

The German Advantage Revisited: An Inside View of German Civil Procedure in the Nineties

Michael Bohlander*

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* Legal Officer, International Criminal Tribunal for the Former Yugoslavia, The Hague. Richter am Landgericht, Meiningen; Doctor of Law; Honorary University Fellow, School of Law, University of Exeter, England; Spring 1997: Visiting Scholar, Northwestern University School of Law. This Article is based on a lecture given by me in April 1997 to the LL.M. class of 1997 of the Northwestern University School of Law. I would like to thank Jane Scarpellino and Ruth Alderman Schlossberg of Northwestern Law School for arranging the talk and for being so helpful and supportive to my research.

I. INTRODUCTION¹

In the years from 1985 to 1988 the legal public in the United States witnessed a controversy between two prominent law professors, John H. Langbein, then with the University of Chicago, and Ronald J. Allen, of Northwestern University. The source of their dispute was a 1985 article by Langbein in which he explained his views on the allegedly superior qualities of German civil procedure, comparing these to the situation in the USA.² Allen and his co-authors Köck, Riechenberg and Rosen questioned the accuracy of most of Langbein's arguments in a response in 1988.³ Both sides restated their positions⁴ in the *Northwestern University Law Review*.

I became aware of the controversy only in 1995, when Ronald J. Allen informed me about the papers in another context. Even though more than ten years have passed since the first article was written, I felt that it might nevertheless be helpful to inform the American debate about how German civil proceedings work in practice in the 1990s.⁵

I do not purport to look at all the arguments on both sides, but want to concentrate on the important points and to give a comment as a German judge. I feel that a topic like procedural law can be more fully appreciated if practical experience is added to legal or sociological field research.

Thus I want this Article to be understood as a view from the inside, both from within the practice of civil procedure and from the viewpoint of my specific field of work.

1. In this Article I have used the male pronoun throughout for reasons of brevity and crispness of expression. This is, however, naturally meant to include the female counterpart, too.

2. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) [hereinafter Langbein, *German Advantage*]; see also John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545 (1995).

3. See Ronald J. Allen et al., *Legal Institutions—The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988) [hereinafter Allen, *A Plea*].

4. See John H. Langbein, *Legal Institutions—Trashing the German Advantage*, 82 NW. U. L. REV., 763 (1988); see also Ronald J. Allen, *Legal Institutions—Idealization and Caricature in Comparative Scholarship*, 82 NW. U. L. REV. 785 (1988).

5. See MICHAEL BOHLANDER & CHRISTIAN LATOUR, *THE GERMAN JUDICIARY IN THE NINETIES* (1998) (discussing the question of the recruitment of judges).

II. THE POSITIONS OF LANGBEIN AND ALLEN

A. *Langbein's View*

Langbein's main tenet is the assertion that German judges investigate the facts of the case,⁶ paraphrasing this with the expression that the German judge is "digging for facts"⁷ and that counsel's role in eliciting evidence is restricted to advancing partisan positions, suggesting legal theories and lines of factual inquiry and nominating witnesses;⁸ that they superintend and supplement the judicial examination of witnesses, urge inferences from fact, discuss and distinguish precedent,⁹ interpret statutes and formulate views of the law in favour of their clients.

Langbein thinks that German civil courts gather and evaluate the evidence over as many hearings as necessary,¹⁰ calling the nature of the German hearing process "episodic."¹¹ From this it follows, Langbein says, that "if a case takes an unexpected turn, the disadvantaged litigant can develop his response at a later hearing."¹² He states that counsel usually does not conduct any significant search for evidence unknown to his client.¹³ Courts tend to conduct a case in a way most likely to narrow down the inquiry, and it is counsel's role to guide the court by directing the judge's attention to cogent lines of inquiry.¹⁴

Langbein also voices the opinion that attorneys are not prominent as examiners of witnesses.¹⁵ Furthermore attorneys who contact witnesses out of court are said to commit a serious ethical breach.¹⁶

He reports that "witness's testimony is seldom recorded verbatim"¹⁷ but that the judge dictates a summary from time to time, to which the lawyers may suggest alterations. These summaries,

6. See Langbein, *German Advantage*, *supra* note 2, at 824.

7. *Id.* at 827.

8. *Id.* at 824, 834.

9. It should be borne in mind that German law has nothing similar to the "stare decisis" rule under common law, but it is a fact that the decisions of the appellate courts are usually adhered to by the lower courts for pragmatic reasons. To that extent one may speak of attorneys and judges distinguishing precedents.

10. See Langbein, *German Advantage*, *supra* note 2, at 826.

11. *Id.* at 831.

12. *Id.*

13. See *id.* at 827.

14. See *id.* at 830.

15. See *id.* at 828.

16. See *id.* at 834.

17. *Id.* at 828.

according to Langbein, are to form the basis for the reviewing court on appeal.¹⁸

Langbein goes on to explain that there is no real counterpart to the Anglo-American law of evidence and that what goes to admissibility in the United States goes to weight and credibility of the evidence in Germany.¹⁹

Langbein thinks that the “loser pays” system in costs is an incentive for settlement short of judgment.²⁰ Langbein also feels that experts in Germany are “Judges’ aides”²¹ and “may build reputations with the bench,” thus causing the judge to select them for future cases.²² Finally, Langbein is of the opinion that German courts are hostile to “fishing expeditions” by counsel²³ and that “there is no civil jury.”²⁴

B. *Allen’s View*

Allen and his co-authors²⁵ mainly contend, that Langbein’s research was incomplete and his data insufficient to support his conclusions. A judge-dominated system appears to Allen to entail the problem of bias,²⁶ and he wonders just how the court can know what the “jugular of the case” is right at the start of the proceedings.²⁷ Contrary to Langbein’s opinion that the court rather than counsel is responsible for gathering and sifting the evidence, Allen says that the “court is bound by what the Parties advance.”²⁸ In his view, however, the parties and their attorneys often do not possess the intellectual requirements to fulfil their task of advancing the necessary facts sufficiently.²⁹ Citing two decisions by the Federal Court of Appeal, the *Bundesgerichtshof*, from the 1980s,³⁰ he argues that German civil courts are not even under a duty to inform parties represented by

18. *See id.*

19. *See id.* at 829.

20. *See id.* at 832.

21. *Id.* at 835.

22. *See id.* at 838 & n.48.

23. *Id.* at 845.

24. *Id.* at 848.

25. *See generally* Allen, *A Plea*, *supra* note 3.

26. *See id.* at 715.

27. *See id.* at 717 n.64.

28. *Id.* at 723.

29. *See id.* at 727.

30. Bundesgerichtshof [hereinafter BGH] [Federal Supreme Court], in NEUE JURISTISCHE WOCHENSCHRIFT [LEGAL WEEKLY JOURNAL] [hereinafter NJW] 223 (1989); BGH, NJW 310 (1984).

attorneys of any factual or legal weaknesses in the evidence offered by them.³¹

With regard to section 138 ZPO³² Allen considers the aim of the German civil process as a search for a “formal truth,” because only what the parties advance may be made the basis of the judgment.³³ Allen then goes on to cite a study by Caesar-Wolf on the way judges dictate the evidence of witnesses to show that German judges may distort what the witness has said or even guide the witness to a statement which matches the judge’s view of the case.³⁴ Thus he concludes that with an active judge comes pre-judgment rather than disinterested appraisal of all the evidence.³⁵

As to rules of evidence Allen points to sections 383 and 429 ZPO, which he claims contain (too) many testimonial privileges and hinder discovery of written evidence in the hands of third persons.³⁶ On a counter-point to Langbein’s praise of the German loser pays system and its incentives for settlements Allen stresses the fact that ninety percent of all American civil cases end in a settlement too.³⁷

As to the use of experts by the German courts, Allen thinks that they can be “secret judges” and that “courts are reluctant to call experts because calling experts undermines the judge’s authority.”³⁸ Allen also complains that judges often use stereotype phrases when deciding whether they want to follow an expert’s opinion or not.³⁹

III. THE ARGUMENTS CONSIDERED

In order to look at the points put forward by Allen and Langbein, I feel it is helpful to describe in outline the way in which civil trials work in the German courts and add some insights from practical experience at those points mentioned by Allen and Langbein. Some of the questions concerning Allen and Langbein will be answered here by merely looking at the theory of German civil procedure. I should stress, however, that as with any area of the law all over the world, there are numerous exceptions and qualifications to the basic rules I am going to discuss. In order to keep it comprehensible I will not go

31. Allen, *A Plea*, *supra* note 3, at 724.

32. Zivilprozeßordnung [hereinafter ZPO] [Code of Civil Procedure].

33. Allen, *A Plea*, *supra* note 3, at 725.

34. *Id.* at 727-28.

35. *Id.* at 729.

36. *Id.* at 731-33.

37. *Id.* at 711-12.

38. *Id.* at 738-40.

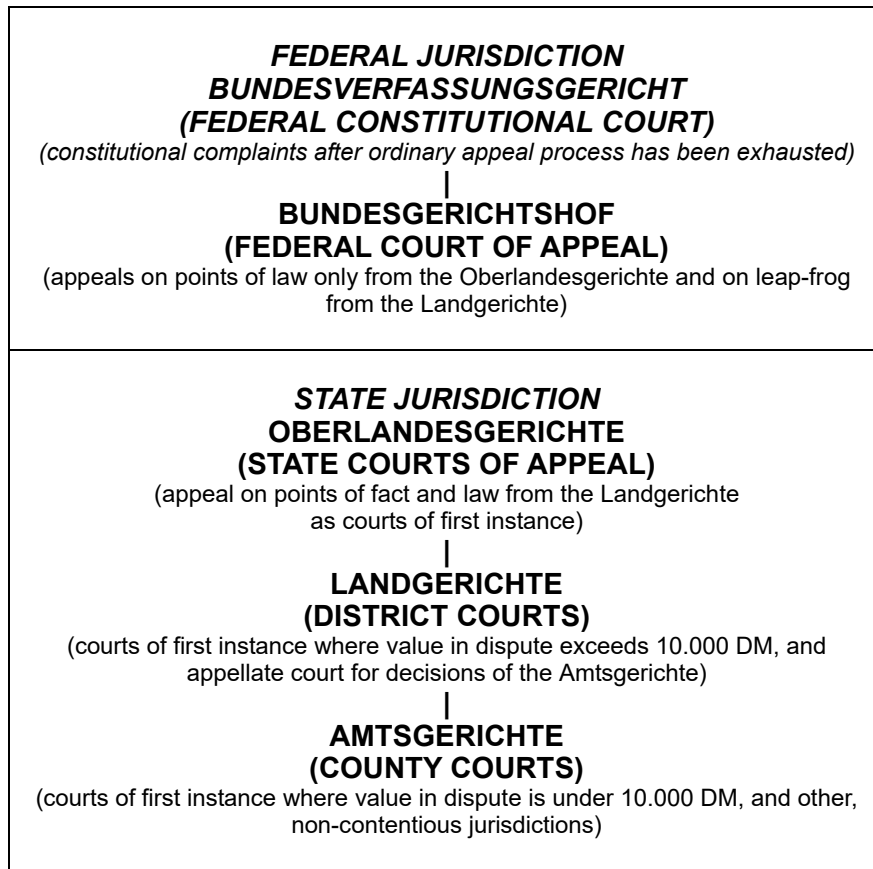
39. *Id.*

into each and every one of the possible ramifications; otherwise, this Article would turn into a textbook of German civil procedure.

A. Court Hierarchy

First of all, one needs to understand a bit about the court hierarchy. The following diagram shows the civil courts structure including appeals ⁴⁰ (without family courts) starting from the top downwards, which is different from the criminal courts' hierarchy within the ordinary jurisdiction.

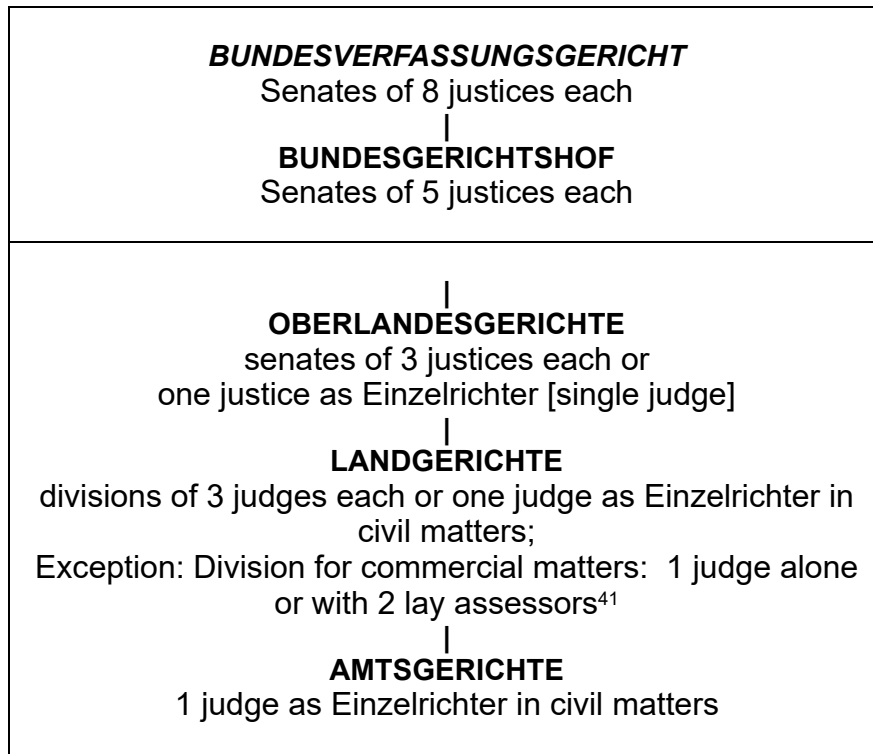
Figure 1: Court hierarchy of the ordinary jurisdiction



40. The diagram only shows appeals against judgments which end the instance; there is a different appeals structure for interlocutory and preliminary issues not shown here.

The courts sit as follows:

Figure 2: Staffing of the civil courts of ordinary jurisdiction



It should be noted that there is no federal jurisdiction of first instance. The jurisdiction of the courts of first instance is mainly established by the value in dispute, although some cases may go straight to the Landgericht regardless of this value, for example, cases involving negligence by the state, counties or towns in the maintenance of roads and public places. This may vary to some extent from state to state. Appeals are restricted according to values in dispute, too. The decision of an Amtsgericht or Landgericht as courts of first instance may not be appealed on law or fact unless the claim denied to one of the parties exceeds 1.500 DM. The judgment of an Oberlandesgericht or Landgericht may only be appealed on points of law to the Federal Court of Appeal as of right if that value exceeds 60.000 DM; in all other cases leave to appeal must be granted. There is no appeal

41. To this extent there is a lay element in civil procedure, but generally *Langbein* is right that there is no jury.

against the judgments of the Landgerichte as appellate courts, except the constitutional complaint, which is not really an appeal within the ordinary jurisdiction.

B. Instituting Proceedings

Trials begin either at the Amtsgericht or Landgericht level. For cases up to a value of DM 10.000 the parties do not normally need the services of a lawyer as mandatory representation by attorneys is only prescribed from the Landgericht upwards.⁴²

If the case starts in one of two ways at the Amtsgericht, it may begin by a so-called "*Mahnbescheid*," which may be to an amount over DM 10.000. This is a simplified form of procedure where the plaintiff applies for a kind of summary judgment without any examination of the merits of the case by the court. This form of trial is handled by a judicial clerk (*Rechtspfleger*), but not normally by a judge. The defendant has the right to object to this kind of proceeding and the case will then be sent to the court of the respective jurisdiction, i.e. if the value is over DM 10.000 the case will go up to the Landgericht and be tried by one or three judges. If the defendant does not object, the court will then—again without examination of the merits—issue an enforceable copy of the *Mahnbescheid*, the so-called "*Vollstreckungsbescheid*," which is similar to a default judgment and subject to an objection, too. However, this copy has the same effect as a first judicial default judgment (*Versäumnisurteil*), which means that the plaintiff may already start recovering on any claim stated on the copy, and the defendant usually may only stop the enforcement by providing security. The case must then be listed for a hearing by the appropriate court as after an objection to the *Mahnbescheid*. The plaintiff will subsequently be asked to give better particulars of his case and name the evidence. From this stage on the procedure is the same as after a first judicial default judgment in a formally filed action.

The second way⁴³ of initiating civil proceedings is by formal action in the court of the proper jurisdiction. This action must comply with certain formal requirements in order to be served on the

42. There are some exceptions for family matters which do not concern us here.

43. There is also the possibility of an early oral hearing (so-called "*früher erster Termin*"), which is used if the case appears to be clear-cut and best resolved by summoning the parties immediately without lengthy, written pre-trial pleadings. The court will in such a case set a short period for the defendant to reply to the claim or to name any defenses and evidence he may deem important. This procedure is not frequently used at the Landgericht level, because cases there tend to be more complicated.

defendant. The defendant must reply within a period of two weeks whether he wants to defend the case or if he admits the plaintiff's claim. If he does not reply, a first judicial default judgment will then be entered against him, provided that the facts stated by the plaintiff justify the claim. If they do not, the case may be summarily dismissed according to the letter of the law, although some case law and commentators suggest that the court must at least give the plaintiff a warning before dismissing the case, and some even require the court to list the case for a hearing, which was the common practice in our court. The dismissing judgment may only be appealed to the next instance. If the court enters a first default judgment for the plaintiff, the defendant may choose if he wants to object within two weeks' time. If he does not do so the judgment becomes final. If he does and there are no technical defects⁴⁴ in his objection, the case will be listed for another hearing and oral argument. Should the defendant fail to appear in this hearing, the court at the motion of the plaintiff will enter a second default judgment which is only appealable on very narrow grounds to the next instance.

In case the defendant gives notice of his intention to defend the claim, he must then within a period set by the court state his version of the case and adduce the relevant evidence. It must be noted that no party is required to supply affidavits or pre-trial statements to support its position. There is nothing like the pre-trial discovery rules in the United States. The court decides later which witnesses or experts to call, etc., after having found "the jugular of the case." The plaintiff usually is asked to reply to the defense case and the defendant may make additional comments to that reply before a hearing is scheduled.

C. Court's Duty to Notify Parties of Defects in Their Pleadings

According to section 139 ZPO, the court must at all stages of the proceedings give notice to the parties if it considers their presentation of the case defective in crucial points and give them opportunity to mend those defects. It may do so before the hearing or in the hearing itself. It will choose the latter if there is a likelihood that a settlement can be "engineered" with the parties present. The parties, on the other hand, are under an obligation to present their case as fully and speedily as possible. If they do not fulfil this requirement and present evidence too late, their case may be dismissed by preclusion of evidence, as far as the precluded evidence is important for the case.

44. If the objection is made out of time or has other defects it will be dismissed summarily without a hearing. The defendant may only appeal the decision to the next instance.

Allen cites two cases by the *Bundesgerichtshof* to show that this duty does not apply to parties represented by attorneys. Although this was generally true at the time those decisions were published, the appellate courts⁴⁵ have drastically tightened their grip of judicial review over the lower courts in more recent years. The *Bundesgerichtshof* itself has held in 1993⁴⁶ that section 139 ZPO applies in principle to represented and unrepresented parties alike. The question now is only which degree of care⁴⁷ an attorney may expect on the side of the judge as compared to an unrepresented litigant. The leading commentators also stress this fact.⁴⁸

Generally I think I can say without unduly generalizing and exaggerating that the judge must now notify the lawyer of *any* defects of the pleadings *and* tell him more or less explicitly how to mend them. This leaves the obvious question who does the lawyers' work.⁴⁹ Failure to give sufficient warnings will result in reversal and remand because of grave procedural error on appeal by the aggrieved party. In practice, this is the real background of the whole matter: The ZPO allows the appellate courts to reverse and send back a case to the court of first instance if a grave procedural error has occurred without having to look at the merits of the case. In my experience the appellate court of our state has used this power widely, some may even say excessively. In the hands of a certain kind of judge the power of reversal for procedural error is a wonderful tool of clearing one's own docket at the expense of the lower courts and the parties. Just how far this can go is exemplified by the following—true—*anecdote*:

A judge at a Landgericht had heard a crucial witness for the plaintiff's case and that witness testified that he could not say anything about the case and did not know why he had been summoned in the first place. The judge

45. Oberlandesgericht [hereinafter OLG] [Trial Court for Selected Criminal Matters and Court of Appeals] Frankfurt am Main, *Entscheidungssammlung der Oberlandesgerichte in Zivilsachen* [OLGZ] 77, 426 (1981); *see also* OLG Hamm, *Rechtsprechungsreport Zivilrecht* [hereinafter NJW-RR] 957 (1995); OLG Schleswig, NJW 3146 (1986).

46. BGH, *Monatsschrift für Deutsches Recht* 1993, 469, 470; *see also* BGH, *Monatsschrift für Deutsches Recht* 1990, 1102.

47. *See* BGH, NJW-RR 1990, 1243; *see also* Bayerischer Verfassungsgerichtshof [hereinafter Bay VGh]; NJW 1992, 1094.

48. STEIN & JONAS, *KOMMENTAR ZUR ZIVILPROZEBORDNUNG* [COMMENTARY TO CIVIL PROCEDURE] § 139, para. 6 (21st ed. 1993); *see also* MÜNCHENER KOMMENTAR ZUR ZIVILPROZEBORDNUNG § 139, paras. 11-14 (1st ed. 1992); ZÖLLER, *ZIVILPROZEBORDNUNG* § 139, para. 13 (20th ed. 1996); BAUMBACH ET AL., *ZIVILPROZEBORDNUNG* § 139, para 46 (54th ed. 1996).

49. *See, e.g.,* Schneider, *Entlastung der Gerichte-eine Sisyphusarbeit*, in *MONATSSCHRIFT FÜR DEUTSCHES RECHT* 865-69 (1996); *see also* Michael Bohlander, *Der Richter als Störfaktor*, in *MONATSSCHRIFT FÜR DEUTSCHES RECHT* 1093, 1093-96 (1996).

recorded this, excused the witness and dismissed the action. On appeal by the plaintiff the appellate court reversed on the grounds of grave procedural error because the judge should have asked the witness again and more thoroughly if he really did not know anything!

Cases of this sort understandably cause a lot of resentment among judges of the lower courts.

D. Parties' Duty to Adduce Facts and Evidence

It cannot, however, be stressed enough that apart from the court's duty to give notice of defects it is the parties' duty to state the exact facts of their respective versions of the case and to nominate witnesses or other evidence for each disputed fact. It is true that a court may of its own motion look at public documents and carry out a judicial inspection of any piece of evidence or the scene of the accident etc. The reality of German civil procedure is, however, that almost always the parties will be ordered to adduce even those documents and pieces of evidence, and if they do not comply within the given time they run the risk that the court will not look at the evidence at all if that would seriously delay the case and thus impair the other side's justified interests. If a party's pre-trial pleadings do not mention such a document or give rise to the obvious question whether there could be such a document or piece of evidence, the court as a rule will almost never start "digging" on its own. In fact, this might be considered as a sign of bias and lead to a motion for disqualification of the judge.

It is here where the main responsibility of the attorneys lies, not so much in guiding the court on the law. In fact, German procedure does not require the parties or their attorneys to say anything about the law at all. German procedure goes by the principle of "*da mihi factum, dabo tibi ius*"—"give me the facts and I will give you the law."

E. The Role of the Lawyer

I think this is the place to say something about the role of the lawyer and his relationship to the judge. Langbein is wrong from my point of view, after what I have just said, if he thinks that the lawyers are the ones who guide the judge as to "cogent lines of inquiry." In fact, in the majority of the cases it is exactly the other way round.

On this point Allen is right when he says that a vast percentage of attorneys are intellectually unable to conduct the case without helpful comments from the judge. There are, of course, numerous

exceptions, for example in big firms with highly trained litigation departments, but these tend to be centered in the big cities where the corporate clients pay large fees. Those firms also often tend to do only non-forensic work and do not bother with the “dirty business” of litigation and court appearances.

On the other hand, I agree with Langbein when he says that attorneys do not normally conduct searches for evidence unknown to the client, but that also depends upon the case. If the case is important enough and pays well, then the lawyer might also be prepared to do some legwork and get down to the nitty-gritty of the investigation of evidence. However, in my experience as a judge it has not happened even once. Lawyers tend to rely on the premise that the court will tell them if it needs further evidence or arguments to decide the case. If it does, they will mostly ask the client to start looking. I do not agree that such a search would be unethical as long as the lawyer did not try to influence the witnesses or tamper with the evidence.

F. *The Hearing*

If the court is satisfied that the parties have had ample opportunity to present their case it will set a date for the hearing. The law provides that the case should be dealt with in only one hearing if at all possible, Langbein is therefore wrong if he calls German civil procedure episodic in its approach. This is, in theory, underlined by the provisions on preclusion of evidence, to which I shall turn later.

The court should summon the necessary witnesses and experts to this hearing and allow enough time so that their evidence may be heard exhaustively. It is clear that in some cases which are very complex there may be dozens of crucial witnesses etc. who simply cannot all be heard in one hearing. The judge will then start with the most important ones, e.g., those whose testimony goes to the basis of the claim rather than to its amount etc. and save the others for another hearing.

G. *Finding the Jugular*

I have now arrived at the question of how the court selects the relevant evidence, i.e., how the *jugular* is found. This depends upon the burden of proof originating from the substantive civil law. The rule is that every party must *offer* the evidence and eventually *prove* all the facts which are necessary to justify its claim or defense, *unless* the other party does not dispute a fact or set of facts; the silence of a

party to a certain allegation is considered to mean that a fact is not disputed. Let us look at a very simple example:

The plaintiff claims damages for a road accident. He contends that the defendant violated his right of way at a junction and crashed into his brand-new Mercedes, thereby causing repair costs of DM 25.000. The defendant without offering evidence disputes the fact that he drove the car, that the plaintiff had the right of way, that the Mercedes was the property of the plaintiff and the actual amount of damages.

The plaintiff then offers witnesses for the fact that the defendant was in fact driving, and that the car was his property, but fails to provide a witness or experts for the amount of damages.

The court will not summon any witnesses at all. The plaintiff's case will be dismissed in the hearing—on the merits, not by summary judgment!—without any evidence being heard. As the amount of damages is for the plaintiff to prove, the defendant need not nominate any witnesses if he thinks that the plaintiff's case is weak. (This is, of course, risky and the defense almost always nominates rebuttal evidence.) The court could on its own motion, e.g., inspect the junction, yet it is for the plaintiff to prove the basis of the claim and its amount. Thus it is completely irrelevant if he can prove that the defendant was in fact driving and that the car belonged to the plaintiff and that he had the right of way, because even if those facts were proven, the proof for the actual amount of damages would still be lacking.

The same would apply if the plaintiff were to name a witness for the amount of damages at the date of the hearing or such a short time before it that the witness could no longer be summoned in time. The court could preclude this evidence as being tendered too late unless the plaintiff brought the witness to the court and the case would not suffer any significant delay by hearing him.

H. Preclusion of Evidence

At this point I should say something about the exclusion or preclusion of late arguments or evidence. Neither Allen nor Langbein have, as far as I could see, said anything on the matter of evidence which is tendered too late and thus likely to delay the case. The main provision in question is section 296 ZPO. In theory it speaks against Langbein's assessment of the German trial as being episodic in nature; however, the appellate courts have watered down the stringency of the law considerably. What does section 296 ZPO say?

The section is the counterpart of the parties' duty to present their case as completely and speedily as possible. Evidence which is tendered out of certain time limits or runs afoul of the above-mentioned duty may be excluded from the trial at first instance, and in

consequence (see section 528 III ZPO) remains excluded on appeal, too.

Section 296 ZPO presents three alternatives:

Section 296 I ZPO states that evidence or other means of attack or defense must not normally be admitted if they are brought outside the time limits of sections 273 II Nr. 1 ZPO (orders for the preparation of the hearing), 275 I 1, III and IV, 277 ZPO (when the judge orders the defendant to reply to the action before an early hearing, or orders the plaintiff to reply to the defense in the hearing), 276 I 2 and III, 277 ZPO (same order as section 275 ZPO in the written pre-trial pleadings procedure without an early hearing). Only in exceptional circumstances may new evidence be admitted, i.e., if the party has a sufficient excuse or the case is not delayed by admitting the new evidence.

Section 296 II ZPO states that evidence brought in violation of section 282 I and II ZPO, i.e., the general provisions on the duty of the parties to state their case as fully and speedily as possible and to allow the other side enough time to prepare their answer to any arguments brought forward, may be excluded if in the court's free discretion it would delay the trial and the late introduction of the evidence is owed to gross negligence on the side of the party bringing it.

Section 296 III ZPO excludes any late motion as to the admissibility of the action (e.g. jurisdiction, formal defects of the action, locus standi etc.) to the extent that the defendant may waive those requirements (he cannot, e.g., waive some exclusive territorial jurisdictions, etc.), unless the defendant has a sufficient excuse for the delay.

This may all look rather impressive and make an outsider think that German courts have sufficient powers to make the parties present their case without undue delay. However, this impression is wrong. Although section 296 ZPO and the other relevant provisions on preclusion do not contain any explicit reference to this, the appellate courts have restricted the exclusionary power with the argument that a judge may only exclude evidence if he has given the parties every necessary notice about defects in their pleadings and has on his behalf tried everything within reason to compensate for the delay caused. What is necessary and within reason depends on the practice of each appellate circuit and of the *Bundesgerichtshof*, and the requirements put up by those courts are very strict indeed, almost up to the point where—as German civil judges tend to complain sometimes—the

inquisitorial approach of the criminal trial is adapted to the basically adversarial civil procedure.

It is therefore common knowledge amongst German civil judges that to rely on section 296 ZPO in order to decide a case which is dragging its feet is a risky exercise at best and will almost certainly lead to additional work. The unjustified exclusion of evidence is usually a grave procedural error and thus results almost invariably in reversal and remand of the case to the lower court. Because of this, German civil trials have *in practice* taken on an episodic character as the majority of judges have lost the nerve, so to speak, to try and enforce the duty of complete and speedy pleadings and more or less let the case roll along as long as the parties wish to adduce new arguments or evidence.

I. Admissibility of Evidence

A few words should be said about the problem of whether as Langbein sees it, questions that go to admissibility of evidence under American law go to weight and credibility under our system. The problem is that the Code of Civil Procedure, unlike the law on criminal procedure, does not say anything about which kinds of evidence are generally admissible and which are not. There are some specific provisions concerning special modes of trial, but they do not concern us here.

It is certainly true that the German law does not know of a rule that would come near the Anglo-American aversion to hearsay. In this respect Langbein is right that a court may listen to a hearsay witness, but must be careful as to whether the testimony may form a solid basis for the judgment. The general position would appear to be that any kind of evidence may be looked at, regardless of how it was obtained, unless this would violate fundamental civil liberties of third persons.⁵⁰ Thus a polygraph could not be used,⁵¹ and any statement obtained by such methods would be inadmissible as this would violate article 1 of the Basic Law. Likewise, evidence obtained by going “wired” to a meeting with the opponent or recording a private (telephone) conversation would be a likely candidate for exclusion,⁵² unless the party relying on the recording could show an overriding necessity to use this evidence.⁵³ There are some other examples

50. See KURT SCHELLHAMMER, ZIVILPROZESS [CIVIL PROCEDURE] 227 (7th ed. 1996).

51. See RAINER OBERHEIM, ZIVILPROZESSRECHT FÜR REFERENDARE 133 (3d ed. 1997).

52. Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], NJW 891 (1973); see also BGH, NJW 277 (1982).

53. BverfG, *supra* note 52; see also BGH, in NJW 2289 (1994).

among the published decisions which are mostly variations on the theme of a violation of privacy and other fundamental constitutional rights.⁵⁴

It is certainly arguable that German law may contain too many testimonial privileges, as *Allen* claims, but that is a fundamental problem of weighing the different interests involved in a trial. I cannot, therefore, give cogent reasons why *Allen*'s opinion should be wrong, but I do not think that this was one of his main points against the German system anyway.

J. Judge's Case Summary and Settlement Negotiations

If both parties have offered sufficient evidence for all necessary facts, the judge will order a date for the trial and have the witnesses summoned. After each party has made its formal application—which is usually done by referring to the pre-trial pleadings—the judge will summarize the case as he sees it based on what the parties have written so far, or at least give an overview of the decisive points. He will then usually⁵⁵ ask the parties if there is the possibility of a settlement short of judgment and more often than not provide them with a rough proposal of how the settlement should be drafted from his point of view. This is often a very helpful way of handling the case, especially if the taking of the evidence would be difficult or cumbersome and take very long, keeping the parties and their attorneys busy on just one case for a long and thus hardly lucrative period of time. A lot depends here on the judge's ability to negotiate between differing standpoints. Another incentive for the lawyers is that by agreeing to a settlement they will have earned their fee without having to go through the evidence, which would only trigger the same fee but entail much more work. This prospect often serves as a sound foundation for persuading their clients to settle short of judgment, although sometimes in very big cases there are settlements even after the evidence has been heard, for example in order to avoid an even lengthier appeal.

I also think it is less the loser pays system which can be used to engineer settlements, but rather the general economic considerations of the parties of having to wait a long time for their money if the trial goes according to the book without having the security that they will carry off a complete victory. Costs are divided according to the quota

54. See *Schellhammer*, *supra* note 50; see also *supra* text accompanying notes 46-51.

55. See § 279 I 1 ZPO (The judge is required by law to try to get the parties to settle, though this always depends on the nature of the case.).

of success and failure to prove one's case. For example, if the plaintiff claims DM 10,000, but can only prove that he is entitled to DM 5,000, he will have to bear half of the costs of the trial including the attorney fees of the other party, the other half being paid by the defendant.

K. *Sequence of Evidence*

If there is no settlement the judge will then order the sequence of the evidence. This normally means that evidence which goes to the basis of a claim comes before evidence for the amount, e.g., of damages. Thus in our little example of the road accident the judge would first hear the plaintiff's witnesses for the events that led to the accident and its exact circumstances. If those witnesses already failed to satisfy the judge that the facts alleged by the plaintiff might be true, he would dismiss the case without hearing any rebuttal evidence from the defendant's side at all. Otherwise he would then go on to hear the defense witnesses and after that he would have to decide whether he believes that there is a basis for a claim. If so, he will hear the evidence, for example, of contributory negligence of the plaintiff and subsequently of the amount of damages, etc.

It is often at this stage that expert opinions come in. But before I turn to that, a brief excursion again on "finding the jugular": This might be seen as a point which supports Allen's argument, that after all in some cases the court will not know the jugular of the case in advance, but only after all the evidence has been heard. Yet I think that this lies somewhat beside the point: Because the court knows which evidence is necessary in order to prove or rebut the claim, it will only call the relevant witnesses and hear the relevant evidence. The judge has to know the jugular before calling the evidence—otherwise he will be wasting the parties' and the court's time. It is a truism that the judge will not know on what to base his decision until after he has heard all the *relevant* evidence, and that consequently the facts which form the jugular may indeed change. All I am saying is that it is the *ex ante* view of the jugular which decides which evidence is looked at to begin with.

L. *Experts*

Coming back to experts: It may, however, be necessary to start with an expert right away, for example, if the facts of the case are not disputed except the amount of damages, or in a case of medical negligence. The court will then make an order appointing an expert,

who is generally publicly known for his field of expertise, choosing from special lists which are made available to the judges by the Chambers of Commerce or other organizations.

Experts usually prepare their findings in a written report and are only exceptionally summoned to appear in person at the following hearing. It must be noted that in Germany and contrary to the American perception experts are *not* witnesses, but court-appointed aides of the judge in finding his decision. This may explain the difficulties American lawyers have with the concept of a court-appointed expert. The German system of court-appointed experts is based on the assumption that an expert who has been appointed by a neutral tribunal rather than by one of the parties will not easily take a one-sided and biased view of the facts, because he is responsible to the court and subject to forfeiture of his expenses and possibly contempt proceedings if he can be proven not to have been neutral and detached in his findings. The expert is, however, paid for by the party whose contention he is supposed to prove according to the burden of proof. That party has to make an advance down-payment to the court who formally reimburses the expert, and if the expert does prove the alleged facts, the successful party may claim his expenses from the loser. Yet the party has no influence over whom the judge will appoint. (The German law also knows *expert witnesses*—they are not court-appointed but are normal witnesses who testify to facts which only their expertise has allowed them to notice, usually before the case ever came to court. Unless the parties name them and offer them in evidence, the court will not take notice of what they may have to say.)

The expert is appointed by court order and the parties are usually asked to suggest suitable persons or even agree on one, which very often they cannot. The parties may appeal the choice of the judge and request that the expert be removed from the case or that the forfeiture of expenses be ordered if the expert's work is not satisfactory, if he lacks the necessary expertise or if there is undue delay in the investigation process, etc. They may also move for a second expert to be appointed. Whether the court grants these motions is within the discretion of the judge, but refusal may in severe cases provide a ground for appeal.

German judges do quite frequently appoint experts, although this depends on the nature of the case. If you have a big building construction case with dozens or even hundreds of allegations of faulty workmanship by the contractors and damages rising into the millions you are quite prepared as a judge to have an expert look at

the whole project because you yourself lack the technical knowledge and the time to examine the points put forward. The same applies to medical cases of all sorts.

I have never felt that I was giving away my power to decide the case, but I simply see the expert as somebody whose task it is to help me evaluate a certain set of facts where I lack the necessary knowledge. If the expert's report did not persuade the judge or was unintelligible for a layman in these matters he would not hesitate to let him do it again or maybe even get another expert. I therefore feel that the whole preoccupation about experts replacing the judge is more a matter of legal theory than practice. After all, what would be the alternative? Make all judges take courses in architectural design, static calculations, etc., or have them study medicine in order to be allowed to preside over construction or medical negligence cases?

M. The Status of the Expert in Germany and the United States Compared

If the German system is compared to the jury system and the expert witness concept as under American law I really do feel that it might have some advantages. German judges obtain at least some kind of familiarity with certain often recurring problems and thus become more and more able to scrutinize the experts' reports. Jurors as triers of fact in the American system do not gain such an experience unless they bring it into the trial because of their personal and private vocational training.

There is something to be said for having a neutral expert not selected by the parties which means that there is less likelihood of bias. Because the sheer number of cases requiring expert opinions makes it necessary that many different experts are appointed for the same kind of investigations, a German judge gets a fairly accurate overview of the level of knowledge and abilities of presentation of different experts and can thus in future cases make an informed choice as to which expert is best suited to look at the facts of a particular case. Experts very often make quite a substantial part of their living on court-appointed work and have thus every incentive to perform impeccably, lest the judge be disappointed with them and refuse to appoint them in future cases.

N. Witnesses

Witnesses are questioned first by the presiding judge and then by the other judges, if any are sitting. Only then are the parties and their

attorneys allowed to interrogate the witnesses, starting with the side who nominated them. Abusive questioning can be stopped by the judge, but German judges do not have the power to hold attorneys in contempt for anything they do when acting in the trial. They may hold the parties in contempt, but the parties are mostly unaware of what is going on anyway, and thus leave the talking to their lawyers. There is no formal distinction between evidence-in-chief and cross-examination but every side may generally ask as many questions as they like and at whatever time they like, subject to the judge's direction as to who has the floor at the time. If the judge's preparation of the hearing is adequate, there will be very few questions from the lawyers as the judge will have asked all the important ones.

O. Recording the Witness Statement

The witness should be encouraged first to give a coherent account of the facts as he remembers them, before he is asked specific questions. Section 160 III Nr. 4 ZPO orders the court to record the statements of the witnesses and this should, of course, be done as verbatim as possible, as long as the literal recording is pertinent to the case. Very often witnesses cannot give a coherent account of their own and therefore must be prodded by specific questioning, whilst others ramble on and on, telling the court a myriad of things which are insignificant for the solution of the case. The latter must be "reined in," so to speak, and asked to keep to the important facts. To save witnesses from embarrassment, judges often polish their wording, trying not to let the witnesses feel their intellectual inadequacy or lack of education, and to get an intelligible account into the transcript. This is, of course, questionable but harmless as long as the polished wording does not lead to a different meaning of the record. To safeguard against such dangers the law provides that the recorded statement must be read or played back to the witness and the parties who may then suggest changes in the wording. If the statement is dictated on tape recorder by the judge in the presence of the parties—which is now the rule at the *Amtsgericht* and *Landgericht* level—they may waive this right and usually do so. The transcript of each hearing is sent to the parties or their attorneys so they can also move for alterations to be made after the hearing.

P. The Judgment

After all the evidence has been heard the parties will restate or alter their formal motions as the case may be. If the case is clear-cut,

the judge can pass judgment at once, but usually he will reserve judgment, which must then normally be passed within a period of three weeks. The judgment has to contain the facts considered by the judge to be proven or unproven, as well as main legal reasons for the decision so that the parties may decide if they want to appeal the decision. Judgments at the Landgericht level thus sometimes run into dozens of pages.

Q. Appeals

As I have said at the beginning, appeal lies as of right only where the matter in dispute exceeds certain amounts. The judgment of an Amtsgericht or a Landgericht may be appealed on fact and law, the decision of a Landgericht also by leap-frog appeal on points of law only. The appellate court is not bound by what the lower court has stated and may look afresh at all the evidence if it so chooses, although usually this will be restricted to new evidence. If the appeal is on points of law only it is either made by way of case stated and only the application of the substantial law is reviewed, or procedural errors are alleged and the appellate court may send the case back to the lower court if there are errors of a grave nature. On appeals pertaining only to points of law no evidence is allowed, except on facts pertaining to procedural errors.

Insofar as Langbein refers to the transcript of the trial at first instance being the basis of the appellate court's examination of the case, this is only partially true. It depends on the question whether the appeal is on points of fact and law (*Berufung*), or on law only (*Revision*):

For the *Berufung* this holds true in the case where no party contests the way the evidence has been recorded or what the witnesses have said, thus for all purposes arguing that the lower court has applied the law incorrectly to a correctly investigated set of facts. In all other cases, section 525 ZPO makes it clear that the appeal on fact and law is a completely new trial *de novo* within the scope of the appeal motions of the parties. Thus the transcript and the judgment are only the starting point for the appellate court. It may be forced to hear every witness anew if the parties, for example, allege that the trial judge has wrongfully concluded that the testimony of the witnesses was truthful and that it is necessary to observe the witnesses in person when they give their statements. Also, the appellant may have new facts about which he could not have previously asked the

witness, and the appeal court will thus not be able to preclude this evidence, and so on.

On appeal on points of law (*Revision*), section 561 ZPO provides that the appeal court may only look at the judgment of the lower court or at the transcript, notwithstanding that the parties may adduce other facts as to alleged procedural errors.

IV. SUMMARY

German civil procedure shows a marked difference between theory and practice, even compared to the practice of maybe thirty years ago. In theory, the parties and their lawyers are supposed to adduce the facts of the case and the evidence and to do this as speedily as possible. In practice, the judge must urge them to comply with time limits and to disclose all the facts and evidence the court needs for its decision. The appellate courts over time have tightened their control over first instance courts considerably and do now require judges to warn the parties of defects in the pleadings and state more or less explicitly how to mend them, regardless of whether they are represented by attorneys or appearing pro se. Failure to do so empowers the appellate court to reverse the judgment for grave procedural error without having to examine the merits of the case. For the same reason, the sanction of precluding evidence for failure to comply with the time limits or the general duty to expedite the case as much as possible has been all but abolished by the appellate courts.

The judge's role in pre-trial preparation and at the trial hearing is becoming more and more pro-active as a consequence of the above-mentioned attitude of the appellate courts. Judges play a significant role in reaching settlements short of judgment by trying to mediate between the positions of the parties. The role of the lawyers is mostly reduced to a controlling function with regard to the court's actions. The modern civil trial in Germany could no longer be carried out on the lawyers' responsibility alone.