ÉTUDES

PUNITIVE DAMAGES IN EUROPE AND THE USA: DOCTRINAL DIFFERENCES AND PRACTICAL CONVERGENCE

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I. INTRODUCTION

The concept of the law of damages in common law systems is dualistic: damages can be recovered for the losses incurred, including loss of profit, *and* for punishment of the wrongdoer. On the contrary the concept of the law of damages in civil law systems is purely monistic, at least if taken at face vale. Damages are strictly restricted to compensation. Punishment of the tortfeasor is under no circumstances a legitimate function of damages[1]. The latter function might only be pursued in the context and by the means of criminal law.

This "apparently irreconcilable gap"[2] that has separated common and civil law systems for more than a century is particularly visible in the case of the USA and Germany because of the former's extensive use of punitive damages and the latter's persistence on doctrinal coherence in their tort

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[1] See V. Behr, Punitive Damages in American and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts, *Chi.-Kent L. Rev.* 2003, 105, 105-06.

[2] *Ibid.*, at 106.

systems[3]. Interestingly enough, "what seems to be but a theoretical distinction turns out to be of practical relevance when an American money judgment creditor applies for enforcement of his judgment in Germany"[4]. The German Federal Supreme Court held, back in 1992, that American punitive damages awards are not to be enforced in Germany because they are contrary to German public policy[5].

This latter decision has confirmed the German legal system's traditional hostility towards punitive elements in private law. Nevertheless during the last decade tort law has proven less static than one might initially think. It is still to be examined whether any recent developments have brought the two systems any closer to each other, so as at least to narrow that apparently unbridgeable gap.

II. PUNITIVE DAMAGES IN COMMON LAW JURISDICTIONS

A. Nature and historical background

"Punitive" or "exemplary" damages are defined as "money damages awarded to a plaintiff in a private civil action, in addition to and apart from compensatory damages, assessed against a defendant guilty of flagrantly violating the plaintiff's rights"[6]. The principal purposes of such damages are usually said to be (1) to punish a defendant for outrageous conduct, and (2) to deter the defendant and others from similarly misbehaving in the future[7]. Practically this rationale of deterrence becomes a crying need in

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[3] On the contrary, other jurisdictions have been taking a more relaxed view on the matter: The UK has continuously been decreasing the use of exemplary damages and by now has practically ejected them from its tort system. In other civil law countries, punitive damages are generally not permitted either. France for example, even though it has at sometimes been shown receptive to influences from Canada, at last has precluded inception of punitive damages in its legal system. Nevertheless, the issue has never arisen with even comparable acuteness to the debate between Germany and the USA.

[4] Behr, *supra* note 1, at 107

[5] BGHZ 118, 312 (343). For a discussion of the case see among others P. Hay, The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court, *Am. J. Comp. L.* 1992, 729 and V. Behr, Enforcement of United States Money Judgments in Germany, *J.L. & Com.* 1994, 211.

[6] Potential Congressional Responses to the Supreme Court's Decision in *State Farm Mutual Automobile Ins. v. Campbell*: Checking and Balancing Punitive Damages, Hearing before the Subcomm. on the Constitution of the Comm. on the Judiciary, 108th Cong. (23 September 2003) (prepared statement of David G. Owen, expert witness) at 8; also available at http:// www.house.gov/judiciary/89462.PDF.

[7] D.G. Owen, *supra* note 6, at 8. See also *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (382).

cases where the law systematically underestimates damages or where the wrongdoer counts profit from a violation that the law does not recognize in purely compensatory terms[8]. As the landmark *Ford Pinto* case[9] has shown, persons deliberately or with gross negligence causing great harm should not view paying damages as merely a cost of doing business, a cost that might fit neatly into a risk analysis of wrongdoing.

David G. Owen describes punitive damages as "straddling the civil and the criminal law, being a form of "quasi-criminal" penalty: they are "awarded" as "damages" to a plaintiff against a defendant in a private lawsuit; yet their purpose in most jurisdictions is explicitly held to be noncompensatory and in the nature of a penal fine. Because the gravamen of such damages is considered civil, the procedural safeguards of the criminal law (such as the beyond-a-reasonable-doubt burden of proof and prohibitions against double jeopardy, excessive fines and compulsory self incrimination) have generally been held not to apply. This strange mixture of criminal and civil law objectives and effects – creating a form of penal remedy inhabiting (some would say "invading") the civil-law domain – is perhaps the principal source of the widespread controversy that has always surrounded the allowance of punitive damages awards"[10].

What is particularly interesting for the analysis that will follow is that punitive damages serve to punish and deter the tortfeasor. They are action-oriented, tortfeasor-oriented, and mostly prospective. On the contrary compensatory damages serve to put the victim in the position it would have been in had the wrongful act not occurred. They are loss-oriented, victim-oriented, and retrospective[11].

The doctrine of punitive damages has an ancient lineage. Starting from the Babylonian Hammurabi Code it marched its way through Roman law to the firmly entrenched "exemplary damages" in the eighteenth-century English cases[12]. "Exemplary damages" have then been exported to the US and ever since have been awarded in a large array of cases[13]. Never-

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[8] For illustrations of such cases see D. Laycock, *Modern American Remedies* (3rd edition, 2002) 728.

[9] *Grimshaw v. Ford*, *supra* note 7.

[10] Prepared Statement of Owen, *supra* note 6, at 9.

[11] Behr, *supra* note 1, at 109-13 (extensively discussing these features of punitive and compensatory damages).

[12] M. Rustad & Th. Koenig, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, *Am. U. L. Rev.* 1993, 1269, 1284-1304 (discussing in detail the history of punitive damages).

[13] The first reported case is *Genay v. Norris*, 1 SCL (1Bay) 6 (1784). For an exposition of early American punitive damages cases see Rustad & Koenig, *supra* note 12, at 1290-1295.

theless in the latter half of the 1800s punitive damages got in the critical sight of the classical legal science representatives. Harvard Professor Simon Greenleaf argued that exemplary damages were not a part of the Anglo-American tradition and were without doctrinal basis[14]. It is not surprising that the "legal scientists" were using doctrinal based argumenttation regarding the compensational function of tort law and the distinction between private and public law, just like the mainstream civil law scholars in Europe did and continue to do. Nevertheless, in the nineteenth-century "War on Punitive Damages"[15] "legal scientists", although they did sow the seed of discredit on punitive damages, were not finally able to prevail. The American tort system remained clearly a dualistic one, based on two distinct pillars: the compensation of the victim and the punishment and deterrence of the tortfeasor and others like him.

B. Current trends in the USA

The seed of discredit that the nineteenth-century debate has sowed regarding punitive damages has found fertile land during the last few decades, when punitive award amounts have risen dramatically and "concern about punitive damages that 'run wild'" has been raised[16]. Some striking three-digit million or even billion dollar awards against wealthy corporations have once again given food for thought and wariness regarding punitive damages and the impact they might have on the American economy[17]. However this time the debate goes around the amounts of punitive awards, whereas the doctrinal issues are considered more or less settled.

1. Statutory and constitutional restrictions of punitive damages in various states

David G. Owen reports that as of today "many states, either statutorily or constitutionally, prohibit punitive damages in a vast array of contexts, including commercial transactions under the Uniform Commercial Code. More broadly, five states prohibit all awards of punitive damages unless

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[14] S. Greenleaf, *A Treatise on the Law of Evidence* (16th edition, 1899) § 253, at 240. See also Rustad & Koenig, *supra* note 12, at 1298-1300; *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, at 25-28 (1991).

[15] See Rustad & Koenig, *supra* note 12, at 1298-1304.

[16] See the majority in *Pacific Mutual Life Insurance Co. v. Haslip*, *supra* note 14, at 18.

[17] According to Rustad & Koenig, *supra* note 12, at 1298, even in the nineteenth-century the legal scientists' attack on punitive damages was initiated by a concern about their impact on the then emerging American industry.

specifically authorized by statute[18]. Since the 1980's, punitive damages have been a favourite target of tort reformers, so that most states now have some form of tort reform legislation limiting punitive damages in a variety of ways"[19]. The most common measure taken is to cap punitive damages at some multiple of the plaintiff's compensatory award or at an absolute dollar amount or a percentage of defendant's net worth or its gross income. Most States use a statutory combination of more than one of the above restrictions or others.

The problem with all the above restrictions seems to be the rigidity of their statutory provision. Although they generally seem to be a partial solution to the risk of over-punishment (for example by setting an absolute cap of $250,000), they definitely create a risk of underdeterrence: Should the tortfeasor's expected profit be greater than the capped amount of punitive damages that can be possibly awarded, he is likely to proceed with his tortuous activity.

Other measures that could and indeed are in some states taken include raising the standard of proof, providing remittur of excessive awards, providing absolute defence when the defendant had complied with government standards, bifurcating the trial with regard to punitive and compensatory damages, transferring to the court the responsibility for determining the amount of the award, and splitting awards with the state[20]. However the blind application especially of the latter measure creates the problem that not all punitive damages awards can be considered "quasi-criminal" and as such "quasi-public"; there are cases where the need for punitive damages has only to do with achieving justice between the parties. In the latter cases juries might at the end find their selves bound to double the amount of damages to be awarded in their effort to "do justice".

2. Federal constitutional review and control

Beginning largely with the Supreme Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*[21] in 1991, punitive damages awards have been increasingly subjected to federal constitutional review and control[22]. Landmark decision is *BMW of North America Inc. v. Gore*[23], where the

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[18] Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington.

[19] Prepared Statement of Owen, *supra* note 6, at 9.

[20] See *ibid.*, at 14-22, for an extensive exposition.

[21] 499 U.S. 1 (1991).

[22] Prepared Statement of Owen, *supra* note 6, at 9.

[23] 517 U.S. 559 (1996).

Supreme Court of the United States reversed the judgment of the Alabama Supreme Court[24], which already had reduced the $4 million punitive damages of the Circuit Court. The Supreme Court held that "grossly excessive" punitive damages transcend the constitutional limit established by the Due Process Clause of the Fourteenth Amendment[25] and set up the guideposts regarding the degree of requisite responsibility, the proper ratio of punitive to actual damages, and the comparability of punitive damages to civil and criminal penalties available in case of comparable misconduct[26].

Recently the Supreme Court was given the chance to fully reaffirm the *BMW* guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*[27]. Campbell's claims were based on State Farm's purported bad faith failure to settle within policy limits third-party claims that were asserted against Mr. Campbell after an auto accident in Sardine Canyon, Utah[28]. The bad faith trial was used by Campbell's counsel as a platform to attempt to obtain punitive damages against State Farm for an alleged twenty-year nationwide scheme[29]. The jury returned a compensatory award of $2.6 million of emotional distress damages, which the trial court reduced to $1 million. The jury also awarded $145 million in punitive damages, which the trial court reduced to $25 million, but the Utah Supreme Court reinstated in full. In relation to the ratio problem the US Supreme Court ruled that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process". It also ruled regarding the defendant's wealth that "the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award"[30]. It seems that the parties will now argue before the Supreme Court of Utah on the basis of a 1:1 or a 1:9 ratio[31].

Although the Court has definitely found excessiveness in the punitive damages award, it declined once again "to impose a bright-line ratio which a punitive damages award cannot exceed". It did suggest a single-digit ratio between punitive and compensatory damages, but did not deny that even a 500 to 1 ratio might be constitutionally valid in an appropriate

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[24] 646 S0. 2d 619 (Ala. 1994).

[25] *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, at 568 (1996).

[26] *Ibid*., at 575-84. See Behr, *supra* note 1, at 119-20.

[27] 123 S.Ct. 1513 (2003).

[28] Sh.L. Birnbaum, *State Farm v. Campbell*: Presentation Outline, *in* Sh.L. Birnbaum & P.D. Rheingold (eds.), *The Future of Punitive Damages After* State Farm v. Campbell (2003) 11.

[29] *Ibid.*

[30] *Ibid.*, at 12.

[31] See R.S. Peck's statement, *supra* note 6, at 72.

case. Such a case might exist, the Court noted, where "a particularly egregious act has resulted in only a small amount of economic damages"[32].

Therefore it is not accurate to say that *Campbell* has enunciated new rules or guideposts regarding punitive damages. It has only applied the existing jurisprudence (esp. *BMW*)[33]. It is rather the echoes in the newspapers that have brought again the "problem" of punitive damages on the surface, provoked by some impressive peculiarities of the case and especially the overruled ratio of 1 million compensatory to 145 million punitive damages.

3. The current tort reform discussion

The dust that followed the Supreme Court's avocation of the excessive punitive damages award from the Supreme Court of Utah, mainly provoked by its coverage by the media, led the Congress to once again scrutinize the issue of the future of punitive damages in the USA and to reconsider the eventual need of the federal legislator's intervention.

In light of the State Farm decision, the Congress' Constitution Subcommittee of the Committee on the Judiciary has held a meeting to "explore the insights of the Court into the unfairness of large punitive awards in certain circumstances and steps Congress might take to alleviate that unfairness"[34]. It is interesting to see that although many of the hosting Congressmen had a quite aggressive view on the matter, none of the three invited expert witnesses took an even approximately hostile approach.

At the outset all the participants have agreed, that the purpose of any reforms should be "to adjust various aspects of how the law of punitive damages is administered, not to eliminate it as a remedy available in appropriate cases"[35]. It was noted that with few exceptions, neither the courts nor the community of scholars has urged that the institution of punitive damages be abolished[36]. It was further acknowledged that "in USA, most people still view punitive damages as an important remedy that checks, rectifies, and helps prevent extreme misconduct. In recent decades, however, both courts and legislatures have initiated a series of re-

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[32] Birnbaum, *supra* note 28, at 11.

[33] See R.S. Peck, *supra* note 29, at 16.

[34] Steve Chabot's opening statement, *supra* note 6, at 2.

[35] See the Prepared Statement of Owen, *supra* note 6, at 14.

[36] *Ibid.*

forms in an effort to reduce as much as possible the most serious problems with the law and administration of punitive damages"[37].

Most Congressmen seemed to agree with one expert's opinion that it was time for the federal legislator to take action and codify the guideposts that are being used by the Supreme and other courts, so as to increase predictability and prevent excessive awards before they come to the Supreme Court[38]. Taking into account the Supreme Court's high selectivity as to the cases it hears as well as the cost and time consumption for presenting a case to the Court, it was showed that it would be beneficial to enact some kind of legislation that will guide lower courts and will prevent excessive punitive damages awards. According to a more bold view of the matter, that legislation should not limit its scope only to codifying the outermost constitutional boundaries of punitive awards that Congress can discern from the Supreme Courts decisions, but it should begin with the constitutional core and "then add in other fair and appropriate reforms, whether demanded by Constitution or not"[39].

Nevertheless – and to the Congressmen's great surprise – there are serious doubts as to whether the federal legislator has the authority to legislate in that field of tort law. According to Robert S. Peck's expert testimony the Congress is barred from intervening by means of the 10th Amendment[40]. The only field where that expert sees a chance for the Congress to act upon – besides of course the federal courts' awarding of punitive damages – is that of taxation of victims who are awarded punitive damages: According to his testimony, there is a "strange operation of the tax laws" that tax the person who wins a punitive damage award also on the amount that will go to the State (in case of a sharing type institution) and on the amount that goes to the counsel (who is then of course in turn re-taxed himself)[41]. In that way the "winner" might easily end up owing more to the State than he has actually won[42].

Another issue that has been raised as needing immediate attention was that of multiple imposition of punitive damages for the same conduct[43]. One can easily understand that individual states, no matter how much they might want to, they cannot resolve the problem of multiple imposition of

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[37] *Ibid.*

[38] See Chabot's and Owen's statements, *supra* note 6, at 68.

[39] See Owen's recommendation, *supra* note 6, at 68.

[40] See Peck's statements, *supra* note 6 at 33, 38-41.

[41] For all that see *ibid.*, at 33-34 and 42.

[42] See also E. Neff, Talk of the Morning, Victory in State Farm Case Could Cost Plaintiff Dearly, *The Salt Lake Tribune*, August 13, 2003.

[43] See V.E. Schwartz's statements, *supra* note 6, at 43 and 47-48.

punitive damages all by themselves. At the outmost they can only prevent it from happening within their own borders. It is the Congress' duty to intervene and prevent companies from being hit again and again for the same wrongdoing in several fora[44].

III. PUNITIVE DAMAGES IN CIVIL LAW JURISDICTIONS

A. Historical background

The civil law approach towards punitive damages has been for more than a century a rather hostile one. Indeed, in civil law jurisdictions, damages as a method of sanction have traditionally been considered a taboo. These jurisdictions have a traditionally monistic tort system, where damages have a strictly compensatory function, which sets a sharp contrast to the American dualistic one. What is rather interesting though is the fact that both systems have a somewhat common origin and were somehow close to each other before their roads diverged more than a century ago. It has been showed that until the nineteenth century, the German attitude toward punitive damages was quite similar to what was being discussed in the United States at that time[45]. Although there was no unanimous attitude towards noncompensatory damages, punitive damages were quite common in some German States. Actually the Prussian Civil Code provided for punitive damages in several occasions, whereas the Bavarian Civil Code on the other hand ruled out such damages when the tortfeasor could be punished by means of criminal law. As one could foresee, this issue was intensively debated during the unification procedure and the preparation of the enactment of the German Civil Code of 1896. After a lot of debate the German Civil Code followed the path that the Code Napoleon had shown about a century before in France, and abolished all punitive elements from German tort law.

So, while in the United States the more practical approach won over the more theoretical and dogmatic one of Simon Greenleaf, in Germany the war on punitive damages was decided in favour of a monistic, purely compensatory system[46]. During the legislative procedure it has been made clear that "punitive elements in the civil law of damages were considered to be contrary to the very idea of the law of damages, which is strictly restricted to compensate the victim, while punishment is restricted

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[44] *Ibid.*, at 47.

[45] Behr, *supra* note 1, at 127.

[46] *Ibid.*

to criminal law sanctions"[47]. As Volker Behr notes, with the enactment of the German Civil Code in 1900 "legislation seems to have erased the very idea of punitive damages"[48].

For almost a century "German courts and blackletter doctrine, in line with the legislative history and the German Civil Code, considered punitive damages not to be a part of the German legal system"[49]. This principle has shown to be that strong in German legal culture, that today it is even questioned whether introduction of punitive elements is reconcilable with constitutional law[50]. In any case, as it has already been mentioned above, the German Federal Supreme Court has found that punitive damages awards are contrary to German public policy, and therefore American judgments providing for such awards could not be enforced in Germany[51].

B. Current trends in European continental Law

1. The emergence of preventive considerations in tort law

It is true that for more than a century an apparently irreconcilable gap has separated the common law and civil law concepts of the law of damages. This gap was particularly visible in the case of American and German law, because of the particular insistence on punitive damages of the former and the categorical rejection and great insistence on doctrinal coherence of the latter. Contrary to the American concept of dualistic law of damages, where damages can be recovered for the losses incurred (including loss of profit) and for punishment of the wrongdoer, the German Civil Code of 1896 (that has strongly influenced most civil law countries) takes the totally opposite approach: The law of damages is purely monistic.

Nevertheless, a closer look at the German courts' most recent case law might well put in question the purported dogmatic clarity and coherence of German tort law. In particular recently, in a series of cases, the otherwise strict and doctrinal German Federal Supreme Court has "discovered" that a tortfeasor might be "calculating" in form of a risk and cost-

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[47] *Ibid.*, at 128.

[48] *Ibid.*

[49] *Ibid.* with further citations.

[50] Ch. Siemes, Gewinnabschöpfung bei Zwangskommerzialisierung der Persönlichkeit durch die Presse, *Archiv für die civilistische Praxis* (=AcP) 2001, 201, 202, 212; W. Seitz, Prinz und die Prinzessin – Wandlungen des Deliktsrechts durch Zwangskommerzialisierung der Persönlich-keit, *Neue juristische Wochenschrift* (=NJW) 1996, 43, 2848, 2849.

[51] See *supra* note 5.

benefit analysis the cost of his otherwise tortuous entrepreneurial activity and (the court) has decided to do something about it.

It is not surprising that the re-introduction of punitive elements in German tort law was made through the back door and particularly by using the vehicle of damages for pain and suffering. In Germany the courts and the legislator have historically been very chary of awarding damages for pain and suffering. This fact derives from an old well-established notion that pain and suffering constituted nonpecuniary loss, and that only pecuniary loss could be compensated by money[52]. As this notion began from the very early times losing ground, the German Federal Supreme Court was constantly becoming more generous in awarding such damages.

Striking are the cases of infringement of the right to personality. For such cases the German Civil Code explicitly provides only for a claim of the victim on abrogation of the insult and omission in the future, combined with a right to claim (compensatory) damages according to tort law. Nevertheless the Court early enough saw that in cases of infringement through the press all the above rights were of little importance for a past harm with little or hardly provable pecuniary damages. So the Court has started in such cases – but in a halting manner – awarding damages for pain and suffering, naming them "satisfaction" (*Genugtuung*)[53]. Nevertheless the Court was obviously trying to keep those awarded damages mainly victim-oriented and retrospective as opposed to punitive considerations, which are more tortfeasor-oriented and prospective.

But an unexpected turn in the Federal Supreme Court's practice arose in 1995, only three years after its landmark negation of American punitive damages awards' compliance with the German public policy and order[54]. The Court was called to decide on the case of a popular magazine that had published a fake interview pretending it was a real interview with Princess Caroline of Monaco elaborating on her plans on marriage. The District Court of Hamburg had awarded the Princess an amount of damages for pain and suffering, which the Superior Court of Hamburg had then considerably lowered as excessive. The Federal Supreme Court had reversed the judgment of the latter court because the amount of damages awarded was held to be insufficient. Surprisingly enough the Supreme Court expressly stated that the amount had to be determined *in such*

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[52] For a description see Behr, *supra* note 1, at 131.

[53] See e.g. BGHZ 26, 349 (1958), also known as the *"Herrenreiter"* case and BGHZ 35, 363 (368) (1961).

[54] BGHZ 128, 1 (1) (1995), also known as *"Caroline I"*. For a thorough discussion of the case see A. Heldrich, Privates Glück in der Medienwelt, *in* A. Heldrich (ed.), *Medien zwischen Spruch und Informationsinteresse: Festschrift für Robert Schweizer* (1999) 29.

a way that the commission of similar torts would be deterred in the future. The Court also mentioned the notion of taking the profits from the tortfeasor; nevertheless, it did not build its argumentation on unjust enrichment, but did insist on the means of tort law and damages.

That change in the Court's attitude was later confirmed in a series of cases, all related with the infringement of the Princess' and her child's right to personality by publication of paparazzi photographs and arbitrary "invented" interviews with her[55]. So, it seems that the German Federal Supreme Court has at last openly given up its negation of all punitive elements in German tort law. It would be far-reached to say that the German doctrine has gone that far as to erect a second, retributive, pillar in its tort law[56]. But it is rather doubtful whether American punitive damages awards can doctrinally still be considered as totally irreconcilable with the German public order.

It should be noted though that, apart from this *doctrinal* convergence between the two legal orders, there still exists a huge and for the moment irreconcilable gap with regard to the *amounts* awarded. The amount of damages that the German courts have awarded and that have been considered as an act of revolution in the German legal culture[57] did not exceed the equivalent of $100,000.

2. Statutory provision of punitive damages

This trend towards openly admitting punitive considerations in continental private law is to be traced not only in case law evolution but in the legislators' activity too. The optimum area to observe such evolution is the field of consumer law, where some well established American legal trends are transplanted to the European legal culture after having been baptized by the European Commission as European Community Law.

For example, Section 10 (9) (b) of the Greek Consumer Protection Act[58] provides for a particular form of pecuniary damages in form of "satisfaction" that can be claimed against sellers or suppliers of consumer goods or services. This cause of action is provided as a universal remedy

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[55] See BGH, *NJW* 1996, 984; BGH, *NJW* 1996, 985; BGH, *NJW* 1996, 1128.

[56] That seems to be the claim of P. Müller, *Punitive Damages und deutsches Schadenser-satzrecht* (2000), *passim.*

[57] See e.g. Heldrich, *supra* note 54, *passim.*; H.P. Westermann, Geldentschädigung bei Persönlichkeitsverletzung – Aufweichung der Dogmatik des Schadensrechts?, *in* I. Koller *et al.* (eds.), *Einheit und Folgerichtigkeit im juristischen Denken, Symposion zu Ehren von Herrn Professor Dr. DR. h. c. mult. Claus Wilhelm Canaris* (1998) 143.

[58] Law 2251 of 1994 as amended, which is a close equivalent to an American UDAP statute.

for any unfair or deceptive act or practice of the defendant including the use of unfair terms in a contract, the selling of defective services or products, and the engagement in misleading advertising or deceptive selling practices. In case a seller or a supplier of a good or service engages in such a deceptive practice, in addition and irrespective of any other remedies provided by law to the particularly affected consumer, a consumers' association can by means of a collective action not only seek for an injunction but also sue the seller for pecuniary satisfaction. For the assessment of the height of that pecuniary satisfaction the law explicitly provides that "the court shall take into consideration the intensity of the insult of the law and order that the illegal conduct has caused, the size of the defendant's enterprise and especially its annual turnover, as well as the needs for general and specific prevention". The introduction of the latter institution of "satisfaction" in the consumer protection context came as a thunderbolt in the Greek legal order that has traditionally been following the German doctrine of elimination of retributive considerations in the fields of private law.

Even more striking is the fact that in the recommendatory resolve of the Act, the Greek legislator explicitly comments regarding the pecuniary satisfaction that "for the first time specific legal criteria are prescribed that model it after the foretype of punitive damages in Anglo-Saxon laws"[59]. While the Greek legal scholarship has been trying to mitigate the damages from this unexpected breach in its blackletter doctrine[60], the courts did not hesitate to take a more open approach[61].

Recently the Greek Supreme Court had to decide on a collective action filed by a consumers' association against some major banking institutes who were issuers of credit cards. The plaintiff was seeking amongst others pecuniary satisfaction for the defendants' allegedly deceptive practice of initially charging the consumers' credit card accounts without having checked in advance whether there exists a signed transaction slip regarding each transaction. The Court has classified this particular – at that time indeed contrary to the agreed contract terms – practice as illegal and deceptive and has upheld the pecuniary satisfaction awarded by the appellate court. The latter had assessed its amount using the above enumerated

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[59] See I. Karakostas, *Consumer protection* (2003) 346-348 [in Greek].

[60] See e.g. *ibid.*, at 343-344, and G. Panopoulos, *Punitive damages and the Greek public policy of article 33 CC* (2003) 98-103 [in Greek].

[61] See Efeteio Athenon 1448/1998, *Νομικό Βήμα* (=Nomiko Vima – NoV) 1998, 1251; Polimeles Protodikeio Athenon 2411/1997, *Επιθεώρησις Εμπορικού Δικαίου* (=Epitheorissis Emporikou Dikaiou – EempD) 1998, 592; Polimeles Protodikeio Athenon 2438/1997, *NoV* 1998, 838 a.o. See also S. Matthias, Legal nature and the effects of collective action, *Ελληνική Δικαιοσύνη* (=Elliniki Dikaiossyni – EllDni) 1997, 1, 3 [in Greek].

considerations provided by the law, explicitly including that of general and specific prevention[62]. The Supreme Court further stated regarding the award of damages that "in spite of its designation as pecuniary satisfaction, in fact it is a civil sanction"[63]. According to the Court this qualification emerges from various provisions of the Greek Consumer Protection Act and especially by the criteria that the law prescribed for assessing the height of the amount to be awarded, by the fact that the pecuniary satisfaction can only be awarded once, and by the fact that the amounts awarded and received must be used (by the consumers' association) for social goals related to consumer protection[64].

What seems to be once again important for our analysis is firstly that the amount of satisfaction awarded was nominal, that is approximately $2,500 to be borne by each of the 8 defendant banking institutions[65], and secondly that this special kind of punitive damages can only be awarded in favour of regulated consumers' associations, which are by law obliged to spend it for social goals related to consumer protection.

But the above twist was in fact not to the Greek legal community's great surprise. A couple of years before, the Greek Supreme Court had already come to the conclusion that, despite the blackletter doctrine regarding the goals pursued by tort law, a Texan punitive damages award should not be *ab initio* regarded as contrary to the Greek public order[66]. According to the Court, punitive damages, although they are not an integral part of Greek tort law, they are not contrary to Greek public order, provided that they are not excessive[67]. But in that particular case the Court did at last disallow collection of the punitive damages awarded on the basis that part of it was indeed excessive.

So when compared to American law, it still remains significant *how much* the court awards and *to whom* it awards it. The first is significant more as a practical matter (European courts are usually intimidated in view of the huge American punitive damages awards, even if the amounts

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[62] Areios Pagos 581/2001, *Δίκαιο Επιχειρήσεων & Εταιριών* (=Dikaio Epicheirisseon & Etairion – DEE) 2001, 1117 (1120).

[63] *Ibid.*

[64] *Ibid.*

[65] It must be noted though that the actual amount of the unauthorized charges in the particular case was nominal too (not exceeding $8 per customer) and affected only a limited number of customers.

[66] Areios Pagos 17/1999, *DEE* 2000, 181. *Contra* K.D. Kerameus, S. Vrellis & A. Grammatikaki-Alexiou, Declaring enforceable in Greece a foreign punitive damages award, *Κοινοδίκιον* (=Koinodikion) 2000, 31 [in Greek].

[67] *Ibid.* See also K. Panagopoulos, Punitive damages and Greek public order, *Κριτική Επιθεώρηση* (=Kritiki Epitheorissi – KritE) 2000, 195 (233).

awarded are not always paid out as most cases settle for a lower amount), whereas the second might be of doctrinal significance too. The same arguments that are heard in the US against the plaintiff keeping the full amount awarded apply here too; but they are even louder, because in Europe there is no tradition of a Private Attorney General and the trial expenses are considerably less, if they are not borne by the party who has lost the case[68].

Therefore it seems that even if the issue of the unusual level of American punitive damages awards is overcome in the future, one can foresee that the victim's enrichment by the tortfeasor's conduct might prove an insurmountable barrier in their compliance with the continental law public order. Contrary to cases where there is an individual victim who is awarded the – explicit or implicit – punitive damages (like in the German Caroline cases), it is mostly unlikely that European courts will ever accept the enforcement of cases, where a victim has been awarded punitive damages because of a conduct that has affected an indefinite class of consumers (also called a "quasi-criminal" or "quasi-public" trial). Even if the American case provides for the allowance of a particular class, class actions are generally not accepted in European law systems[69]. Their closest equivalent is the "collective action", which is to be exclusively filed by a consumers' association, but the amounts awarded are definitely not to be distributed between the association's members[70]. Therefore it can be said that the American tort reformers will be definitely walking on the safe side if they further pursue the already existing course of not leaving the fruits of the claim with the plaintiff.

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[68] On the other side of course this fee shifting that exists in European legal orders has itself a deterrent effect for the party who decides to 'flagrantly break the law". The effecttiveness of that deterrence is related to the particular system's choice to be assessing nominal or actual fees and costs or anything in between. In fact the European fee shifting can be considered as a counterbalance to the combination of the American Rule (concerning litigation expenses) and the awarding of punitive damages.

[69] See also *infra*, 3.

[70] See P. Reinel, *Die Verbandsklage nach dem AGBG* (1979) 15-17 (discussing the differences between the German *"Verbandsklage"* and its American equivalent, the "class action"). Article 7 of Directive 93/13/EEC (which was also the foretype for the Greek statutory provision discussed) explicitly left the choice between a class action and a "collective action" to the national legislators. Interestingly enough, even the British legislator has opted for the second solution. Moreover, the British Unfair Terms in Consumer Contracts Regulations of 1999 (in Regulation 12) provides only for an injunction against the use of unfair terms in contracts, as opposed to the more radical remedy of "satisfaction" provided in the Greek Consumer Protection Act and discussed above.

3. The problem with the numbers

The discrepancy that we have already traced above with regard to the amount of damages that are being awarded between the two sides of the Atlantic has recently emerged quite acutely in a case still pending before the German Federal Constitutional Court.

Last year, some American music producers brought a class action against the German media giant Bertelsmann AG in the District Court for the Southern District of New York. The basis of the suit was Bertelsmann's provision of loans to the infamous Napster (in the context of a contemplated leveraged buy-out), which the plaintiffs argue aided the today bankrupt site's copyright infringement activities. The plaintiffs were suing for $17 billion compensatory damages. Having served process in two subsidiaries of the Bertelsmann in the US, the plaintiffs tried to serve process in the Bertelsmann Headquarters in Germany too. The defendant denied to receive the legal documents and ultimately sought recourse to the Constitutional Court, asking it to halt the service procedure.

The defendant appealed to article 13 of the Hague Convention of 1965[71] that provides that a State may refuse to comply with a request of service of legal documents if it deems that compliance would infringe its sovereignty or security. Bertelsmann argued that the plaintiffs were bringing the action only as an attempt to put the defendant under public pressure and force it into an out of court settlement of the case. It particularly argued that the exorbitant claim of $17 billion compensatory damages was unfounded because it was a multiple of the allegedly hurt American music industry's turnover and because, according to defendant's calculations, the alleged damages could not under any circumstances – not even by approximation – have occurred. Moreover, the amount claimed exceeded by far the defendant's net worth and as a result its financial ability.

This abusive use of the legal system constituted according to the defendant an infringement of the principle of proportionality and thus of its constitutionally protected freedom of action (article 2 (1) of the German Constitution). Moreover, by allowing such abusive use of the legal proceedings, the defendant was allegedly hurt in its constitutionally protected right to property and entrepreneurial activity (articles 13 and 14 of the German Constitution), but also Germany was hurt as a result with regard to its sovereignty and security (article 13 of the Hague Convention).

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[71] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters concluded on 15 November 1965 in The Hague.

Surprisingly enough the German Federal Constitutional Court has issued a Temporary Restraining Order (TRO) halting the service of process against the Bertelsmann headquarters in Germany[72] and ever since has renewed it once[73]. By granting the order, the court ruled that the defendant's allegations are neither impermissible nor obviously unfounded and stayed the service process for its final judgment to follow a formal hearing. The legal community shall eagerly await the formal hearing and the Constitutional Court's final decision, especially because the defendant has challenged even more facets of the American legal system, like the expensive pre-trial discovery procedure, the institution of class action itself and the jury trial, all with regard to their conformity with the German constitutional state and order.

It is quite dubious whether the Court will insist on permanently enjoining the service procedure, since the temporary restraining order was basically based on the irreparable harm that could be invoked if the TRO had been negated in case the final decision goes in favour of the defendant. Nevertheless, it is clear that the German court wanted to give a signal to the other side of the Atlantic as far as exorbitant claims of damages are concerned.

What is even more striking for our case is the fact that the same Court had denied in the past a similar motion to prevent service proceedings of an action on the basis that the plaintiff was seeking from the defendant in Germany punitive damages[74]. The Court had then ruled that the mere fact that punitive damages were considered discrepant to the German legal system and contrary to German public order did not prevent the plaintiff from serving the relevant lawsuit to the defendant. This process should be held distinct from that of enforcing the decision, should punitive damages be finally awarded[75].

So, once again it is showed that the problem is not so much with the *nature* but with the *level* of the damages[76]. Continental legal orders seem worried about what might happen to their commoners when they are faced with American civil justice. In other words, the Europeans are worried about the same things the Americans are: that is the runaway dam-

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[72] BverfG, *NJW* 2003, 2598.

[73] In January 2004 for another six months (BVerfG, 2 BvR 1198/03 vom 13. Januar 2004, available at http://www.bverfg.de/entscheidungen/rs20040113_2bvr119803.html).

[74] BVerfGE 91, 335 (1994).

[75] *Ibid*., at 343. It is also worth noting that the Court has indirectly cast doubt on the Federal Supreme Court's decision about contradiction to the German public order by nam-ing the cases of immaterial loss and of "hidden" compensation for the trial's expenses.

[76] This is also the point that the Greek Supreme Court in Areios Pagos 17/1999, *DEE* 2000, 181, has made.

ages that are being awarded – either as punitive or as "compensatory" – and are threatening the viability of even large companies. The only difference is that the non-Americans being outsiders can take much more radical measures – like denying service or enforcement – than the Americans themselves, who have to fight with and within their own system. Nevertheless, if that *quantitative* factor is settled, the *doctrinal* issues regarding convergence with the civil law system seem to have been pretty much alleviated.

IV. CONCLUSIONS

In a global world, doctrinal differences between legal systems become always less important. Societies have always been facing more or less the same problems, but they have been traditionally using different methods to resolve them. Today, the more the living cultures and the financial conditions seem to converge, the more will solutions to the same problems become more alike. Obsolete doctrinal differences that in previous times were viewed as insurmountable obstacles today fall like house of cards.

This is reasonable in view of the fact that the same need for punishment or deterrence that exists in some marginal cases involving tort law in the US does exist in similar cases in European countries too. There is no need of falsely negating the inclusion of at least some preventive considerations in continental European law, just for the sake of some "doctrinal coherence". Continental countries' courts and legislators will at the end be much better off if they go ahead and openly admit this fact.

On the other side, it seems that American tort reformers have some things to be taught by keeping an eye on the European legal orders too. For example, one can positively judge that they are indeed on the right track when trying to put a leash on runaway damages. The same applies for the measure of the victim sharing the punitive damages award with the public. Both measures beyond their positive internal effect on the American legal system will also enhance this system's interaction with the rest of the world[77]. And that interaction, as opposed to isolation, comes at the bottom line to the benefit of the American global players, who can see their – with many costs associated – judicial awards be finally enforced and legal documents be served abroad.

Therefore we can easily foresee that the issue of level of punitive damages awards will be constantly gaining importance in the years to come.

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[77] On the contrary, taxing the damages award unfavourably may have internally more or less the same effect, but it does not enhance the American legal system's acceptability in its interaction with the other legal orders, as the face value of the award will remain irrational.

Actually, one could possibly speak of an emerging jurisprudence of amounts. In this context, American courts and legislators will have to find ways of rationalizing punitive damages awards and increasing predictability. The State Farm decision, with its broad exceptions and indecisive language, has failed to trace a definite route to be followed. Perhaps the key to a solution should be sought after in the fields of antitrust law, where institutions similar to punitive damages (like treble damages) have been smoothly and frictionless practiced for almost a century both in Europe and the USA.