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ESSAY

RECOGNITION AND ENFORCEMENT OF AMERICAN TORT JUDGMENTS IN GERMANY

GERFRIED FISCHER*

INTRODUCTION

The United States is, at least from a European point of view, but probably in its own eyes as well, the country of superlatives. It is the richest country in the world. It has the greatest military power and the most liberal constitution. Everything is bigger, larger, or greater than in other parts of the world. There are areas, however, where this can be a problem, and the recognition of United States court judgments is one of them, at least as far as damage awards are concerned. The awards in the United States are higher than in any other country known to me, far exceeding the amounts of German judgments in tort cases. For instance, the largest damage award for pain and suffering in Germany came to about 500,000 DM (300,000 DM lump sum plus 500 DM as a monthly rent),1 yet multimillion-dollar awards for punitive dam-

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1 LG MÜNCHEN I 190 10676/85 (1985), reprinted in SUSANNE HACKS ET AL., SCHMERZENSGELD 235 (15th ed. 1991); GERAI NT HOWELLS, COMPARATIVE PRODUCT LIABILITY 140 (1993). “[F]inancial ceilings [for death or personal injury] are fixed at a maximum in individual cases of either a lump sum of 500,000 DM or an annuity of 30,000 DM.” Id.
ages seem to be not at all uncommon in the United States. In cases having contact with both jurisdictions, differences like this invite or even provoke forum shopping on the one side and resistance to judgment recognition on the other.

I. THE FIRST GERMAN CASE

In Germany, this resistance has been voiced by academicians in legal journals for about ten years, as well as by practicing lawyers, mainly those working for business clients or insurance companies. Especially in the field of products liability, German manufacturers, as well as their insurers, have been afraid of the high liability risks they incur when exporting to the United


States. Surprisingly, the problem has not reached the German courts until very recently. The first decision of the Bundesgerichtshof ("BGH"), the German Supreme Court, dates from June 1992. As a conflicts case, it was rather atypical because its origin was not in international commerce or international tourist traffic, but in the criminal conduct of a German immigrant naturalized in the United States. He had been sentenced for sexual abuse of children in the United States. One victim was a thirteen year-old boy with whom he had masturbated on five occasions. This boy sued him in a California court and won an award of $750,260, of which only $260 were for past medical damages. Future medical damages were assessed at $150,000, pain and suffering and general damages of that nature at $200,000, and exemplary and punitive damages at $400,000. The defendant, after having been criminally sentenced, moved back to Germany, where he owned real property.

Thereafter, the plaintiff turned to the German courts asking for recognition and enforcement of the California award, which by German standards was clearly excessive. Had the boy originally sued in a German court, he would have been lucky to win more than 100,000 DM, less than one-tenth of the American award. Before reporting the extent to which the German Bundesgerichtshof recognized the California judgment, I shall explain the reasons for such big differences. Most of them may be well known to those who are familiar with the tort law or civil procedure of European countries or with Professor Fleming's excellent book *The American Tort Process.*

II. DIFFERENCES IN SUBSTANTIVE TORT LAW AND LITIGATION

Some of these reasons can be traced to divergences in substantive tort law, but even more are due to fundamental differences between tort litigation in the United States and in Germany, as well as in most other European countries.  

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7 See supra note 2.
8 See Fleming, supra note 2, passim; see generally Benjamin Kaplan et al., *Phases of German Civil Procedure I,* 71 Harv. L. Rev. 1193 (1958) (providing general exposition on nature of German civil procedure and litigation as compared to American system).
A. Differences in Substantive Tort Law

As for substantive law, the most important difference probably originates from the reluctance of German law to allow the imposition of punitive damages.\(^9\) The primary purpose of German tort liability is compensation;\(^10\) whereas, punishment and deterrence are usually regarded as indirect consequences.\(^11\) Narrow exceptions to this rule have been developed by modern case law for outrageous defamation and invasion of privacy.\(^12\) In cases of personal injury, however, serious misconduct of the defendant will not be a reason for assessing punitive damages, but will be a reason for increasing the damages awarded for pain and suffering.


The American idea of private law enforcement, which is promoted by allowing punitive damages in addition to criminal sanctions, is completely unknown to German law.

Another difference in substantive tort law, which may not be as fundamental as the one just mentioned, but can often be the reason for a substantially higher American award, concerns future damages, which are often difficult to assess at the time of the trial. In case of grave physical or mental injuries, it may be almost impossible to predict the duration of medical or psychotherapeutic treatment and the extent to which it will be successful. In Germany, these uncertainties are dealt with in two ways: (1) the assessment of periodical payments, which can be altered in a new action if the circumstances have changed considerably, and (2) the so-called “Grundurteil,” a type of judgment which declares the defendant liable for all future damages arising from the injury and leaves determination of the actual amount to be paid to the agreement of the parties or to future trials. By contrast, common law demands that past and future damages arising from the same injury be assessed at the same trial in the form of a lump sum. This means that the court or the jury will have to predict the future, and juries usually give the benefit of the doubt to the plaintiff. The case decided by the California court is a good example. It is rather astonishing, to say the least, that there should be a

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16 Cf. ZPO, supra note 15, § 304; see Baumbach/Lauterbach, supra, note 15, at 304 Anm. 2; Zöller, supra note 15, at 304 no. 1; Tunc, supra note 10, ch. 8, § 90.

17 Fournier v. Canadian Nat. Ry., A.C. 167 (P.C.) (1927); FLEMING, supra note 2, at 231; KIONKA, supra note 13, at 303; Tunc, supra note 10, ch. 8, § 91; see supra note 14, § 8:7, at 461-62 (stating all past and prospective damages caused by injuries to persons or real property must be accounted for in single action).

need for a $150,000 treatment in the future, when the past medi-
cal damages amount to only $260.  

B. Differences in Tort Litigation

Substantive law rules are not the sole reason that United States damage awards reach greater and different financial dimensions than those in Germany. The more important factor is the way in which tort actions are litigated in Germany.

1. The Role of Judge and Jury

First, American tort litigation is almost exclusively conducted by jury trial; whereas, civil law countries do not have civil juries. In Germany, tort actions for more than petty amounts, usually more than 10,000 DM, must be brought before a panel of three professional judges, who are much less easily influenced than a jury of laymen by trial lawyers' forensic fireworks and the plight of seriously injured tort victims. That juries tend to be more generous to plaintiffs, especially when awarding future or nonpecuniary damages, is a view expressed by several American writers and shared by their European colleagues.

2. Evidence

In the United States, civil actions are much more the private business of the parties and their attorneys than in Germany, where the adversary system is mitigated, or from the American point of view, diluted, by the strong influence of the court.

19 See, e.g., Sales & Cole, supra note 2, at 1154 ("boggle the mind").

"The flawed nature of the punitive damage doctrine is clearly evident in the total absence of any uniformity of application. The legal rationale formulated to justify the concept is fraught with contradictions and is totally unpredictable in its effect." Id.

20 Cf. Gerichtsverfassungsgesetz (GVG) §§ 23, 71; see supra note 5, at 752-56 (discussing procedural differences in German and American litigation and describing pervasive role of judges under German system).

21 Fleming, supra note 2, at 224; Keeton, supra note 5, § 82, at 591; see supra notes 18 & 19 and accompanying text. "One of the most difficult decisions facing the jury in a personal injury action is to decide the amount of monetary award . . . that the plaintiff is entitled to be awarded as compensation for past, present and future pain and suffering . . . ". Speiser et al., supra note 14, § 8:19, at 557 (quoting Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291, 301-02 (Mo. 1978)).

22 Stiefel & Stürner, supra note 4, at 835; Schütze, supra note 4, at 392.

The distinction begins with the way in which evidence is procured. In Germany, there is no “pretrial discovery.” On the contrary, the American system of searching for evidence is strongly resisted, and this is an important reason why the Hague Evidence Convention does not work between the United States and most European countries.

In German civil litigation, the parties must indicate in their pleadings the evidence relied upon to prove their allegations. Except for documents in their own possession, parties are not obliged to produce that evidence at the trial. Witness coaching by the parties’ lawyers is considered a violation of professional ethics rules. Expert witnesses are called by the court and not the parties, and are supposed to be impartial. If an expert shows any sign of bias, the adversely affected party can request that the expert be replaced. At the trial, real cross-examinations are rare. Usually the interrogation is done by the judges, and the parties’ lawyers are only allowed to ask additional questions.

Expert witnesses ordinarily submit their testimony in writing and are only called for personal appearance at the trial if the court or one of the parties believes that further questioning

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24 Rolf A. Schütze, Zur Verteidigung im Beweiserhebungsverfahren in U.S.-amerikanischen Zivilprozessen, WM (WERTPAPIERMITTEILUNGEN) 633 (1986); Haimo Schack, Einführung in das U.S.-amerikanische Zivilprozerecht 40 (1988); see supra note 5 and accompanying text. “[One major] conflict has centered on one main area of difference between the German and American systems—the protection of business information.” Id. at 764 (footnote omitted). See generally Symposium, Compelling Discovery in Transnational Litigation, 16 N.Y.U. J. Int’l L. & Pol. 957 (1984).

25 Rolf Stürner, Rechtshilfe nach dem Haager Beweiserbarmachungskonvention für Common Law-Länder (1981); Stiefel & Stürner, supra note 4, at 830; Gerber, supra note 23, at 779; Abbo Junker, Discovery im Deutsch-Amerikanischen Rechtshilfeverkehr (1986); see supra note 5, at 747. “[T]he preparation and operation of an international treaty on evidence-taking, the Hague Evidence Convention, has led to misunderstandings and unfulfilled expectations on both [American and European] sides.” Id. (footnotes omitted).

26 See Wilhelm C. Feuerich, Bundesrechtsanwaltsordnung, § 43 no. 76 (2d ed. 1992); supra note 8, at 1200-01 (describing attorney’s limited access to witnesses due to stringent ethical standard). “A witness, as distinguished from an expert, will not be heard in ordinary litigation unless nominated by a party . . . [O]nly the court can call nominated witnesses and it exercises a discretion as to order and number.” Id. at 1233 (footnotes omitted).

27 See supra note 15, § 404 ZPO; see Kaplan, supra note 8, at 1242-43 (describing status and treatment of experts under German civil system).

28 Leo Rosenberg & Karl Heinz Schwab, Zivilprozerecht, § 124 at 762-67 (14th ed. 1986); see Kaplan, supra note 8, at 1243, “In German courts, it would be hard to find . . . anything resembling American-style clashes between experts paid to be partial . . . ”)

29 Supra note 15, § 397 ZPO; see Kaplan, supra note 8, at 1234-35 (illustrating interrogation of witnesses under German civil procedure).
might be necessary. The neutrality of expert witnesses ensures a more realistic appraisal of damages in personal injury cases. Americans may argue that in the adversary system the same result can be reached because when there are big differences between the experts for the plaintiff and for the defendant, the jury's assessment will come out somewhere in the middle. This result, however, is far from certain in cases in which sympathy for the plaintiff or anger at the defendant's tortious conduct is strong, or the defendant is a corporation with a "deep pocket." In general, the appraisal of an impartial expert is more rational and less emotional than that of a jury.

3. Legal Costs

Third, the rules on what can be charged as legal costs and who must bear those costs differ significantly in the United States and Germany. According to German law and to the law of other European countries (including England), the losing party must pay the court fees and reimburse the attorney's fees of the winning party. Due to these procedural regulations, legal costs are completely separated from the question of damages and have no influence over their assessment. In America, the traditional rule is against such fee-shifting. Nevertheless, juries know that the plaintiff will have to pay his attorney's fees from his damages, and

30 See Rosenberg & Schwab, supra note 28, at 770; Kaplan, supra note 8, at 1243. "Generally an expert will submit a written opinion in advance and will then appear and be questioned on it... A written opinion alone may be received, but a party can still require that the expert appear and defend it." Id. (footnote omitted).

31 See Fleming, supra note 2, at 111-24; W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 4, at 24-25 (5th ed. 1984) (stating that courts will factor relative ability of parties to bear loss into their decisions).


33 See Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("American rule" accredited); Fleming, supra note 2, at 188; see also Vargo, supra note 32.
so damages will often be increased accordingly.\footnote{Owen, supra note 13, at 1297 (compensating tort victim generously, offsets American rule); Stiefel & Stürner, supra note 4, at 831. Contra Joachim Zekoll, Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany, 37 Am. J. Comp. L. 301, 320 (1989) (suggesting excessive awards be reduced prior to enforcement); Michael Rustad & Thomas Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 Am. U. L. Rev. 1269 (1993); Alan H. Scheiner, Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 Colum. L. Rev. 142, 167 (1991).} In the aforementioned California case, the judgment expressly ordered that 40\% of the damages paid by the defendant be kept by the plaintiff's attorney. The different ways the plaintiff is reimbursed for his legal costs could be considered a mere technical difference if the plaintiff's attorney's fees were not disproportionately higher in American than in German tort litigation and, hence, did not proportionately drive up damage award. In Germany, lawyers' fees are related to the amount of the claim, but in a regressive way, so that with an increase of the claim, the fees will rise too, but not to the same degree.\footnote{Cf. Benjamin Kaplan et al., Phases of German Civil Procedure II, 71 Harv. L. Rev. 1443, 1461-67 (1958) (increasing award results in decreasing percentage received by attorney); Suhr, Legal Fees in Germany, INT'L BAR J., May 1979, at 18; Rolf Bender & Christoph Strecker, Access to Justice 530 (Mauro Cappelletti & Bryant Garth eds. Vol. I Book I, 1978) (determining costs on basis of amount in controversy and statutory requirements as opposed to degree of work); Pfennigstorf, supra note 32, at 56 (1984); Lawrence W. Newman & Michael Burrows, 'Loser Pays'—Attorneys' Fees in England, Germany, N.Y. L.J., Oct. 15, 1993, at 3; D. Luban, Lawyers and Justice: An Ethical Study 97 (1988).} For instance, if the claim is for 100,000 DM, the attorney's fee will be 5667 DM, but if the claim is for one million DM, the fee will be 17,367 DM.\footnote{See § 11 I Bundesgebührenordnung für Rechtsanwälte [hereinafter “BRAGO”] (tables); Jürgen F. Ernst, Anwaltsgebühren (2d ed. 1991); The base fee for a 100,000 DM dispute is 1889 DM charged once for drafting and filing a complaint, once for participation in an oral hearing, and once for participation in taking evidence for a total of 5667 DM. Newman & Burrows, supra note 35. This base fee may also be charged for participation in negotiated settlement and further costs may be charged for appeals. Id.} These fees are fixed by statutory regulation. Fee arrangements are permitted,\footnote{See § 3 BRAGO; Ernst, supra note 36, at 125 et seq.; see also Newman & Burrows, supra note 35 (stating that different arrangements are possible under different circumstances, although it is violation of code of ethics to arrange for fees lower than statute).} but they are unusual in civil cases. Contingent fees, the darling of plaintiffs' lawyers in the United States, are not allowed by German law.\footnote{Cf. BGHZ 34, 64, 71 (1960); Feuerich, supra note 26, § 43 no. 194; Laurel S. Terry, An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct, 7 Geo. J. Legal Ethics 1, n.127 and accompa-}
can easily see that the fixed fees just mentioned are negligible compared with the 30% or 40% contingency fee an American lawyer might receive, and that damage awards which include such costs look excessive from the German point of view.

III. ARGUMENTS FOR REFUSING RECOGNITION IN GERMANY

The recognition of foreign judgments in Germany is regulated by section 328 of the Code of Civil Procedure ("ZPO"). The general rule is that, if the trial court had jurisdiction and the defendant was duly served and due process met, the judgment will be recognized unless it is obviously incompatible with fundamental principles of German law—meaning that it does not violate German public policy. The question then is whether American dam-


There are no treaties or conventions on recognition of judgments between the United States and Germany. The Hague Convention, on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, dated February 1, 1971, is in force, but has been ratified by neither the United States nor Germany; Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1 (1991); David Westin, Enforcing Foreign Commercial Judgments and Arbitral Awards in the United States, West Germany, and England, 19 Law & Pol'y Int'l Bus. 325 (1987); Michael Gruson and Michael Kutschera, Opinion of Counsel on Agreements Governed by Foreign Law, 19 Vand. J. Transnat'l L. 515, n.23 and accompanying text (1986); cf. Informations Diverses, Revue Critique de Droit International Prive [R.C.D.I.P.], 82, 187 (1993).


Cf. Martiny, supra note 40, at 744-45 (recognizing judgment unless basic notions of justice violated); Zekoll, supra note 34, at 311 et seq. (recognizing judgments unless incompatible with fundamental German principles); Haimo Schack, Internationales Zivilverfahrensrecht 314 (1991).
age awards, which for the aforementioned reasons are considera-
ably higher than those of German courts, violate fundamental 
principles, and what exactly those principles are in Germany.

A. Public Policy: German International Tort Law

Several Germany writers have proposed a seemingly easy 
way to adjust American tort judgments to come down to German 
damages proportions.\textsuperscript{42} According to a provision in the Introductory Law to the German Civil Code,\textsuperscript{43} a German defendant cannot 
be held liable for claims exceeding those that would be justified 
under German law even if foreign tort law is applicable. This is a 
special rule of public policy, and it has been argued that it should 
be regarded not only as a choice-of-law rule, but also as a defense 
to the recognition and enforcement of foreign judgments. 
Although this solution would have the advantage of making the 
chances of recognition predictable and of deterring forum shop-
ning, the BGH has rejected it because it is too rigid and 
inflexible.\textsuperscript{44}

The proposed rule does not allow the relationship of the 
wrongful conduct to other states to be taken into account. This 
deficiency is particularly obvious in the case at hand, which was 
closely connected with California. Both parties were domiciled 
there as U.S. citizens, the tort was committed in California, and 
the connection to Germany was rather weak—only the defend-
ant’s cumulative German citizenship. Certainly, defendant does 
not deserve the protection of German law simply because he re-
turned to Germany after the wrong or because his property is situ-
ated there. Incidentally, the German conflicts provision protecting 
German defendants simply on account of their nationality has 
long been criticized for its nationalistic approach. It does not fit 
into modern conflicts law,\textsuperscript{45} and a rule of such dubious character

\textsuperscript{42} HAIMO SCHACK, ART. 12 EGBGB IM DEUTSCHEN ANERKENNUNGS-UND REGERVERFAHREN, \textit{VersR} 422, 424 (1984); SCHACK, \textit{supra} note 41, at 869; Schutze, 
\textit{supra} note 4, at 400; MünchKomm2-Kreuzer, Art. 38 EGBGB Rn. 318. \textit{But see Mar-
tiny, \textit{supra} note 40, at 746 (using public policy to favor Germans in tort cases is un-
just); Zekoll, \textit{supra} note 34, at 314-17 et seq.}

\textsuperscript{43} Art. 38 EGBGB (revising Art. 12 EGBGB).

\textsuperscript{44} \textit{Supra} note 6, at 3100 et seq.

\textsuperscript{45} \textit{See} Palandt-Heldrich, \textit{Bürgerliches Gesetzbuch}, Art. 38 EGBGB, no. 28 (52d ed. 1993); CHRISTIAN v. BAR, INTERNAIONALES PRIVATRECHT, no. 679 et seq. (3d ed. 2, 1991); KREUZER, MUNTCHKOMM 2, Art. 38 EGBGB, no. 306; Gerhard Kegel, INTERNA-
TIONALES PRIVATRECHT, 469 (6th ed. 1987); Zekoll, \textit{supra} note 38, at 654 n.56 and accompanying text.
should not be applied by analogy to the recognition of foreign judgments.

B. Public Policy: Differences in Tort Litigation

When American damage awards are so much higher than German ones mainly because of fundamental differences in tort litigation, one might expect that the public policy defense would be based on this point. However, German courts, as well as writers, have been extremely cautious to deny recognition because of procedural differences, and this has been confirmed by the BGH in the California case.

The court has expressly rejected the argument that pretrial discovery as such should be regarded as contrary to German public policy. It will tolerate this way of uncovering evidence, unless its concrete results are obviously incompatible with German notions of judicial fact-finding, taking into account whether there have been interferences with German sovereignty.

As far as the considerable differences in legal costs are concerned, it has been settled by several earlier decisions that the German prohibition of contingent fees does not apply with equal rigor to agreements with lawyers in foreign or international litigation. The courts may reduce the scale if it is regarded as excessive even by generous European standards. Whether there is an obvious excess will be judged by taking into account the difficulty and complexity of the case, as well as the lawyer's expenses in time and money; for example, when the lawyer's activity consisted of no more than some correspondence and the timely application for a rather undisputed claim, the scale was reduced from 35% to 20%, which was still four times as high as the fee of a German lawyer. In the California case, the BGH saw no reason to reduce the 40% fee included in the damages award because the California court had expressly considered it as reasonable in view of the com-


47 Schütze, supra note 4, at 401; see Zekoll, supra note 38 (stating that pretrial discovery should not pose problem in enforcement proceedings).

48 Supra note 6; see Stiefel & Stirner, supra note 4, at 830.

49 See BGHZ 22, 162, 164 (1956), 44, 183, 187 (1965); Alan A. Paterson, Contingent Fees and Their Rivals, 1989 SCOTS L. TIMES 81, 81 (discussing exceptions to German rules prohibiting contingency arrangements).

50 BGHZ 44, 183, 191 (1965).
plexity and difficulty of the case.\textsuperscript{51} It seems that the court which is asked to recognize the fee should not re-examine the issue if the original court has already dealt with it.

It has also been argued that the American rule against fee shifting should preclude recognition if a German defendant has not entered an appearance because the cost of winning would have been too high.\textsuperscript{52} However, it cannot and must not be the purpose of the fee recognition procedure to relitigate the original suit just to see who would have won.\textsuperscript{53} Furthermore, the German Supreme Court has observed that there is good reason for the American rule insofar as it facilitates access to justice\textsuperscript{54} because the plaintiff's cost risks are lower. For these reasons, the cost rule will not be regarded as a valid objection to recognition except for frivolous or abusive suits, for which many American states seem to have fee-shifting rules as well.\textsuperscript{55} Finally, after having expressed some doubts about the impartiality of juries in certain types of tort cases, I must say that the jury trial, as such, has never been considered as a possible violation of German public policy. As a result, even though the much higher American damage award is to a large extent due to procedural differences, these differences will usually not constitute a reason for denying recognition.

\textsuperscript{51} See supra note 6, at 3101.

\textsuperscript{52} Cf. Schütze, WM 1979, 1174, 1176. But cf. Zekoll, supra note 34, at 322-23 (bearing one's own expenses entices attorneys to accept contingency fees thereby allowing indigent parties to sue).

\textsuperscript{53} See Stiefel & Stüner, supra note 4, at 831; see also Fleming, supra note 2, at 192.

\textsuperscript{54} Supra note 6, at 3099. For a neutral evaluation of the rule, see Fleming, supra note 2, at 192 et seq.

C. Public Policy: Differences in Substantive Tort Law

As stated above, recognition of a foreign judgment will be granted unless an award is regarded as excessive in light of fundamental principles of substantive German tort law. At this point, I will return to my earlier remark that the primary purpose of German tort rules is compensation. Punishment and deterrence are no more than indirect effects, which as a rule do not justify non-compensatory damages.

1. Punitive Damages

It is obvious that the purpose of punitive damages contrasts sharply with the German purpose of compensation. The primary object of such damages is punishment and deterrence, and their size may be influenced more by interests of the general public than by those of the immediate parties. This, according to German notions, is the domain of penal, not private, law. For these reasons, the German Supreme Court has held punitive damages to be incompatible with fundamental German tort principles, and therefore barred punitive damages from recognition and enforcement in Germany.

Of course, exemplary and punitive damages may occasionally serve as compensation for nonpecuniary detriments, economic losses that are difficult to prove, or costs and expenses not covered by other parts of the damage award. In these situations, they certainly do not violate public policy and should not be excluded from recognition. The problem is whether this can be detected from

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56 Cf. Scott v. Donald, 165 U.S. 58, 87 (1896); Gostkowski v. Roman Catholic Church of Sacred Hearts of Jesus & Mary, 186 N.E. 798 (N.Y. 1933) (deterring future torts achieved through punishment); Fleming, supra note 2, at 214; Kionka, supra note 13, § 9-3, at 371; Keeton et al., supra note 5, at 9 (deterring others by punishing offender); Sales & Cole, supra note 2, at 1126-29 (punishing and determining main objectives); Owen, supra note 13, at 1277-95 (punishing and deterring primary purpose of punitive damages); Zekoll, supra note 34, at 324-30 (punishing and deterring inherent in punitive damages); Jonathan Kagan, Comment, Toward a Uniform Application of Punishment: Using the Federal Sentencing Guidelines As a Model for Punitive Damage Reform, 40 UCLA L. Rev. 753 (1993); Eileen R. Kaufman, Punitive Damages in Section 1983 Cases, 449 PLI/Lit 445 (1992); Philip H. Corboy, Vicarious Liability for Punitive Damages: The Effort to Constitutionalize “Tort Reform,” 2 Seton Hall Const. L.J. 5, n.5 and accompanying text (1991).

57 Supra note 6, at 3104.

58 BGH, supra note 6, at 3103; cf. Stiefel & Sturmer, supra note 4, at 841; Zekoll, supra note 34, at 330 (recognizing compensatory components of award not barred); Siehr, Vollstreckung ausländischer Verurteilungen zu "punitive damages" RIW 705, 709 (1991).
the original judgment. The judgment of the California court allowed no such inference, as nonpecuniary detriments were already covered by the generous damage award of $200,000 for pain and suffering, and the lawyer's fees were also included in all other parts of the award. Under these circumstances, there were no compensatory elements to be detected in the punitive damages that might allow at least partial recognition. One might argue that asking the plaintiff to demonstrate such compensatory aspects amounts to partial relitigation of the first suit. That idea has not come to the BGH, and I think it is right. Given the primary purpose of punitive damages in American law, there is something of a presumption that they are not compensatory, and it must be for the plaintiff requesting recognition to overcome this presumption.\footnote{See Pacific Mutual Ins. Co. v. Haslip, 111 S. Ct. 1032, 1037 n.1 (1991); Rustad & Koenig, supra note 34; Victor E. Schwartz & Mark A. Behrens, Symposium, Punitive Damages Reform—State Legislatures Can and Should Meet the Challenge Issued by the Supreme Court of the United States in Haslip, 42 Am. U. L. Rev. 1365 (1993); cf. Reinhold Geimer, INTERNATIONALES ZIVILPROZERECHT, no. 2974 (2d ed. 1993).}

2. Future Damages and Damages for Pain and Suffering

At first glance, the recognition of awards for future damages or damages for pain and suffering seems to be much easier than the problem of punitive damages. Both American and German law share the same purpose—compensation. Provided that only the ways by which they achieve this purpose differ, there will be no obvious public policy conflicts. Therefore, the German Supreme Court has, on both counts, been rather generous towards the California award. It allowed the recovery of damages for future medical treatment, even though the plaintiff had no intention to undergo the treatment, which is contrary to the rules that this same court rather recently established for German tort law.\footnote{See BGHZ 97, 14, 19 (1986).} Furthermore, the extraordinary amount of the awards, at least by German standards, has not been regarded by the court as sufficient reason for limiting recognition to a reduced amount.\footnote{But cf. Deutsch, JZ 266-67 (1993).}

At this point, however, one must bear in mind the special circumstances of the case at hand. As previously noted, both the tortious conduct and the parties involved in the case had strong contacts with the United States and rather weak ones with Germany. This explains the rather liberal attitude toward the enormity of
the damages. When contacts with Germany are stronger, such as in products liability suits against German manufacturers, it is improbable that a tort judgment would be recognized without limitation if the award were of disproportionate size according to German tort standards. German law adheres to the principle of proportionality ("Grundsatz der Verhältnismaßigkeit"), which is regarded as a constitutional rule. Its effect on tort law is that compensation must be proportionate to the loss, and the closer the connections with Germany, the more domestic public policy requires that this principle be observed by a foreign judgment. Such a rule, of course, is rather vague and opens the door to more questions than answers. It does not set forth the types of contacts that will be taken into consideration and to what extent higher amounts will be tolerated. That is, however, the problem of all public policy rules in conflicts law.

CONCLUSION

Since the purpose of recognition of foreign judgments is to avoid double litigation on the same issue, it is insufficient that the American award simply exceed an amount that would be assessed by the German court; it obviously must be much higher. Taking into account that living in the United States is more expensive anyway, reduction should not be considered unless the award is at minimum two to three times as high as a German one.

As for the domestic contacts that might justify a reduction, they depend on the sort of wrong committed. Persons who have committed an intentional tort in a foreign country do not deserve as much protection as those held liable for negligence or strict liability. In the latter case, the question of insurability will be of great importance. If a defendant has his domicile, permanent residence, or place of business in Germany, then the German

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63 BGH, supra note 6, at 3104; see Zekoll, supra note 38, at 652 nn.48 & 49 and accompanying text.

64 See Staudinger v. Hoffmann, Art. 38 EGE3GB no. 249.

65 See Stiefel & Stürner, supra note 4, at 840. See Zekoll, supra note 38 (noting Germans' highest court's statement that proportionality test must account for absence of contacts with Germany and give greater deference toward foreign judgments).

66 See Fleming, supra note 2, at 21, 221 et seq.; Stiefel & Stürner, supra note 4, at 835; Kionka, supra note 13, at 375 et seq.; Keeton et al., supra note 5, at 584 et seq.
courts should, and I believe will, protect him or her from damage awards that are so excessive that they cannot be covered by insurance at a reasonable price.

One may think that this last view is rather nationalistic. It should first be noted that the enormity of United States damage awards has also been criticized by distinguished American writers. Furthermore, I am, of course, interested in not being held liable for extremely high damages if I cause economic loss to someone who relies on an erroneous remark that I may have made in this Article.

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