The Recognition and Enforcement of Punitive Damage Awards in Germany: Recent Developments

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I. INTRODUCTION

Damage awards in tort cases in the United States (U.S.) have a bad reputation in Germany. This reputation is not limited to the popular press, where nearly every extraordinary U.S. damage award receives substantial attention, but extends into the German legal community, which considers the U.S. torts system absurd and excessive. This attitude is largely due to the fact that U.S. damage awards typically exceed those granted by German courts in similar cases. Moreover, the German law of torts does not allow for punitive damages even in cases of gross negligence or intentional torts. This presents a problem for U.S. plaintiffs seeking to have a judgment of a U.S. court recognized in Germany where the judgment encompasses punitive damages. The question of whether foreign judgments encompassing punitive damages are recognizable by German courts was unclear until the German supreme court recently ruled on the issue. The following article outlines the German law governing the recognition and enforcement of foreign judgments (Part II), discusses the possible limits to the enforcement of punitive damage awards in Germany (Part III), describes the recent decision of the German supreme court concerning U.S. punitive damage awards (Part IV), and offers a critical analysis of that decision. Thorough analysis shows that the court's judgment is based on a fundamental misunderstanding of punitive damages and a refusal to recognize the similarities between German and U.S. damage awards.

II. THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN GERMANY

A. Applicable Laws

There are two sources of law which govern the recognition and enforcement of foreign judgments in Germany: international treaties

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and the German law of civil procedure. Multilateral as well as bilateral international treaties to which Germany is a party are given preference over German domestic law. Where no international treaty is applicable, the German Code of Civil Procedure, referred to as the Zivilproze.ordnung (hereinafter ZPO), governs. Since there are no international treaties between the United States and Germany governing the recognition and enforcement of foreign judgments, the provisions of the ZPO apply to the enforcement of U.S. judgments in Germany.

B. Requirements of the German ZPO

According to the ZPO, the enforcement of a foreign judgment in Germany requires an execution judgment by a German court (Vollstreckungsurteil). The court, in deciding whether to grant the execution


3 In contrast to the United States, where each state has its own rules on civil procedure, the German Zivilproze. ordnung (ZPO) applies in all of the 16 Länder of Germany.

4 The execution of a foreign judgment is governed by ZPO §§ 722 & 723:

§ 722 [Enforceability of foreign judgments inland]

(1) The judgment of a foreign court shall only be executed if its admissibility is pronounced by an enforceable judgment.

(2) Jurisdiction for the claim for granting a judgment is had by the municipal court or district court where the debtor has his general jurisdiction; otherwise the municipal court or district court at which
judgment, is not to examine the legality of the decision, but rather is instructed to determine whether the requirements of ZPO § 328 are fulfilled. There are essentially six requirements.

1) Final Judgment of a Foreign Civil Court

The foreign judgment must be a final decision of a civil law court of a foreign state. The sphere of application (Anwendungsbereich) of ZPO § 328 extends only to judgments of courts of law of foreign states in civil or commercial matters. The term “judgment” encompasses “all decisions entered by a court in a civil action settling a dispute between the parties regardless of the name given to the decision (e.g. decree, order).” Summary as well as default judgments are generally recognizable. The judgment must have been entered by a court of law of the foreign state. Decisions of private tribunals do not receive recognition under ZPO § 328. Moreover, the foreign judgment must be final and have concerned a civil or commercial matter. The finality requirement means “that the judgment is no longer subject to ordinary forms of appeal or review.” Although judgments in criminal matters fall outside the scope of the ZPO,

§ 723 [The execution judgment]
(1) The execution judgment shall be given without examination of the legality of the decision.
(2) The execution judgment shall not be given before the judgment of the foreign court became final according to the law governing such court. It shall not be given if the recognition of the judgment is excluded by virtue of § 328 [recognition of foreign judgments].

Goren, supra note 2. All other translations are by the author.


6 MICHAEL EBERSTEIN, ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE (Charles Platto ed. 1989) 142, 145. Mr. Eberstein authored the treaty on behalf of the government of the Federal Republic of Germany.

7 REINHOLD GEIMER, INTERNATIONALES ZIVILPROZE. RECHT 448 (1987).

8 Schütze, supra note 1 at 584. The enforcement of foreign arbitration awards is governed by ZPO § 1044, or in certain cases, the Treaty of Friendship, Commerce and Navigation, May 7, 1956, F.R.G.-U.S., art. 6, 7 U.S.T. 1839.

9 ZPO § 723(2).

10 See EBERSTEIN, supra note 6, at 145-46 (not limited to “civil and commercial courts but includes decisions of labour courts and administrative courts exercising civil jurisdiction”).

11 EBERSTEIN, supra note 6, at 146.

12 See generally Christof von Dryander, Jurisdiction in Civil and Commercial Matters Under the German Code of Civil Procedure, 16 INT’L LAW. 671 (1982). The ZPO is a civil code and does not involve criminal matters.
civil damage awards arising in criminal proceedings (Adhäsionsurteile) are recognized. The prevailing opinion in Germany is that the classification of a case as civil or commercial is determined according to the laws of both states (Doppelqualifikation).

2) Jurisdiction of the Foreign Court

There are two jurisdictional requirements: one implied, the other express. The implied jurisdictional requirement is that the courts of the state where the judgment was rendered must have had proper international jurisdiction (internationale Zuständigkeit). This does not mean that the particular court which rendered the judgment must have had proper jurisdiction. Rather, it requires simply that the judicial system of the state in which the judgment was rendered had jurisdiction. This requirement is not expressly stated in the German ZPO, but arises from the fact that Germany would be violating international law if it recognized a judgment in which a court extended its jurisdiction beyond its judicial sovereignty.

The express jurisdictional requirement is that the rendering court must have had proper jurisdiction according to German law. The fact that the rendering court lacked jurisdiction according to its own laws is irrelevant. Determinative is whether a basis of jurisdiction can be found under German law. For example, German law does not contain an equivalent to what is known in the United States as transient jurisdiction. In addition, much of the conduct which would serve as a basis under a typical long arm statute would not qualify as a basis for jurisdiction in Germany. However, even if a U.S. court’s jurisdiction was founded on a basis which is unknown to

13 Strafproze.ordnung [StPO] § 403.
14 EBERSTEIN, supra note 6, at 146.
16 Schütze, supra note 1, at 586.
18 Schütze, supra note 1, at 586; see also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 298-300 (4th ed. 1990); F. A. Mann, The Doctrine of International Jurisdiction Revisited After Twenty Years, 186 R.C.A.D.I. 19 (1984); MALCOM N. SHAW, INTERNATIONAL LAW 399 (3rd ed. 1991) (concerning the power of a nation’s courts to try cases involving a foreign factor).
20 See e.g., Judgment of June 22, 1983, BGH 88 BGHZ 17.
German law, recognition of the United States judgment in Germany is not automatically precluded. Recognition will be denied only if no basis can be found under German law.\textsuperscript{21} If the defendant has property in the jurisdiction, this requirement is satisfied because the property will serve as a basis of jurisdiction under German law even though the actual basis of jurisdiction relied on by the U.S. court is not recognized in Germany.\textsuperscript{22}

3) Judicial Notice

Similar to the U.S. Restatement of Foreign Relations Law,\textsuperscript{23} German law requires that a defendant who has not previously appeared in the proceedings be properly served with notice within a sufficient time to enable him to prepare for his defence.\textsuperscript{24} Although this provision initially applied exclusively to German citizens, it was expanded by the 1986 reform of the German international private law to include non-citizens.\textsuperscript{25} The validity of the judicial notice is determined exclusively by the law of the foreign state.\textsuperscript{26}

4) Lis Pendens

The foreign judgment must not be in conflict with a judgment already issued in Germany or with an earlier foreign judgment recognized in Germany.\textsuperscript{27} In addition, recognition is denied if the pro-

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\item \textsuperscript{21} Schütze, supra note 1, at 583. The ZPO denies recognition of a foreign judgment "if the recognition of the judgment would give rise to a result which is manifestly incompatible with the basic principles of the German law, especially when the recognition would be inconsistent with the constitution." ZPO § 328(1)(4).
\item \textsuperscript{22} In tort actions, the court in whose jurisdiction the tort was committed has jurisdiction according to ZPO § 32. For further discussion of the other relevant jurisdictional bases under the ZPO, see Eberstein, supra note 6, at 146-49.
\item \textsuperscript{23} Restatement (Third) of the Foreign Relations Law of the United States § 482(2)(b) (1983).
\item \textsuperscript{24} ZPO § 328(2). Of particular significance in this respect is the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, to which Germany and the United States are parties.
\item \textsuperscript{26} See e.g., Judgment of Feb. 6, 1991, 37 RIW 343, 344; Judgment of Feb. 25, 1987, OLG 8 Praxis des Internationalen Privat- und Verfahrensrechts [IPRax] 97, 98.
\item \textsuperscript{27} ZPO § 328(1)(3). Compare Restatement (Third) of the Foreign Relations Law of the United States § 482(2)(e) (1983).
\end{itemize}
ceedings leading to the foreign judgment are inconsistent with proceedings in Germany which have in the interim become final.  

5) Reciprocity

There must be reciprocity in the recognition of judgments between the states involved. It is not necessary, however, that reciprocity extend to all judicial decisions. Instead, it is sufficient if the foreign state would recognize a German judgment with the same subject matter and surrounding circumstances. The reciprocity requirement typically does not present a problem for the recognition of U.S. judgments in Germany.

6) Public Policy

To fulfill the final requirement, the recognition of the judgment must not lead to a result which is manifestly incompatible with the basic principles of German law or the German constitution. This public policy requirement is referred to as *ordre public* in the German legal system. Since the German judge is prohibited from examining the legality of the foreign judgment, she is limited to examining whether the results of the enforcement of the foreign judgment would violate fundamental principles of German procedural or substantive law. Such a violation can arise, for example, when the foreign judgment includes a punitive damage award.

III. The Enforcement of United States Punitive Damage Judgments in Germany

A. Punitive Damages in United States Tort Law

Damage awards in United States tort cases can generally be classified as either compensatory or punitive. Whereas compensatory

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28 ZPO § 328(1)(3); See Peter Hartmann, ZIVILPROZE.ORDNUNG 1043 (Adolph Baumbach et al. eds., 50th ed. 1992).
29 ZPO § 328(5); See e.g., Judgment of Oct. 11, 1956, BGH 22 BGHZ 24, 26; Judgment of Nov. 15, 1967, BGH 49 BGHZ 50, 51.
32 ZPO § 328(4); Compare RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d) (1983), which states that United States courts need not recognize a foreign judgment which is repugnant to the public policy of the United States.
33 See e.g., Judgment of May 9, 1990, BGH 43 NJW 2197, 2198.
34 ZPO § 723(1).
damages are designed to compensate the injured party for the injuries suffered, punitive damages in United States torts cases serve to punish the tortfeasor for his outrageous conduct. Punishment in itself, however, is not the goal of punitive damages. Rather, punishment is sought because of the effects it has. In other words, punishment is the instrument by which other goals are achieved. The primary reason that a tortfeasor is punished is “to deter him and others like him from similar conduct in the future.” Deterrence, however, is not the only function of punitive damages. The punishment of the plaintiff, according to Professor Owen, serves the goal of helping to restore the injured party’s “emotional equilibrium”: “When the judicial systempunishes a defendant, the injured plaintiff receives the satisfaction of seeing the defendant suffer.” In addition, punitive damages serve to compensate the injured party for losses that may not have otherwise been adequately compensated. Since the determination of compensatory damages, especially for pain and suffering, is often imprecise, the granting of punitive damages to injured parties ensures that they are adequately compensated. Finally, the imposition of punitive damages provides motivation for private individuals to “police” wrongful behavior. Punitive damages may been seen as a reward for bringing a claim against a tortfeasor who has engaged in socially wrongful behavior.

Most states place strict limits on the instances and the amounts of punitive damages imposed. First, the claim for punitive damages requires a successful claim for compensatory or at least nominal damages. Second, more than the mere commission of a tort is required before punitive damages are imposed. The plaintiff generally must

37 Restatement (Second) of Torts, supra note 36.
39 For example, compensation involves reimbursement for losses not ordinarily recoverable as compensatory damages (such as actual losses the plaintiff is unable to prove). Compensatory damages also serve to compensate the plaintiff for psychological harm suffered from the defendant’s act and to restore the plaintiff to the financial position he occupied prior to the injury (in some instances by covering litigation expenses). Id. at 1295-1299. But see Note, An Economic Analysis of the Plaintiff’s Windfall from Punitive Damage Litigation, 105 Harv. L. Rev. 1900 (1992) (arguing that punitive damages are unnecessary because plaintiffs are adequately compensated through compensatory damages).
40 Keeton et al., supra note 36.
show that the defendant has acted at least with reckless indifference to the rights of others. 41

The amount of the punitive damage award is also limited in most states even though the determination falls within the discretion of the jury. In determining the amount of punitive damages, juries are typically instructed to take into account the character of the defendant’s act along with his wealth and the extent of harm caused. 42 The United States Supreme Court has recently indicated that it is concerned “about punitive damages that run wild” and that the amount of punitive damages awarded in a particular case should be tested against a reasonableness standard which arises from the Due Process Clause. 43

B. Types of Damages in German Tort Law

German tort law recognizes basically two types of damages: compensatory damages and damages for pain and suffering. 44 Tortious conduct gives rise to a claim for damages against the tortfeasor called Schadensersatz. 45 The law of Schadensersatz requires the tortfeasor to restore the conditions to where they would be had the conduct which gave rise to the liability not occurred (Naturalrestitution). 46 If this is not possible, which is usually the case, the tortfeasor must compensate the injured party in money (Geldersatz). 47 For non-economic harm such as pain and suffering, the tortfeasor may be liable for Schmerzensgeld. 48

41 See Smith v. Wade, 461 U.S. at 52; RESTATEMENT (SECOND) OF TORTS § 908(2) (1977); KEETON et al., supra note 36, at 9-10.
42 RESTATEMENT (SECOND) OF TORTS, supra note 41.
44 For a more detailed discussion of German tort law, see BASIL MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 669-92 (2d ed. 1990); K. ZWEIGERT & H. KÖTZ, 2 INTRODUCTION TO COMPARATIVE LAW 291-99 (1987).
46 BGB § 249 For further discussion, see WOLFGANG FIKENTSCHER, SCHULDRECHT 797 (7th ed. 1985); HEIN KÖTZ, DELIKTSRECHT 172 (5th ed. 1991); 1 KARL LARENZ, LEHRBUCH DES SCHULDRECHTS, ALLGEMEINER TEIL 467 (14th ed. 1987); PETER SCHLECHTRIEM, SCHULDRECHT, ALLGEMEINER TEIL 97 (1992).
Compensation for material damage in most cases is not difficult to determine since it is based on restoring the injured party to the conditions as they were before the harm. If this amount is contested, the court has the discretion to determine the award.\textsuperscript{49} Since there is no jury, German courts regularly rely on compensation tables or the judgments of other courts in similar circumstances to determine the amount of damages.\textsuperscript{50} The damage awards by German courts are substantially lower than in the United States and much more predictable. A plaintiff who is paralyzed from the waist down due to the defendant’s tortious conduct can expect a damage award of around $180,000 with an additional monthly compensation of $1100.\textsuperscript{51} Punitive damages, as they are known in the United States, are not directly awarded in German tort law. As such, foreign civil judgments which contain punitive damages raise the question of their enforcement in Germany.

C. Bases for Non-Recognition of Punitive Damage Awards

1) Punitive Damages Fall Outside the Scope of the German ZPO

As indicated above, one of the requirements for the recognition of foreign judgments in Germany is that it be a civil or commercial matter.\textsuperscript{52} It has been argued that judgments which include punitive damages should not be recognized because they are penal rather than civil in nature.\textsuperscript{53} According to one of the leading German experts in this field, “punitive damages primarily have penal characteristics and statutes which award punitive damages are not judgments in civil


\textsuperscript{52} See supra notes 11-13 and accompanying text.

cases. Accordingly, a German court should exclude them from the class of laws capable of recognition."

2) Punitive Damage Awards Violate German ordre public

(a) German ordre public

The enforcement of a foreign judgment involving punitive damages may violate German public policy (ordre public). According to German ordre public, foreign judgments will not be recognized if their enforcement would be manifestly incompatible with the basic principles of German law or the constitution. The rationale behind this principle, which exists in most legal systems, is that "a society is not prepared to make its legal machinery available where the consequences would deeply offend its views of justice and morality."

The German legal system distinguishes between procedural and substantive ordre public. A foreign judgment will not be denied on grounds of procedural ordre public because the procedures of the foreign court differed from those of the German ZPO, but rather "when the judgment of the foreign court proceeded on such basis that differs from basic principles of German civil procedure such that the judgment can not be viewed, from the perspective of German legal system, as having proceeded in accordance with principles of law and order." For example, foreign proceedings which contradict

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54 Schütze, supra note 1, at 600. Contra Joachian Zekoll, Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany, 37 AM. J. COMP. L. 301, 324 (1989) ("punitive damages regularly constitute only one of several claim components in products liability suits, and are thus embedded in a judicial process which generally redresses the same types of injury as do ordinary German civil proceedings"); Ernst C. Stiefel, Rolf Stürner & Astrid Stadler, The Enforceability of Excessive U.S. Punitive Damage Awards in Germany, 39 AM. J. COMP. L. 779, 785 (1991) ("punitive damages involve a claim among private parties and are therefore a civil matter").

55 See supra notes 32-34 and accompanying text. This requirement is similar to that of the Restatement (Third) of the Foreign Relations Law of the United States § 482(1)(a) (1983).

56 See generally Enforcement of Foreign Judgments Worldwide (Charles Platto ed. 1989).


PUNITIVE DAMAGE AWARDS

a fundamental principle of German civil procedure such as judicial impartiality or procedural guarantees of the German constitution will not be recognized.

German courts will also refuse to recognize a foreign judgment where enforcement would contradict the purpose of German substantive law (substantive ordre public). According to the German supreme court, "Such a violation, which would preclude the recognition of a foreign judgment, exists only when the application of the foreign law would result in such a significant contradiction to the basic ideas of the German legal rules and concepts of justice that it would be intolerable for us." The German supreme court has held, for example, that debts arising out of contracts not allowed under German law, or between persons not having the capacity to conduct such transactions under German law, violate German ordre public and should not be recognized. In its Judgment of September 26, 1979, the court stated:

The court has previously held [Judgment of Oct. 18, 1967, Bundesgerichtshof, 48 BGHZ 327, 331 (1968)] that in deciding whether German ordre public would be violated by the recognition of a foreign judgment, a comparison between the German and foreign laws may not be undertaken. It does not depend on whether the foreign law is based on the same principles as the corresponding German rules, but instead solely on whether the concrete result of the application of the foreign law from the standpoint of the German law is to be disapproved.

(b) Punitive Damages as Violative of German Ordre Public

The opinion among legal scholars in Germany is that punitive damage awards cannot be enforced in Germany because they violate German ordre public. There are several reasons offered as to why

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66 See Peter Gottwald, 1 MÜNCHENER KOMMENTAR ZUR ZIVILPROZE.ORDNUNG 2123.
Punitive damage awards may violate German *ordre public*.

First, since public international law, which is part of German law, indicates that states will not enforce the criminal laws of other states, German courts should not recognize penal sanctions imposed in the form of a foreign punitive damages claim.

Second, foreign judgments imposing greater liability than a German court would have awarded if the tort had been committed in Germany contradict Article 38 of the EGBGB which states that claims against Germans for torts committed abroad cannot exceed the liability that the German civil law would have imposed had the tort been committed in Germany. Although this is a provision of German private international law which governs the application of foreign law in Germany, it is argued that it also “prevents the recognition of a judgment based on such barred foreign rules.” Since punitive damages in most cases exceed the amount of damages a German court would award, a foreign judgment against a German national involving punitive damages will violate this provision of German law.

Third, the ZPO specifically prohibits the recognition of foreign judgments whose enforcement would be inconsistent with the German constitution. It is argued that since the imposition of punitive damages is penal in nature, it requires compliance with the constitutional safeguards granted to criminal defendants under the German constitution. The German constitutional supreme court supports this argument and has held that excessive sanctions, such as unpredictably high compensation, in civil cases may also violate certain rights guaranteed by the German constitution.

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(Gerhard Lüke & Alfred Walchshöfer eds. 1992); Schütze, *supra* note 1, at 601; Rolf Schütze, *Die Anerkennung und Vollstreckbarerklärung US-amerikanischer Schadensersatzurteile in Produkthaftungssachen in der Bundesrepublik Deutschland, Festschrift für Heinrich Nagel zum 75. Geburtstag* 392, 399 (Walther Habscheid & Karl Heinz Schwab eds. 1987).


69 Schütze, *supra* note 1, at 601; *See also* Westphalen, *supra* note 68, at 141.

70 ZPO § 328(1)(4).


Fourth, punitive damages, to the extent that they impose punishment on the tortfeasor, violate the separation of functions principle in German law which separates the fields of civil and criminal law. According to this principle, "the civil law may not take away any of the functions of the criminal law." Since punishment is considered a function of criminal law sanctions, it should not be encroached upon by the civil law through the imposition of punitive damages.

Finally, it is argued that German tort law is designed solely to compensate for harm suffered. To the extent that foreign damage awards exceed compensation for harm suffered, they violate this fundamental principle of German law and should not be recognized.

IV. Judgment of June 4, 1992 of the German Supreme Court

A. Background

The defendant in the California civil case, a citizen of both the United States and Germany, had been convicted in a criminal proceeding for sexual abuse committed on the plaintiff. After the plaintiff instituted a tort action for battery against him, the defendant returned to Germany where he currently lives. Notice was served on the defendant prior to his departure for Germany. On April 24, 1985, the Superior Court of California awarded the plaintiff $750,260 in damages ($260 for past medical expenses, $100,000 for future medical expenses, $50,000 for cost of placement, $200,000 for pain and suffering, and $400,000 exemplary and punitive damages).

The plaintiff then sought to have the judgment enforced in Germany. The German lower court held that the California judgment was enforceable in its entirety in Germany. The appellate court, however, held that the damage award was only enforceable to the extent of $275,325. According to the court, the compensation for non-economic injuries, namely pain and suffering, as well as the punitive damage award cannot be recognized by a German court because they are "intolerably excessive for German legal standards."
Both parties appealed this decision to the German supreme court.

B. Decision

In its first decision concerning the enforceability of punitive damages, the German supreme court held that foreign judgments encompassing damage awards that exceed compensation for the damages suffered are not enforceable in Germany because they violate German ordre public. Those damages which are compensatory, however, can be recognized even though they may exceed what a German court would have awarded in the case. According to the court, even if that portion of the judgment of the California court which was designed as compensation for non-economic harm exceeded that which a German court would have awarded in such a case, "it is nevertheless to be recognized." As such, the judgment of the California court was recognized only to the extent of $350,260 (the amount awarded by the California court less the punitive damages portion).

According to the court, punitive damages in judgments of foreign civil courts are not denied recognition because they belong to criminal law and are therefore outside the scope of the German ZPO. It was not necessary, according to the court, to determine in the present case whether characterization of the case as criminal or civil is to be made according to the laws of the U.S., Germany, or both. The court stated: "[f]rom the U.S.-American as well as the German standpoint, a civil case is to be accepted." Under German law, civil cases involve "the existence or non-existence of private rights and legal relationships of equally situated parties." The court held that punitive damages can therefore be qualified as civil since they are "a special kind of compensation between private parties." The foreign judgment is not to be recognized, however, to the extent that the damages granted exceed compensation for damages suffered because acceptance of such excessive compensation would violate German ordre public. According to the court, the modern

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81 Id. at 1464. Damages for similar injuries in German courts are around $30,000. See supra note 50.
82 Id. at 1460; See supra notes 52-54 and accompanying text.
83 See supra note 15 and accompanying text.
84 Judgment of June 4, 1992, BGH, supra note 80, at 1461.
85 Id.
86 Id.
87 The court expressly refused to rule on whether procedural constitutional protections would be violated if foreign judgments including punitive damages were recognized. Id. at 1463.
German civil law provides solely for the compensation for damages as a legal consequence of tortious conduct and not the enrichment of the injured party. Such damages violate the fundamental German legal principle of proportionality (Verhältnismäßigkeit) according to which "exorbitant compensation awards for immaterial or material damages" are contrary to German law. Moreover, deterrence, which is an inherent aspect of punitive damages, belongs to the "punishment monopoly of the state." The court did indicate, however, that punitive damages may be recognized if their imposition was designed to compensate for harm that is difficult to prove or to deprive the defendant of the gain acquired through his tortious conduct. Although United States punitive damage awards have a compensatory aspect, this possibility has limited importance for United States plaintiffs since the compensatory portion of punitive damage awards is typically not identified.

The German supreme court enforced the portions of the judgment intended to compensate the plaintiff for harm suffered. The fact that the foreign judgment was not enforceable in its entirety did not preclude recognition of certain portions of the judgments. The court also rejected the argument that Article 38 EGBGB prevents the recognition of foreign damage awards exceeding levels a German court would have awarded if the case had been adjudicated in Germany. Moreover, the use of pre-trial discovery, which is prohibited in the German legal system, does not result in a violation of German ordre public in this case so as to preclude recognition of the judgment resulting from that process. Finally, the court held that the contingency fee arrangement with the attorneys involved in the case did not prevent the recognition of the judgment even though such agreements are void under German law.

88 Id. at 1461.
89 Id. at 1463.
91 Judgment of June 4, 1992, BGH, supra note 80, at 1461.
92 Id. at 1462.
93 See supra note 39 and accompanying text.
94 Judgment of June 4, 1992, BGH, supra note 80, at 1462-63.
95 See supra notes 68-69 and accompanying text.
96 Judgment of June 4, 1992, BGH, supra note 80, at 1458.
97 Id. at 1456.
98 Id. at 1459.
V. COMMENTS ON THE DECISION

This decision is the first by the German supreme court concerning the issue of whether United States punitive damage awards are enforceable in Germany. In declaring punitive damage awards to be violative of German ordre public, the court followed the lead of the Swiss courts and the arguments of numerous German scholars. An examination of the reasons given by the court suggests, however, that the decision rests on a mischaracterization of punitive damages and an unwillingness to recognize that damages in German torts cases may exceed compensation for harm suffered.

A. Mischaracterization of Punitive Damages

The court characterized the imposition of punitive damages as being within the "free discretion of the court" and "without firm relation to the injuries suffered." This overlooks the fact that the imposition of punitive damages, as well as their amount, is limited by law in most if not all United States jurisdictions. First, as indicated above, punitive damages cannot be imposed in cases of mere negligence, but instead require aggravating circumstances. For example, California, the state where the judgment in the present case was rendered, requires oppression, fraud or malice. In other words, "[s]imple negligence
cannot support an award of punitive damages." Second, the discretion of the jury in fixing the amount of punitive damages is coming under increasing scrutiny by courts and legislators throughout the United States. The United States Supreme Court has recently imposed a reasonableness standard on the amount of punitive damages that can be awarded by a jury. In addition, the law in California, the state where the judgment in the present case was rendered, is that punitive damages must bear some relationship to the actual damages suffered. California courts will not enter punitive damage verdicts which exceed the level necessary to deter the wrongful behavior in the future. The California Supreme Court has stated: "[t]he purpose [of punitive damage verdicts] is to deter, not to destroy." Thus, contrary to the opinion of the German supreme court, there are a number of limits in the imposition as well as the setting of the amount of punitive damages.

**B. Non-Compensatory Aspects of Damages in German Tort Law**

The German supreme court also wrongly refused to recognize that in certain cases, German damage awards can exceed mere compensation. According to the court, "The modern German law of civil procedure provides only the compensation for damages (§§ 249 et subseq. BGB) as consequence of a tort and not an enrichment [like punitive damages] of the injured party (emphasis added)."

This, however, is not an entirely correct representation of German damages law. If compensation was the only function of damages in German tort cases, the focus in setting the amount of damages would be strictly on the injured party. As it is, German courts in certain cases will rely, at least in part, on factors not related to the injuries in determining the amount of the damage award. For example, the German supreme court has repeatedly held that in determining the amount of the Schmerzensgeld, the courts are instructed to consider not only the extent of the harm, but also the culpability of the

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110 Id. at 112.
111 Judgment of June 4, 1992, BGH, supra note 80, at 1461.
112 Judgment of July 6, 1955, BGH, 18 BGHZ 149, 157 (1956); See also ESSER
tortfeasor and the financial status of both the injured party and the tortfeasor. Although it is argued that the reason the financial position of the tortfeasor is taken into account is because the courts do not want to impose too great a burden on the defendant, this does not explain why the culpability of the tortfeasor is taken into account. According to the German supreme court, "It would be incomprehensible if the trial judge did not have the authority to set the amount of damages higher for the consequences of conduct amounting to a crime than for the same results caused by an accident that can occur to anyone." This suggests that the imposition of damages carries a punitive element. This conclusion is supported by the observation that the defendant's exposure to criminal sanctions has an influence on the amount of damages imposed in a civil case. One can infer that if the amount of damages is reduced because the tortfeasor has already been punished, there is an inherent relationship between damages in tort cases and punishment. If the sole function of the damage award was to compensate the plaintiff, there would be no need to reduce the damage award where the defendant is exposed to criminal sanctions.

& Weyers, supra note 50, at 622 ("[o]nce one realizes that the purpose of Schmerzensgeld is supposed above all to compensate, then the most important factor is always the extent of the injuries and other mental burdens").


114 Judgment of June 18, 1973, BGH 61 BGHZ 102, 108 (1974); Judgment of July 6, 1955, BGH, supra note 112, at 159. Consideration by the court of the defendant's status is generally recognized and accepted among German scholars. See Esser & Weyers, supra note 50, at 624; Fikentscher, supra note 46, at 800; Kötz, supra note 46, at 188.

115 Nehlsen-v.Stryk, supra note 48. The financial standing of the defendant is similarly taken into account in the U.S. See, e.g., Thiry v. Armstrong World Industries, 661 P.2d 515, 518 (Okla. 1983) ("[t]he trial judge must exercise considerable control to avoid excess punitive damage verdicts since the goal is to punish and deter, not to bankrupt and destroy").

116 Judgment of July 6, 1955, BGH, supra note 112, at 158.


PUNITIVE DAMAGE AWARDS

In addition, the retributive function of Schmerzensgeld, known as Genugtuung,\(^{119}\) has many of the same characteristics as punitive damages and supports the conclusion that the German law of torts exceeds mere compensation. The Genugtuung, as an element of damages in German tort law, was first expressly identified by the German supreme court in 1955. At that time, the court was faced with the issue of whether the trial courts could take the defendant's financial position and degree of culpability into account when determining the amount of Schmerzensgeld under § 847 BGB.\(^{120}\) In a landmark decision, the court identified the two functions of Schmerzensgeld:

Schmerzensgeld legally has a dual function. It is supposed to offer the injured party an adequate compensation for those injuries that are of a non-economic nature. At the same time it is supposed to take into account, that the tortfeasor owes the injured party Genugtuung.\(^{121}\)

The Genugtuung, whose limit lies within the limited discretion of the trial judge,\(^{122}\) in itself serves three recognized purposes which have parallels with United States punitive damages. First, it "purports to describe that special function of liability which seeks to assuage the aggrieved party's sense of justice by means of a legal reaction to the wrong."\(^{123}\) Genugtuung, like punitive damages,\(^{124}\) is supposed to give the injured party the peace of mind that the tortfeasor has been made to pay for his wrongful conduct.\(^{125}\)

Second, Genugtuung operates to impose a "perceptible financial burden" on the tortfeasor similar to punitive damages.\(^{126}\) This function

\(^{119}\) The word Genugtuung has been translated as "satisfaction", Stoll, supra note 48, at 9, as well as "retribution", Zekoll, supra note 54, at 328.

\(^{120}\) Judgment of July 6, 1955, BGH, supra note 112, at 157-58.


\(^{122}\) Judgment of Sept. 19, 1961, BGH, supra note 121, at 370.

\(^{123}\) Stoll, supra note 119, at sec. 10.

\(^{124}\) See supra note 38 and accompanying text.


\(^{126}\) Kern, supra note 73, at 249; See also Claus Ott & Haus-Bernd Schäfer,
is inherently connected to the first since the Genugtuung of the injured party is realized through the imposition of the burden on the tortfeasor. According to the German supreme court, "A claim for Schmerzensgeld, even if it is not supposed to take the form of a private penalty, nevertheless unmistakably carries with it somewhat of a character of a fine especially from the Genugtuung aspect.'\textsuperscript{127}

The third function of Genugtuung is prevention (Präventionsfunktion). This is essentially the same as the deterence function of punitive damages. As one influential German author describes it, "the Genugtuung is supposed to prevent the injury if possible and serve the ex post prevention and sanction of the norm.'\textsuperscript{128} The German courts have repeatedly recognized the Präventionsfunktion\textsuperscript{129} and it is generally accepted by the experts.\textsuperscript{130}

Despite these similarities, the German supreme court held that punitive damages cannot be compared to the Genugtuung of German damages law.\textsuperscript{131} The court gave two reasons for the distinction.\textsuperscript{132} First, in determining the amount of the Schmerzensgeld, the extent and severity of the injury is of primary importance. Other factors such as the defendant's financial status are of less importance. Second, the Genugtuung function does not give rise to a direct punishment

\textit{Schmerzensgeld bei Körperverletzungen}, 45 JZ 563, 573 (1990) ("[t]he Genugtuung function of Schmerzensgeld refers to the benefit that the injured party receives in having a perceptible burden of his living situation imposed on the tortfeasor").

\textsuperscript{127} Judgment of Dec. 16, 1975, BGH, supra note 121, at 1148.

\textsuperscript{128} \textsc{Erwin Deutsch, Unerlaubte Handlung und Schadensersatz} 222 (1987); \textit{See also} Ott & Schäfer, supra note 126, at 573 ("[t]he goal of the payment of Schmerzensgeld exists therefore not to compensate to the extent possible for the harm as material damages, but rather to provide incentives to avoid the damage").


\textsuperscript{130} \textsc{Erwin Deutsch, Haftungsrecht und Strafrecht, Festschrift für Eduard Wahl} 339, 342 (Klaus Müller & Hermann Soell eds. 1973); \textsc{Erwin Deutsch, Schmerzensgeld und Genungtuug, 9 Juristische Schulung} 197, 202 (1969); \textsc{Peter Gottwald, Schadenszurechnung und Schadensschätzung} 167 (1979); \textsc{Hein Kötz, Ziele des Haftungsrechts, Festschrift für Ernst Steindorff zum 70. Geburtstag} 643 (Jürgen Baur et al. eds., 1990); \textsc{Karl Larenz, Lehrbuch des Schuldrechts}, 423 (14th ed. 1987); \textsc{Hans-Joachim Mertens, Der Begriff des Vermögensschadens im Bürgerlichen Recht} 97 (1967). As a number of authors have pointed out, however, the Präventionsfunktion is not the primary significance of Schmerzensgeld. \textsc{Hermann Lange, Introduction to Schadensersatz.} 10 (1979); Ott & Schäfer, supra note 126, at 564; \textsc{Stiefel & Stürner, supra note 100, at 838; Hans-Leo Weyers, Unfallschäden} 446-47 (1971).

\textsuperscript{131} Judgment of June 4, 1992, BGH, supra note 80, at 1461.

\textsuperscript{132} Id.
character of Schmerzensgeld. Rather, it is inseparably tied to the compensatory function which is inherent in the claim for Schmerzensgeld.

A comparison with the imposition as well as the functions of punitive damages indicates, however, that the two types of damages are not as contrary as the German court indicated. Although German scholars generally agree that the imposition of Schmerzensgeld should not have a punishment function,\textsuperscript{133} Genugtuung, as applied by the courts, goes beyond mere compensation and has taken on a "private" punishment character similar to punitive damages. According to one German scholar, "The concept of Genugtuung has proved to be a synonym for private penalty which is viewed completely as a permissible function of civil law."\textsuperscript{134} This punishment aspect of Genugtuung necessarily serves a preventative or deterrence function.\textsuperscript{135} Although the liability arising from German tort law is to be distinguished from criminal liability, "the differences with a private penalty are slight since the Genugtuung function also possesses general as well as specific preventative characteristics."\textsuperscript{136}

In addition, the imposition of Genugtuung parallels that of punitive damages. Like punitive damages, the Genugtuung does not expand the sphere of conduct that could serve as a basis for a cause of action. In distinguishing Genugtuung from punitive damages, the German supreme court pointed out that Genugtuung was "inseparable" from the claim for compensatory damages.\textsuperscript{137} As discussed above, this is a requirement for the imposition of punitive damages.

The distinguishing characteristic between punitive damages and Genugtuung cited in the literature is that Genugtuung focuses on the injured party and tries to mollify his injured feelings while United States punitive damage awards focus on the punishment of the tortfeasor.\textsuperscript{138} However, this distinction ignores the fact that the injured party receives his Genugtuung via the punishment of the tortfeasor.

\begin{footnotes}
\footnotetext{133}{Esser \& Weyers, \textit{supra} note 50, at 618; Kötz, \textit{supra} note 46, at 188.}
\footnotetext{134}{Kern, \textit{supra} note 73, at 268. According to Nehlsen-v. Stryk, the penalty aspect of Genugtuung has existed since the end of the Nineteenth Century. Nehlsen-v. Stryk, \textit{supra} note 48, at 125.}
\footnotetext{135}{Erwin Deutsch, \textit{Comment}, 25 JZ 549 (1970) ("[t]he Genugtuung is aimed above all at the sanction and prevention and at the same time it guarantees the personal well-being by way of a claim for damages in cases where it is harmed").}
\footnotetext{136}{Westphalen, \textit{supra} note 68, at 148.}
\footnotetext{137}{Judgment of June 4, 1992, BGH, \textit{supra} note 80, at 1461.}
\footnotetext{138}{Stiefel \& Stürner, \textit{supra} note 100, at 840-41.}
\end{footnotes}
which occurs through the imposition of damages. Professor Hans Stoll has commented on this distinction:

Comparison of the different forms of liability... justifies the conclusion that there is no contradiction in principle between a special award of "satisfaction" in order to mollify the victim and a private fine. Both are aspects of the same principle of liability. On the one hand, all special measures of "satisfaction" reaching beyond restoration and compensation for the damage contain a punitive element.\(^{19}\)

*Genugtuung* further resembles punitive damages in so far as the payment is made to the injured party. In this sense such damages have a retributive effect similar to *Genugtuung* and are distinguishable from penalties imposed in criminal cases which are paid to the state.

VI. CONCLUSION

In its first decision concerning the enforceability of foreign punitive damage awards in Germany, the German supreme court held that such awards are not enforceable because they violate German public policy. This conclusion was based primarily on the premise that German damage awards in tort cases are strictly compensatory. As discussed above, German damage awards are not always limited to compensation. German courts, in determining the amount of the award, often take factors into consideration that are not related to compensation for damages suffered. United States damage awards that exceed compensation for injuries, pain, or suffering do not represent as great a divergence from German law as the German supreme court concluded. The difference lies, rather, in the fact that United States damage awards are in most cases significantly higher than damage awards for similar torts in Germany. Whether this, in itself, presents a violation of the public policy of the recognizing state is dubious since "the public policy clause is meant to prevent recognition in very extreme individual cases only where the judgment to be recognized contravenes fundamental notions of justice and therefore is deemed absolutely intolerable."\(^{140}\)


The practical significance of the decision is that damage awards granted to U.S. plaintiffs can only be enforced against German defendants with no assets in the United States to the extent that the plaintiff can show that the award is compensatory. Although the present case involved two private parties, the judgment is important for German companies doing business in the United States. For example, a U.S. plaintiff injured by a defective German product can only expect to receive compensatory damages from the German company unless that company either has assets in the United States which can be used to satisfy the judgment or it is willing to pay the award. This is an unfortunate development in light of the fact that the decision of the German supreme court rests on an inaccurate understanding of U.S. punitive damage awards.