obligee is entitled to damages for nonperformance, he shall receive the forfeited penalty as the minimum amount of damages. The recovery of further damages is not excluded." § 343 BGB states: "If a forfeited penalty is disproportionately high, the court may upon the obligor's request reduce it to an appropriate amount. In determining the question of what is appropriate, every rightful interest of the obligee, not only his monetary interest, has to be considered ..."

every rightful interest of the obligee has to be considered. That means not only recovery of money, but all circumstances of the case have to be considered. Relevant factors are: the intensity of the wrongdoing, the character of the clause as a sanction, the function of deterrence, and the negligence of the wrongdoer.[70] This shows the obvious character of the rule as a sanction. The rationale of such a contractual penalty is to pressure the other party to conform to the contract. The penalty is independent from an actual damage. Furthermore, the German Commercial Code also is familiar with contractual penalties.[71] The obligee can even recover damages in excess of the agreed-upon penalty if the obligor is responsible for his failure to perform and if the obligee proves such damages. Thus, to a certain extent punishment in German Civil Law is permissible. From a comparative perspective it is an interesting fact that common law generally does not allow penalty clauses in contracts.[72]

For the law of intellectual property rights and copyright, German scholars recommend the adoption of multiple damages of the American law because the owner of the intellectual property right usually would have difficulty proving the actual damage.[73] Furthermore, the German corporate law is not unfamiliar with the concept of prevention. Since the worldwide economic crises of recent years, it has been discussed to abate the barrier for claims of damages against the board of directors in order to enforce the function of deterrence.[74]

---

70. Rieble, in: Staudinger BGB 2009, number 104.

71. § 348 HGB says that "a contractual penalty by a merchant in the course of his business cannot be reduced under the provisions of § 343 of the Civil Code." Translation from: Schesinger's Comparative Law, 7th ed. (2009), p. 889. Besides the German civil law also the French Civil Code (article 1226), the Spanish Civil Code (article 1154) and the Swiss Code of Obligations (article 161, 163) are familiar with the institute of the contractual penalty. Schesinger's Comparative Law, 7th ed. (2009), p. 885-890. In Italy penality clauses ("clausola penale") exist in the doctrine, but not in the Civil Code.

72. Schesinger's Comparative Law, 7th ed. (2009), p. 886. But there are alternative ways in the U.S. for dealing with the problem, for instance reward clauses as incentives (for example for finishing a project earlier) and liquidated damages clauses. A liqidtated damages clause is a provisison, placed in the contract itself, specifying the conseqences of breach. E.g. the contractor contracts to built a house for $ 200,000. In the contract, the parties agree that for every day after the deadline that Contractor finishes, the price charges by him will be reduced by $ 1000.00. Such liquidated damages clauses are only enforceable, if the court is satisfied that the provision is not a "penalty". The court wants to be satisfied the the clause is an attempt to estimate actual damages.

73. Assmann, Schadensersatz in mehrfacher Höhe des Schadens: Zur Erweiterung des Sanktionensystems für die Verletzung gewerblicher Schutzrechte und Urheberrechte, in: BB 1985, pp. 15 (16).

74. Götz, Die Überwachung der Aktiengesellschaft, in: AG 1995, p. 337 (351, 352).

5. Monetary Penalties and Imprisonment Under the Code of Civil Procedure

The law of execution of titles provides an interesting example. If the debtor in a judgment for a specific performance does not comply with the terms of such a judgment, the creditor may apply to the court rendering the judgment for an order of civil contempt of court requiring a monetary penalty (Ordnungsgeld), § 890 ZPO. If this fine is not paid or is ineffective, the court may order imprisonment (Ordnungshaft), § 890 ZPO. These are instruments of German civil law, even though they have some resemblance to criminal law.

III. THE RECOGNITION AND EXECUTION OF PUNITIVE-DAMAGES-JUDGMENTS IN GERMANY

A. THE GERMAN ORDRE PUBLIC UNDER § 328 I NUMBER 4 ZPO

If a judgment which was rendered abroad is enforceable against a debtor, it is usually governed by the domestic law, provided that no overriding treaty exists between the two states. Because such a treaty does not exist for the German-American relation[75], the German Code of Civil Procedure (ZPO) is applicable. The holder of the American judgment must go through the standard statutory procedure set forth in §§ 722 ff. ZPO. According to § 722 I ZPO a foreign civil judgment can be enforced in Germany, if the authority for the enforcement is granted by a German judgment. According to § 723 I ZPO, this judgment does not revise the foreign judgment. But no judgment of enforceability can be issued until the German court is satisfied that the underlying foreign judgment has res judicata effect according to the law of the court that issued it, § 723 II sentence 1 ZPO.

The main prerequisite for the enforceability of the foreign judgment is the compliance with § 328 ZPO. § 328 ZPO – the basic German rule for the recognition of judgments issued by states outside the European Union

75. The Hague "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" ("Service Convention"), 1965, and the Hague "Convention on the Taking of Evidence Abroad in Civil and Commercial Matters" ("Evidence Convention"), 1970, cover service abroad and all forms of civil and commercial matters/taking of evidence abroad and do not deal with this problem. For holders of judgments issued by another Member State of the European Union the simplified Brussels Regulation is applicable. In addition to the general provisions of German law and the Brussels Regulation, there are multilateral treaties and conventions that address the recognition and enforcement of foreign judgments. These treaties and conventions are applicable in specific categories or matter. E.g. the Hague Convention of 1973 on the Recognition and Enforcement of orders and support, the convention on contracts for the International Carriage of Goods by Roads (CMR), 1956; compare also: Spellenberg, in: Staudinger BGB (2005), EGBGB, § 328 ZPO number 14-26.

– embodies the key circumstances under which a German court will not recognize a foreign judgment.[76] § 328 I number 4 ZPO contains the ordre public. Under this rule, a German court will not recognize a foreign judgment if the recognition of the judgment "leads to a result that is irreconcilable with material principles of German law, especially if recognition is irreconcilable with constitutional rights."[77]

The barrier for overcoming this requirement is high. The German judge does not decide if the foreign judgment was correct ("prohibition of révision au fond"). Scholars emphasize that the question "only" concerns the recognition of a decision that was already rendered by a foreign court. This would require a higher degree of tolerance.[78] The recognition should be denied only if the judgment goes beyond a mere foreign differentness and is unbearable according to the German view.[79] In other words, it is not sufficient for a violation of § 328 I number 4 ZPO simply that a German judge – if he would have decided the case – would have reached a different decision than the foreign court did.[80] The method to determine if there is a violation consists of two steps. First, the basic principle that is violated needs to be questioned. Second, it has to be established that the differences are considerable. Concerning both steps, caution is demanded.[81] Therefore German courts have to be tolerant to acceptance of the judgments of foreign courts and not substitute their judgments for that of the foreign court. The acknowledgement of a foreign judgment should only be denied in extreme cases.

B. THE "CALIFORNIA-JUDGMENT" OF THE BGH

The question here is whether a judgment that awards punitive damages under a foreign civil law would be such a violation of basic principles of German law and thus not enforceable in Germany. Because punitive damages are – like in the U.S. – categorized as civil law, § 328 ZPO is

76. There are two categories of the ordre public. One category is the ordre public with respect to the proceeding, under which the foreign judgment was obtaines. Another category is the ordre public with respect to substantive law, which would be violated if the material result of a judgment would violate basic principles of German law. Compare: Spellenberg, in: Staudinger BGB (2005), EGBGB, § 328, number 487-537.

77. Translation from: Murray/Stürner, German Civil Justice (2004), p. 526.

78. Martiny, Handbuch des Internationales Zivilverfahrensrechts III/1 (1984), Chapter 1, number 1014; Bungert, Vollstreckbarkeit US-amerikanischer Schadensersatzurteile, in: ZIP 1992, 1707-1725 (1711).

79. That is the established jurisprudence of the BGH, compare: BGHZ 50, 370 (375, 376); BGHZ 75, 32 (43) BGH, in NJW 1991, 1418 (1420); compare also: Stadler, in: Musielak, ZPO, 7th ed. (2009), number 23; Koch, Ausländischer Schadensersatz vor deutschen Gerichten, in: NJW 1992, 3073-3075 (3073); Zekoll, Zur Vollstreckbarkeit eines US-amerikanischen Schadensersatzurteils, in: RIW 1990, 302-305 (303).

80. OLG Stuttgart, 27.7.2009 – 5 U 39/09, in: BeckRS 2009, 21932, II. 3. bb).

81. Spellenberg, in: Staudinger BGB (2005), EGBGB, § 328, number 460-461.

applicable. The BGH argues that punitive damages are just a special form of damages between private persons, regardless of the considerations which they are based on. Furthermore, punitive damages are awarded based on the initiative of the victim.[82]

In the aforementioned California-Judgment,[83] the BGH refused to give recognition to American punitive damages awards. The court held that an American judgment that awards punitive damages in a considerable amount, in addition to material and non monetary damages, usually cannot be enforced in Germany due to a violation of § 328 I number 4 ZPO.[84] The BGH argues that the German law of damages only aims at providing compensation and does not want the injured party to be enriched. The BGH held that the effect of accepting punitive damages would be that the individual plaintiff would act as a "private prosecutor" instead of the state. This would not be – according to the BGH – compatible with the state's monopoly on penalisation. Furthermore, the court held that the function of deterrence and punishment would not be comparable to the aspect of satisfaction which has to be considered in German damages for pain and suffering and damages for the infringement of personal rights. In this context, the court points out the following differences: Firstly, for the determination of the damages for pain and suffering the level of the pain and suffering are the main aspects. Secondly, the aspect of satisfaction itself does not constitute a penal character of the damages for pain and suffering. The aspect of satisfaction would be connected to the aspect of compensation.[85]

C. GERMAN LITERATURE

The opinions of German scholars concerning the acknowledgment of American punitive damages judgments in Germany are divided. Opponents argue that there is no parallel category of punitive damages in Germany. The authors state that regulation and even deterrence may be the aims of the German law of damages, but they are achieved by means

82. BGH, in: NJW 1992, p. 3096 ff. (3102). The court left open, if another qualification could be possible, if the punitive damages would be awarded to the state or to another institution.

83. BGHZ 118, 312 = NJW 1992, 3096.

84. BGH, in: NJW 1992, p. 3096 ff. The question of the acknowledgment and enforcablity was only one part of the judgment. The BGH also decided if the judgment was enforcable concerning the award of compensation for healing if the victim does not intent to undergo a treatment (fictive medical costs). Another part concerned the enforcability of the fees of the lawyer which was a contingency fee in the case at hand. Furhermore the court decided if differences in the proceeding (pre-trial discovery in the U.S.) could result to a denial of enforceability.

85. BGH, in: NJW 1992, p. 3096 ff. (3103).

of "fair compensation". Claims that go beyond the actual financial loss of the injured person are not based on punitive considerations.[86]

Others scholars accept a partial acknowledgment of punitive damage judgments. Some of these authors suggest limiting the acknowlegment of that part that aims at compensation. Another suggestion is to consider the aspect if the main criteria for the American judgment was compensation.[87] Some scholars favor a limitation and suggest that only those judgments where the award is limited to an amount double the losses that would be awarded in the same case under German law can be enforced.[88]

According to a very liberal point of view, punitive damages should be acknowledged. A violation of the ordre public would be possible in only very narrow circumstances, e.g., in cases where the defendant was held liable multiply for punitive damages in the same case. In those cases the acknowledgement and enforceability in Germany would violate the requirement of proportionality.[89]

D. COMPARATIVE ANALYSIS AND OWN SOLUTION

The question at hand is whether the barrier of tolerance of the German ordre public would be exceeded by the recognition of American punitive damages judgments. As previously explained, the criteria is whether punitive damage judgments result in such extreme money awards that the acknowledgment would be prohibited under § 328 I number 4 ZPO. It is important to keep this high barrier in mind. It means that under the ordre public differences between two legal systems have to be accepted and per se do not constitute a reason for the refusal to acknowledge and to enforce a foreign judgment. Something more – an extreme case, a unbearable violation of basic German principles – is required to constitute a violation of the ordre public. The answer to this question has to consider this standard.

---

86. Jansen/Rademacher, Punitive Damages in Germany, in: Helmut Koziol/Venessa Wilcox, Punitive Damages: Common Law and Civil Law Perspectives, Tort and Insurance Law, Vol. 25, 2009, p. 85.

87. Compare: Bungert, Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exorbitanter Höhe, in: ZIP 1992, p. 1707 ff. (1718 ff.); Böhmer, Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen, in: NJW 1990, p. 3049 ff. (3050).

88. Stiefel/Stürner, Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exzessiver Höhe, in: VersR 1987, p. 829 ff. (837 ff.).

89. Rosengarten, Punitive Damages und ihre Anerkennung und Vollstreckung in der BRep. Dtschl. (1994), p. 207 and 208; Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht. Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, in: NJW 1996, p. 1935 following (IV.).

The analysis shows that there is a predominance of restitution and compensation under the German doctrinal framework of §§ 249 – 254 BGB. Under German Law, there are no punitive damages like those which exist in the U.S. But like in the U.S., there are cases in Germany where pure compensation cannot effectively address the defendant's wrong. Since the 1950s, there have been noteworthy cases concerning the protection of personal rights which show that the determination of an award of damages is something more than a mathematical operation. Besides awarding compensation, the aspects of the satisfaction of the victim and the prevention come into play.

Leading cases in this context emphasize that the reason, the motivation, the degree of negligence and even the profits of the wrongdoer are factors for the determination. Also in cases of damages for pain and suffering, the level of the wrongdoer's negligence and his economic situation are factors besides the severity of the pain. Even though the German courts do not aim at punishment of the wrongdoer, some of the considerations show obvious parallels to considerations for punitive damages under the American law. The aspect of prevention/deterrence that the BGH emphasizes is also one function of punitive damages in the U.S. Furthermore, the level of the tortfeasor's negligence and his economic condition are relevant factors in the U.S. as well for determining the amount of the punitive damages.

Besides this case law, an imminent change in the statutes was analyzed for damages as a result of discrimination. § 5 AGG, that orders that the employer pay damages for material and non material losses to a prospective employee who was refused employment on the mentioned illegitimate reasons, aims to achieve deterrence in private law. Of course, § 15 AGG and its precursor §611 a BGB are individual statutes based on European law. But it can be stated that the function is extremely similar to American punitive damages, which interestingly are also awarded in cases of discrimination.

Furthermore, the permissibility of penalty clause in contracts under § 339 BGB, is a strong argument for the existence of instruments for regulation of behaviour under German law. As another example, instruments of the German law of execution of civil judgments were analyzed. Of course, § 339 BGB is a particular rule in the German Civil contract law and § 890 ZPO is a special rule in the Law of Execution. Both statutes do not change the fact that the doctrinal framework of the law of damages does not aim at punishment. But both examples prove that German Civil law is not free from regulation of behaviour by the use of punishment. Thus, the statement by the BGH that mechanisms that

aim for punishment and deterrence belong exclusively to criminal, and not to the German Civil law, are too broad.

Also, the underlying cultural and social context between the U.S. and the German systems has to be taken into account. The American legal system is shaped by a thinking that is more oriented by the market. Furthermore, it puts more emphasis on prevention in civil law. Americans believe in the self-regulating power of the market, while in Germany the state provides the impetus for regulation. Differently from Germany, regulative mechanisms in the U.S. are private claims by the consumers and not rules that are imposed by the state. Actual claims or even the threat of lawsuits compels producers or those who offer products to conform, especially to safety standards. Therefore in the U.S., the private plaintiff is fulfilling the task of the effective enforcement of law,[90] which in Germany is left to the state. Hence, regulation in the U.S. is governed by the judiciary, while in Germany the legislature and executive regulate. It can be concluded that there are political and social differences and the question at hand deals with the regulation of behaviour. For the question of a violation of the ordre public, it should be considered that the described difference in the thinking cannot result in a violation. It is a further difference due to a different understanding of the role of the state and hence has to be respected.[91] Due to this different cultural and social context, the concept of proportionality does not prevent the recognition and execution of American punitive damage judgments. It is true that the amounts that American courts award are high from a German perspective and exceed what a German plaintiff could receive in a comparable proceeding before a German court. One possible explanation for the high awards in the U.S. is the lack of a social net. The American victim relies on a high award to secure his future.[92] The different social context should be considered in the question about the acknowledgment of American judgment before German courts.

Differently from the argumentation of the BGH, the recognition and execution of punitive damages in Germany does not violate the state's monopoly on penalization. In certain areas of German law prevention is

90. Compare: Koch, Ausländischer Schadensersatz vor deutschen Gerichten, in: NJW 1992, 3073 following (3074).

91. Herrmann, Die Anerkennung US-amerikanischer Urteile in Deutschland unter Berücksichtigung des ordre public. Eine rechtsvergleichende Untersuchung zum "Justizkonflikt" zwischen Deutschland und den USA (1999), p. 265, 266.

92. Herrmann, Die Anerkennung US-amerikanischer Urteile in Deutschland unter Berücksichtigung des ordre public. Eine rechtsvergleichende Untersuchung zum "Justizkonflikt" zwischen Deutschland und den USA (1999), p. 272.

governed by private persons or benefit private persons. One example is the contractual penalty clauses written into agreements.

Even though the German law of damages is governed by the aspects of restitution and compensation, it indirectly also deters and punishes.[93] In this context, it has to be considered that the law of damages cannot only be explained by the aspect of compensation and cannot be explained detached from the disapproval of the wrong behaviour. The reason is that the aspect of compensation just explains that the victim needs compensation, but does not explain by whom and why this should happen. The wrongdoer has to feel the results of the wrongdoing and should be deterred from doing wrong actions in the future.[94] In reality, every rule has the effect of prevention. Every wrongdoer should be deterred from violating the rule again and if he does so, he will feel the consequences. German scholars state that civil law without deterrence would result in a loss of relevance of civil law.[95]

Abstractly from the discussion, if punitive damages should be enforceable in Germany, it should be thought about the idea that sanction and preventions could be desirable for every legal system with a modern economy, since damages are getting more complex. Criminal law often times reaches its limitations, while civil sanctions can be more effective because they allow a flexible and fast reaction to the wrong. This would ultimately result in a relief for criminal law.[96]

Finally, there are more adjustments between the jurisprudence in U.S.A. and in Germany. In 1996, the U.S. Supreme Court imposed limitatons on punitive damages. This was after the "California-judgment" by the BGH. The fact that there are now clear boundaries for the amount of punitive damages should give German courts more confidence in accepting U.S. punitive damages judgments. Furthermore, it should be considered that the BGH is broadening the immaterial losses due to infringements of personal rights, e.g., in the Caroline von Monaco caselaw. Even though German courts do not award sums that are comparable to the amounts awarded in the U.S., the BGH considers

93. Herrmann, Die Anerkennung US-amerikanischer Urteile in Deutschland unter Berücksichtigung des ordre public. Eine rechtsvergleichende Untersuchung zum "Justizkonflikt" zwischen Deutschland und den USA (1999), p. 266, 267.

94. Bentert, Das pönale Element - Ein Fremdkörper im deutschen Zivilrecht? Zugleich ein Diskussionsbeitrag zur Frage der Anerkennung US-amerikanischer "punitive-damages"-Urteile (1996), p. 18-22, 162.

95. Ott/Schäfer, Lehrbuch der ökonomischen Analyse des Zivilrechts, 4th ed. (2005), p. 131, 132.

96. Compare: P. Müller, Punitive Damages und deutsches Schadensersatzrecht (2000), p. 3.

especially bad behaviour of the wrongdoer as one aspect that raises the amount.

IV. CONCLUSION

A general refusal of recognition and enforcement of American punitive damages judgments would disregard German case law that resulted in changes in the doctrinal framework of damages. German law is not unacquainted with the function of regulation of behaviour and deterrence. Claims that go beyond the actual financial loss of the injured party are reality, even though they are not qualified as punitive damages. Due to these changes and with respect to the high standard, which §328 I number 4 ZPO imposes, U.S. punitive judgments should be tolerated in German courts. Only if the defendant was found multiply liable, the ordre public would be violated.[97]

97. Compare for the same opinion: Herrmann, Die Anerkennung US-amerikanischer Urteile in Deutschland unter Berücksichtigung des ordre public. Eine rechtsvergleichende Untersuchung zum "Justizkonflikt" zwischen Deutschland und den USA (1999), p. 274; Rosengarten, Punitive Damages und ihre Anerkennung und Vollstreckung in der BRep. Dtschl. (1994), p. 207 and 208; Rosengarten, Der Präventionsgedanke im deutschen Zivilrecht. Höheres Schmerzensgeld, aber keine Anerkennung und Vollstreckung US-amerikanischer punitive damages?, in: NJW 1996, p. 1935 following (IV.).