ROK XV
2024
NUMER 4 (57)

POLSKI PROCES CYWILNY

K W A R T A L N I K
poświęcony zagadnieniom
wykładni i praktyce
prawa procesowego cywilnego

W numerze:

Wolters Kluwer

Indeks 27142X
ISSN 2082-1743
9 772082 174245 04
Cena 135 zł (w tym 8% VAT)

Za publikację naukową na łamach „Polskiego Procesu Cywilnego" Autor otrzymuje 70 pkt. (zgodnie z załącznikiem do komunikatu Ministra Nauki z 5.01.2024 r. w sprawie wykazu czasopism naukowych i recenzowanych materiałów z konferencji międzynarodowych, wydanego na podstawie art. 267 ust. 3 ustawy z 20.07.2018 r. – Prawo o szkolnictwie wyższym i nauce, Dz.U. z 2024 r. poz.1571).

Kwartalnik „Polski Proces Cywilny" jest ujęty w międzynarodowej bazie European Reference Index for the Humanities and Social Sciences (ERIH+).

Kwartalnik „Polski Proces Cywilny" jest indeksowany w bazie Scopus (Elsevier).

Wydawca
Towarzystwo Naukowe Procesualistów Cywilnych
ul. Grodzka 53, 31-001 Kraków
http://www.czasopisma.wolterskluwer.pl/polski-proces-cywilny

Wersją podstawową (referencyjną) czasopisma jest wersja papierowa.

ISSN 2082-1743

Wolters Kluwer Polska Sp. z o.o.
01-208 Warszawa, ul. Przyokopowa 33, www.wolterskluwer.pl
Dyrektor Działu Publikacji Periodycznych:
Klaudia Szawłowska, klaudia.szawlowska@wolterskluwer.com
Sekretariat: czasopisma@wolterskluwer.pl
Sprzedaż i prenumerata:
Ksiegarnia internetowa Wolters Kluwer Polska www.Profinfo.pl – tel. +48 732 122 863
lub infolinia 801 044 545, e-mail: PL-prenumerata@wolterskluwer.com
Ruch – tel. 22 693 70 00 lub 801 800 803, Kolporter – tel. 801 40 40 44,
GLM – tel. +48 504 914 773, Garmond – tel. 22 837 30 08

POLSKI PROCES CYWILNY

ARTYKUŁY I STUDIA

NA MARGINESIE ORZECZNICTWA

RECENZJE

Z ŻYCIA NAUKOWEGO PROCESUALISTÓW CYWILNYCH

POLISH CIVIL PROCEDURE

ARTICLES AND STUDIES

CASE LAW

REVIEWS

LIVES OF CIVIL PROCEDURE LAWYERS

Prof. habil. dr. Vytautas Nekrošius
Professor of the Department of Private Law, Faculty of Law, Vilnius University, Lithuania
ORCID: https://orcid.org/0000-0002-0869-8840
Contribution to the preparation of the article – 50%

Dr. Aleksandra Klich
Faculty of Law, Vilnius University, Lithuania
ORCID: https://orcid.org/0000-0002-2931-712X
Contribution to the preparation of the article – 50%

Standard of Proof in Lithuanian and Polish Civil Proceedings

Keywords: *standard of proof, evidence procedure, civil procedure, principle of truth, free evaluation of evidence*

1. Introduction

The standard of proof can be described as a certain degree of sufficiency of evidence and judicial certainty, as modelled by law, case law and jurisprudence, at which the trier of fact concludes that a disputed fact has been established or disproved. Consequently, it seems reasonable to assume that the level of belief that the adjudicating authority should have in order to accept a given fact as proven is crucial. This level is precisely referred to as the "standard of proof"[1].

The aim of the article is to examine the standard of proof in Polish and Lithuanian civil proceedings. The issue of the standard of proof in proceedings (whether civil, administrative or criminal) is one of the central themes, since the degree to which this standard is recognised in a given civil procedural law determines the answer to the question of whether the court's decision in a given case can be regarded as reasonable and fair. There is also no doubt that the standard of proof in civil proceedings may be shaped by the cultural and historical contexts of the two countries, which, in turn, may lead to significant differences in the approach to the validity of different types of evidence.

The standard of proof depends on more than one criterion, but what is most important here is the school of civil procedure (liberal or social one) on which the civil procedural law of a given State is based, since the objectives of civil procedural law and the law

[1] P. Rylski, *Stopień dowodu w postępowaniu cywilnym – zagadnienia podstawowe*, „Polski Proces Cywilny" 2016/3, p. 491.

of evidence depend on this. It seems impossible to create tools aimed at standardizing the assessment of the probative value of evidence gathered in a case. On the other hand, the freedom and sometimes discretion of the court to determine the degree of convincingness of the evidence of a given fact may foster the development of different practices in terms of the approach to admissibility and assessment of evidence, which may affect the fairness and efficiency of the judicial process.

The article analyses the standard of proof in Lithuanian and Polish civil procedure from a comparative and historical perspectives. It should be noted that neither Polish nor Lithuanian procedural laws directly provide for a legal concept of standard of proof, therefore the analysis of both jurisprudence and existing case law will be important for the realisation of the set task. The primary objective of the authors is to analyse the differences in the legal systems and rules of civil procedure, as well as investigate possible legislative reforms introduced in recent years, which may influence the concept of the standard of proof in both countries. It is also the intention of the authors to determine whether, despite the existence of similar formal standards related to the taking and evaluation of collected evidence, perceptible differences exist in the experience of the parties of the two models of civil trial. The analysis of the standards of evidence in Lithuania and Poland may lead to the identification of best practices from both systems, which can be used to improve the efficiency and fairness of civil proceedings. The effect of the analysis will be to identify problems, challenges and areas for improvement in the standards of proof in both legal systems, and to suggest potential reforms or improvements. At the same time, the results of the analysis can provide legal practitioners, particularly judges and attorneys, with valuable information on standards of proof in both countries.

2. The standard of proof from a historical perspective

Although Lithuania and Poland have the history of more than a century as common states, the regulation of judicial proceedings in both Lithuania and Poland was carried out independently, i.e. under the autonomous jurisdiction of each of the subjects of the common state. As regards contemporary civil procedure and one of its central themes, the issue of the standard of proof, it is worth taking a brief historical perspective on this issue, because, as Karl von Savigny (1779–1861), one of the fathers of the historical law school, said: the true meaning of law can only be known through history, since law is the result of history and is the outward expression of the spirit of a given nation[2]. Hence, let us briefly review the main developments in Lithuanian and Polish civil procedure in the context of evidence.

[2] W. Kunkel, M. Schermaier, *Roemische Rechtsgeschichte. 13 Auflage*, Boehlau 2001, p. 239–240.

2.1 The Republic of Lithuania

The first Lithuanian textbook on civil procedure (based on the Statute of the Third Republic of Lithuania) states that the law of civil procedure is a system of rules setting out the means of ascertaining the truth in a court case and the administration of justice[3]. The textbook also states that the function of a judge is to be independent and to resolve a dispute in accordance with the law, conscience and the evidence presented by the parties. It also provides that the adjudicating court may give advice to the parties[4]. The concept of truth in civil proceedings is directly linked to the standard of proof in a given legal system, as the degree of proof directly determines when a court hearing a case will be able to conclude that the facts in dispute have been established, and which of them can be regarded as established and which not. Sixteenth-century Lithuania is not particularly different from other European countries in this respect. The rule of the legal proof applies here, and the principle of the free evaluation of evidence and the equality of all evidence, which is generally accepted in the modern world, does not apply, or applies to a limited extent. Article LXXXI (81) of the Third Statute of the Grand Duchy of Lithuania states that a party, in proving his case, must prove it summoning three witnesses, who should be trustworthy and unsuspicious persons. And if a person does not have three witnesses, then, in the absence of a third, he must swear himself with two witnesses and so may win his case[5]. Thus, in the Third Statute, the problem of the standard of proof and the determination of the truth was solved by means of the legally established power of evidence (the principle of formal legal proof).

A major shift towards the modern concept of the standard of proof came in 1864 with the adoption of the Civil Procedure Law of the Russian Empire (CPL), which was based on the then cutting-edge French Code of Civil Procedure of 1804 and remained in force in Lithuania until the occupation of the Soviet Union in 1940. The CPL already moved from formal legal proof to the principle of free assessment of evidence, according to which court determines the weight of the evidence and whether or not it confirms or disproves the facts alleged by the parties[6]. Moreover, given that the purpose of the civil proceedings is to establish the substantive truth of the case, and that the judge is empowered, for that purpose, to put questions to the parties and to request explanations as to the facts relevant to the dispute[7], it can be argued that the solution to the problem of the standard of proof was also focused on establishing the substantive truth in the proceedings. The inter-war Lithuanian civil procedure followed the same approach. The only textbook on civil procedure at that time stated that the evidence in a case might not raise any doubt[8]. Thus, we can unambiguously conclude that prior to the Soviet occupation, Lithuanian civil procedure law consistently developed in the direction of social civil pro-

[3] A. Korowicki, *Proces cywilny litewski*, Vilnius 1826, p. 1.
[4] A. Korowicki, *Proces*..., p. 18.
[5] *Trečiasis Lietuvos Statutas; Lietuvos Didžiosios Kunigaikštystės institutas*; Vilnius 2023, p. 217–218.
[6] E. Waskowski, Kurs graždanskogo processa, Moscow 2016, p. 397.
[7] М.И. Тютрюмовъ, *Гражданский процессъ*, Yuriev 1925, p. 275.
[8] V. Mačys, *Civilinio proceso paskaitos*, Kaunas 1924, p. 209.

cedure, which was based on the establishment of substantive truth and the active role of the court in the case. Accordingly, the standard of proof could be defined as follows: when confirming or denying a circumstance relevant to the case, the court should not have doubts about it.

During the Soviet occupation, the question of the standard of proof in civil procedural law was not an issue at all, as the inquisitorial model of procedure prevailed, with an all-powerful court and its duty to establish the objective truth of the case[9].

After the restoration of Lithuania's independence, there was a very clear need to reform the law of civil procedure, as the existing Soviet model of procedure did not correspond at all to the changing economic and political realities of society. Describing the Austrian civil procedure reform of the late 19th century (1896), one of the main fathers of the reform, Minister of Justice F. Klein, stated that the aim of the reform was to change the way the participants in the proceedings perceived and approached the proceedings[10]. This is essentially the same task with regards to the new Code of Civil Procedure of the Republic of Lithuania (hereafter called the l.c.p.c.). It was necessary to move away from an inquisitorial process towards an adversarial one, in which a balance of power between the court and the parties was achieved. The standard of proof was one of the central issues in this situation, since the role of the court in the proceedings depended on it. The reform took place in two phases: the urgently needed amendments to the 1964 Soviet l.c.p.c. and the drafting of the new l.c.p.c. bill. A working group set up by the Minister of Justice to prepare the new l.c.p.c. started its work in 1996, and the Seimas of the Republic of Lithuania adopted the l.c.p.c. on 28 February 2002, entering into force on 1 January 2003[11].

The members of the working group on the l.c.p.c. unanimously agreed that the new Code should be drafted based on the ideas of social civil procedure. Among other things, this also means that the court takes a pro-active stance in the proceedings, based on substantive management of the proceedings.

2.2. The Republic of Poland

At the turn of the nineteenth and twentieth centuries, three different legal systems existed on the Polish soil, each applying different civil procedures. The Russian Civil Procedure Act of 1864 was in force in the central and eastern regions. The German Civil Procedure Act of 1877, updated in 1898, was in force in the western territories. In contrast, the Austrian procedural legislation of 1895–1896 was in force in the south, in Galicia, except for Spiš and Orava. Civil procedures in these areas were based on the French Code of Civil Procedure of 1806[12]. It is significant that only Russian civil proce-

[9] J. Žeruolis (ed.), *Tarybinė civilinio proceso teisė*, Vilnius 1983, p. 18.
[10] F. Klein, *Pro futuro*, Wien 1891, p. 7.
[11] Official Gazette, 2002, Nr. 36-1340.
[12] Z. Radwański, *Prawo cywilne i proces cywilny* [in:] *Historia państwa i prawa Polski*, ed. F. Ryszka, vol. 2, Warszawa 1968, p. 148.

dure contained a norm regulating the distribution of the burden of proof between the parties to the proceedings. According to Russian procedure, it was the plaintiff who had to prove its claim, and the defendant, raising objections against the plaintiff's claim, was obliged, for its part, to prove the basis of his allegations[13]. The 13th and 14th centuries saw the development of a trial model in which the proceedings were the same for both civil and criminal cases. The principle of proximity to evidence applied to the evidentiary procedure. This situation remained practically until the end of the First Republic of Poland[14]. The considerations concerning the formation of the rules of the burden of proof in the Polish civil litigation should be referred to the period after 1918. The rationale for this approach is that the Polish civil law and civil trial remained uncodified until the end of the existence of the Polish state[15]. The contemporary history of Polish civil procedure largely parallels the Lithuanian experience. The last century in Poland, full of fundamental political changes, resulted in the codification (1930[16]), then decodification (1950[17]) and recodification (1964[18]) of civil procedure[19]. An issue that was transformed in the Polish formation of the approach to the degree of proof was – like in Lithuania – the approach to the determination of truth. In this respect – as in Lithuania – the material truth and formal truth were defined.

After the First World War, when Poland regained its independence, the issues of unification of the Polish lands, torn apart by the Partitions (1772–95), and the restoration of Polish statehood became the matters of utmost importance. In the context of the then prevailing mosaic of legal systems, this was primarily a political issue[20]. From a historical point of view, it should be emphasised that Polish civil proceedings operated on the basis of the principle of formal truth under the Polish Code of Civil Procedure of 1930 (as amended in 1932), between 1930 and 1950. The then Article 250 § 1 of the d.c.p.c. (Decree-Law of President of the Republic of Poland of 29 November 1930) was the counterpart of the present Article 3 of the Civil Procedure Code as amended by the Act of 1 March 1996 (which entered into force on 1 July1996)[21]. In the former Code of Civil Procedure of 1932, the legislator did not formulate any regulation imposing an

[13] H. Dolecki, *Ciężar dowodu w polskim procesie cywilnym*, Warszawa 1998, p. 43.

[14] H. Dolecki, *Ciężar*..., p. 38–39.

[15] I. Adrych-Brzezińska, *2.2. Historia reguł ciężaru dowodu w prawie polskim* [in:] *Ciężar dowodu w prawie i procesie cywilnym*, LEX 2015.

[16] Decree-Law of President of the Republic of Poland of 29 November 1930 – The Code of Civil Procedure (uniform text – Dz.U. [Journal of Laws] 1932, No. 112, item 934), hereafter called the d.c.p.c.

[17] Act from 20 July 1950 amending the regulations of civil proceedings (uniform text – Dz.U. [Journal of Laws] 1950, No. 43, item 394).

[18] Act from 17 November 1964 the Code of Civil Procedure (Dz.U. [Journal of Laws] 1964, No. 43, item 269).

[19] A. Stawarska-Rippel [in:] A. Machnikowska, A. Stawarska-Rippel, *Fundamental principles in the views of the authors of the drafts of the first and second polish Codes of Civil Procedure – a comparative perspective*, "Comparative Law Review" 2016/21, p. 82.

[20] A. Lityński, *Pół wieku kodyfikacji prawa w Polsce (1919–1969). Zagadnienia wybrane*, Tychy 2001, p. 31.

[21] Dz.U. [Journal of Laws]1996 No. 45, item 189.

obligation on the adjudicating court to discover all relevant circumstances of the case and to clarify the actual content of the factual and legal relations. The 1932 Code of Civil Procedure even contained prohibitions on admitting documentary evidence and witness testimony if both parties opposed it (Articles 266 and 282 of the d.c.p.c.)[22].

After the Second World War, countries under the influence of the USSR had to change their legal systems. Poland, Hungary and Bulgaria, for example, began to revise their procedural law. The creation of a new legal system and the adoption of socialist patterns of civil procedure led to a significant, forced unification of procedural law in the people's democracies. This unification process took place very quickly. The beginnings of the assimilation of Soviet patterns into Polish judicial law can be traced back to the political events of 1948, but the debate over the nature of the degree of jurisdiction had suggested the need for a reconstruction of procedural law even before that politically important year[23]. The decodification of civil procedure in the People's Republic of Poland in 1950 consisted mainly of a change in the existing rules, including a shift away from the traditional view of civil proceedings as public (*ius publicum*) to a focus on the protection of private (civil) rights[24]. This was a landmark moment in the Polish civil procedure, as the principle of objective truth, which originated in the Second Republic, was introduced into civil procedure[25]. At that time, it was commonly stated in the legal literature that there was a break with the principles of bourgeois trial and formal truth in the "old" Code of Civil Procedure, following the establishment of the new regulation in the form of Article 236 of the Code of Civil Procedure of 1950, and that from now on the objective truth was to "reign" in civil trial – as a novelty known only to socialist civil procedures[26]. Pursuant to cited Article 236 of the Code of Civil Procedure of 1950, the court could admit evidence even not submitted by the parties and, if necessary, could also order appropriate investigations. Additionally, the court could, *ex officio*, carry out appropriate investigations to determine the assets and earnings of the parties in maintenance cases. This provision was intended to detect the so-called objective truth.

The draft of the new 1964 Code of Civil Procedure introduced in Article 3 a general obligation on the parties to tell the truth in a trial[27]. The duty to tell the truth and the possibility for the court to call evidence *ex officio* were maintained in the amendment of the Polish Code of Civil Procedure of 1 July 1966. However, the possibility to investigate was abolished. The obligation to comprehensively examine all relevant circumstances of the case and to clarify the actual content of factual and legal relations was also repe-

[22] K. Knoppek, *Zmierzch zasady prawdy obiektywnej w procesie cywilnym*, „Palestra" 2005/1–2, p. 9.

[23] A. Stawarska-Rippel, *Fundamental*..., p. 85–86.

[24] A. Stawarska-Rippel, *Fundamental*..., p. 108.

[25] A. Stawarska-Rippel, *Poznanie prawdy w procedurze cywilnej w świetle prac sekcji postępowania cywilnego Komisji Kodyfikacyjnej II RP*, „Z Dziejów Prawa" 2009/2, p. 130.

[26] J. Jodłowski, *Nowe drogi polskiego procesu cywilnego*, „Nowe Prawo" 1951/6, p. 5; M. Waligórski, *Gwarancje wykrycia prawdy w procesie cywilnym*, „Państwo i Prawo" 1953/8–9, p. 266–261; W. Siedlecki, *Ciężar dowodu w polskim procesie cywilnym*, „Państwo i Prawo" 1953/1, p. 63; Z. Resich, *Poznanie prawdy w procesie cywilnym*, Warszawa 1958, p. 23.

[27] A. Stawarska-Rippel, *Poznanie*..., p. 141.

aled[28]. It is thus possible to assume that this was the moment when the principle of the so-called formal truth prevailed over the principle of the so-called objective truth.

Currently, the legislator in Article 3 of the Polish Code of Civil Procedure (hereafter called the p.c.p.c)[29] obliges the parties and participants in the proceedings to perform procedural acts in accordance with good practice, as well as to give explanations as to the circumstances of the case truthfully and without concealing anything and to present evidence. The principle of truth established in the cited regulation is one of the fundamental principles of civil proceedings, although an approach to determine whether the implementation of this principle involves the achievement of the so-called material or formal truth is discernible.

Analysing the wording of Article 3 of p.c.p.c. it seems reasonable to assume that in the currently binding legal state this provision does not impose on the court an obligation to seek to discover the material truth regardless of the procedural activity of the parties. Neither does the cited regulation impose an obligation on the court to examine *ex officio* evidence aimed at clarifying circumstances significant for resolving the case. Such an obligation was imposed on the parties to the proceedings, and not on the court[30]. It is the parties to the proceedings who should care about clarifying all the disputed circumstances, which will aim at discovering the truth on the grounds of the pending court proceedings. As a consequence, it seems reasonable to assume that in Polish civil proceedings the prevailing view is that formal truth applies[31].

3. The standard of proof and establishing the truth in proceedings

The concept of standard of proof is sometimes equated with the degree of probability or the degree of judicial conviction. Neither in Lithuanian nor in Polish civil procedural law has the legislator chosen to construct a legal definition of this concept. It should be noted that in other legal systems there are much more elaborate conceptual tools on this issue. In Anglo-American law, it is the concept of standard of proof, in Germanic law it is *Beweismaß* (which in a literal translation can mean "measure of proof"), and in French law it is *degré de la preuve* ("degree of proof" understood as *critère de la preuve*[32]). Literally, "standard of proof" means an "evidence standard" or an "evidence

[28] A. Kallaus, *Konsekwencje prawne zmiany przepisu art. 3 w postępowaniu sądowym*, „Monitor Prawniczy" 1997/4, p. 139.

[29] Act of 17.11.1964. – Code of Civil Procedure (Dz.U. [Journal of Laws) 2023, item 550 as amended), hereafter the p.c.p.c.

[30] A. Zieliński [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. A. Zieliński, Warszawa 2014, p. 45.

[31] Ł. Błaszczak, *Zasady procesowe w postępowaniu cywilnym* [in:] *Postępowanie cywilne*, ed. E. Marszałkowska-Krześ, Warszawa 2011, p. 54; K. Knoppek, *Zmierzch*..., p. 9 et seq.

[32] The term is used by two international jurisdictions that work in French and English, the International Court of Justice and the European Court of Human Rights. ECtHR judgment of 28 February 2008, Saadi v. Italy, no. 37201/06, HUDOC, refers to the "standard of proof" (§ 122), but also to the "level of proof" (§ 122, § 140). The expression "standard of proof" appears in the ECtHR judgment of

norm". These are two expressions that are, in effect, too abstract to be accepted uncritically[33]. Constructing an unambiguous definition of the standard of proof appears to be difficult due to its complexity and multidimensionality.

The issue of the standard of proof is directly related to the question of which procedural model applies in a given State and what truth the proceedings seek to establish. If the liberal theory of procedure is followed, the court is limited to establishing the formal truth of the case. This means that the court hearing the case considers as established the fact which is more probable from the evidence presented by the parties in the case. Thus, in such legal systems, the standard of proof is the court's conviction by more than a 50% margin that a particular circumstance did or did not exist[34]. In countries that follow the social procedure model (the vast majority of continental European countries), the aim of the procedure is to establish the substantive truth of the case. To achieve this objective, the court hearing the case is given substantive powers of direction, which enable it to influence the conduct of the parties in the presentation of evidence in such a way as to ensure that the facts relevant to the case are revealed as fully as possible. In social civil proceedings, the standard of proof is probability, which is close to reality[35].

4. The Standard of Proof in Lithuanian and Polish Civil Proceedings

When talking about the standard of proof, it is impossible to ignore the issue concerning the free assessment of evidence. In the model of civil proceedings characterised by adversarialism, the principle of free assessment of evidence is a characteristic feature. The legislator, while imposing on the parties to the proceedings the obligation to fulfil the procedural burden of proof, at the same time grants the procedural body the freedom to assess the evidence gathered in the case. The lack of a hierarchy of means of evidence, as well as the failure to set standards and frameworks for the possible assessment of the procedural material, increases the importance of the judge's discretionary power, at the same time shifting to the procedural authority the obligation to obtain the appropriate degree of conviction enabling the issuance of a substantive decision.

The principle of free evaluation of evidence is regulated in Articles 233 of the Polish procedural law and 185 of the Lithuanian Code of Civil Procedure. Both recognise the necessity of performing a comprehensive consideration of the collected material, considering all the evidence carried out in the proceedings together with the circumstances sur-

30 une 2008, Gäfgen v. Germany, no. 22978/05, HUDOC, § 64 – for the sake of completeness, it should be noted that the reference to "level of proof" or "degree of proof" does not appear in Community law.

33 P. Kinsch, *Probabilité et certitude dans la preuve en justice*, "ACTES de la Section des Sciences Morales et Politiques" vol. XII, Luxembourg 2009, p. 70.

34 R. Wassermann, *Der soziale Zivilprozess*, Darmstadt 1978, p. 36.

35 H.W. Fasching, *Lehrbuch des oesterreichischen Zivilprozessrechts*, Wien 1990, p. 433; V. Nekrošius, *Koncentruotumo principas ir jo įgyvendinimo galimybės*, Vilnius 2002, p. 40.

rounding the taking of particular evidence[36]. The specific distinction of evidence indicates its peculiar importance, and the distinction makes it clear that the term "material" is to be understood as including not only evidence, but also the assertions of the parties and other-participants[37]. It is one means of implementing the principle of truth is the principle of free evaluation of evidence[38]. The principle of free assessment of evidence has been minimally formalised by requiring the court to comprehensively consider the material gathered. It is a significant mistake to equate the freedom of assessment with its arbitrariness. Indeed, the indicated issues constitute separate categories and should not be confused[39].

Undoubtedly, the prevention of arbitrariness of the judicial assessment is served by procedural solutions imposing obligations on the adjudicating court, i.e.: 1) to comprehensively consider the material gathered in the case; 2) to take into account all the evidence conducted in the proceedings; 3) to concretise the circumstances accompanying the conduct of individual pieces of evidence relevant for the assessment of their strength and credibility; 4) to indicate the unambiguous criterion of argumentation allowing for the verification of the assessment on the recognition of evidence (or its disqualification); 5) to indicate the factual basis for the decision, including the establishment of the facts which the court found to be proven, the evidence on which it relied and the reasons why it denied the credibility and evidentiary value of other evidence[40]. Consequently, it must be assumed that the framework for the free assessment of evidence is set directly by the regulations of civil procedural law and supported by the judge's life experience and the rules of logical thinking.

When analysing the principle of free assessment of evidence, while referring to the notion of the standard of proof, attention should be paid not only to the model of proceedings adopted by the legislator in terms of collecting trial material, but also to the permissible scope of activity of the court. The limits of the activity of the procedural body are set by granting the parties the power to dispose of the trial. Consequently, the court should not become excessively involved in the collection of trial material. In Polish civil proceedings, it is in vain to find solutions identical to Article 176 of the l.c.p.c., where the Lithuanian legislator explicitly refers to the court's conviction.

As a result, the degree of proof is mainly based on abstractly defined standards, which are intended to try to determine individually the degree of conviction of the trial authority as to the probative value of the actions or omissions taken. It is irrelevant at which stage of the judicial proceedings they were noticed. From the point of view of the merits

---

[36] Judgment of the Supreme Court of 17.11.1966, II CR 423/66, OSNPG 1967, no. 5–6, item 21; Judgment of the Supreme Court of 24.03.1999, I PKN 632/98, OSNAPiUS 2000, no. 10, item 382; Order of the Supreme Court of 11.07.2002, IV CKN 1218/00, LEX no. 80266; Order of the Supreme Court of 18.07.2002, IV CKN 1256/00, LEX no. 80267.

[37] Z. Resich, *Istota procesu cywilnego*, Warszawa 1985, p. 154.

[38] E. Waśkowski, *Zasady procesu cywilnego (Z powodu projektu Polskiej Procedury Cywilnej)*, „Rocznik Prawniczy Wileński" year IV, Vilnius 1930, p. 275, footnote no. 2.

[39] A. Klich, *Dowód z opinii biegłego w postępowaniu cywilnym. Biegły lekarz*, Warszawa 2016, p. 17.

[40] K. Flaga-Gieruszyńska [in:] *Kodeks postępowania cywilnego. Komentarz*, ed. A. Zieliński, Warszawa 2014, p. 472.

of the case, what is relevant is to determine the degree to which the trial authority attributes an act, fact or circumstance described in a clear, convincing, unequivocal, or satisfactory manner[41]. In the case of evidence, this means that the trial authority regards it as highly probable or significantly more likely than not to be true. As a result, equating *prima facie* probability with proof, although it may seem homogeneous in the colloquial sense, is in practice a significant misuse.

4.1. The Standard of Proof in Lithuanian Civil Proceedings

The explanatory memorandum to the new bill of the l.c.p.c., registered in the Seimas on 13 August 2001, states that the working group drafted the bill on the basis of the social model of civil procedure. Since the authors of the draft have chosen the social civil procedure model, one of its essential features is the active judge. That does not mean that the court is given unlimited powers. On the contrary, the will of the parties is decisive in determining the subject-matter of the dispute, but the court has the right to invite the parties to consider various matters: to arrange for representation, to submit additional evidence; in certain cases, to gather evidence on its own initiative in certain circumstances. The court's duty to ensure that the circumstances of the case are investigated as fully as possible is enshrined. An important innovation is that the court's obligation to establish the substantive truth of the case, i.e. to be satisfied or almost satisfied that the decision is in accordance with the facts of the case, is expressly established[42]. The bill of the l.c.p.c. submitted to the Seimas essentially establishes a standard of proof by stating that the purpose of proof is to satisfy the court fully or almost fully as to the existence or non-existence of the circumstances relevant to the case. Unfortunately, however, this wording has changed during the discussion of the bill to a more general and less clear one.

Article 176(1) of the current l.c.p.c. states that the purpose of fact-finding is to satisfy the court, based on an examination and evaluation of the evidence adduced in the case, as to the existence of certain facts relevant to the subject-matter of the dispute. Article 159(1) of the l.c.p.c., which requires the court to take the measures provided for in the l.c.p.c. to discover the essential facts of the case, is also relevant when interpreting the content of the provision. These two provisions are of primary importance in interpreting the content of the standard of proof in civil proceedings.

As already mentioned, the abandonment of the standard of proof in the l.c.p.c. bill has made the standard of proof less clear and has opened the door to various interpretations. The prevailing standard of proof in social civil procedure is that of the court's conviction as to the existence of the facts of the case, which leaves no doubt in the mind

[41] A. Klich, *Problematyka uprawdopodobnienia w prawie cywilnym procesowym – wybrane aspekty praktyczne* [in:] *O pojmowaniu prawa i prawoznawstwa. Profesorowi Stanisławowi Czepicie in memoriam*, ed. E. Cała-Wacinkiewicz, Z. Kuniewicz, B. Kanarek, Warszawa 2021, p. 178.

[42] E-Seimas, lrs.lt. Explanatory Memorandum on Draft Parts I-III of the Code of Civil Procedure of the Republic of Lithuania. No. IXP-926.

of any reasonable person as to the existence of a fact relevant to the case. It is generally accepted in case-law that such certainty is achieved in a situation when probability borders on certainty[43].

Unfortunately, Lithuanian case law on the standard of proof initially took a slightly different path, which was generally not in line with the fundamental principles of social civil procedure. First of all, we should mention the Resolution of the Senate of the Supreme Court No. 51 of 4.12.2004 "On the Application of the Norms of the Code of Civil Procedure on Evidence in the Case Law"[44]. The third point of the Resolution states that if the evidence adduced enables the court to conclude that it is more likely than not that certain facts existed, the court shall accept those facts as established[45]. It is therefore clear from the quoted paragraph that the circumstances must be considered to have been correctly established by the court if the court concludes that it is more likely than not likely that the circumstances in question existed. What is meant by more likely than not likely? Although the Resolution itself does not provide an answer to this question, it can be found in the legal scholarship that it is a situation when "the court decides on the basis of the evidence adduced by the parties as to which party's position is to be believed by considering which party's evidence is the more persuasive. If the plaintiff, having adduced his evidence, is able to convince the court by 51% to 49% on the facts constituting the cause of action, the cause of action shall be deemed to be proved. The mathematical standard of proof is therefore 51% to 49%"[46]. It has to be stated that the Resolution of the Senate of the Supreme Court established a concept of formal truth which is completely inconsistent with the objectives of social civil procedure and the current l.c.p.c. That interpretation has introduced a great deal of confusion into the case-law and, at least initially, has influenced the application of the principle of the balance of probabilities, which is generally applied in countries with a liberal model of civil procedure. Following the Resolution, the Supreme Court has stated in a few rulings that the question of the sufficiency of evidence in civil proceedings is to be decided on the basis of the principle of the balance of probabilities. This means that absolute conviction is not required. Evidence is sufficient to establish the existence of a fact if it is more probable than not from the evidence in the case that the fact existed[47]. This amendment in the existing case law has been significantly influenced by the decision of the Constitutional Court of 10.03.2014 (The Constitutional Court's decision of 14 March 2014 (KT9-S6/2014)), which states that the system of instances of courts of general jurisdiction, which derives from the Constitution, cannot be interpreted as restricting the procedural independence of the lower courts of general jurisdiction: the higher courts of general jurisdiction (and judges of those courts) may not interfere in the proceedings of the lower courts of gen-

[43] H.W. Fasching, *Lehrbuch*..., p. 433.

[44] www://lat.lt (access 16.10.2024).

[45] H.W. Fasching, *Lehrbuch*…, p. 175.

[46] V. Mikelėnas, *Įrodymų pakankamumo problema civiliniame procese; Konferencijos medžiaga* "*Civilinio proceso pirmosios instancijos teisme reforma Baltijos jūros regiono valstybėse ir centrinėje Europoje"*, Vilnius 2005, p. 10.

[47] Decision of the Supreme Court of Lithuania of 21.12.2005 in civil case No. 3K-3-645/2005.

eral jurisdiction, give them any binding or recommendatory instructions as to the manner of deciding the relevant cases, etc. such instructions (whether binding or of a recommendatory nature) shall be regarded as *ultra vires* action by the courts (judges) concerned in relation to the Constitution (The Constitutional Court's decision of 28 March 2006, Constitutional Court's decision of 9 May 2006). It was based on this decision that the Seimas of the Republic of Lithuania adopted amendments to the Law on Courts (No. XII-2402) on 2 June 2016, which eliminated the use of the Resolutions of the Supreme Court's Senate as a form of interpretation of law. On that basis, the abovementioned Resolution of the Senate of the Supreme Court lost its significance and the court practice on the standard of proof began to change. Additionally, the changes are likely to have been influenced by a deeper understanding of the meaning of Article 176 of the l.c.p.c., i.e. the realisation that the l.c.p.c. reflects the social school of civil procedure. The Supreme Court's recent case law no longer refers to the principle of balance of probabilities. A new formulation has become established in the case-law, namely that a fact may be established if, on the basis of the evidence in the case, which has been fully assessed by the court, the court is satisfied that it has been established; it is necessary to assess each piece of evidence and the totality of the evidence; and the conclusions as to the probative value of the subject-matter of the evidence must be based on the logic of the data collected in the case; the court may find that a circumstance exists or does not exist where the evidence in the case is sufficient for such a finding; the sufficiency of the evidence in a case means that it is not contradictory and that, taken as a whole, it permits a reasonable conclusion to be drawn as to the existence of the facts being proven[48]. The fact that the principle of balance of probabilities as the standard of proof has ceased to be mentioned in the case-law shows a rather clear change in the Supreme Court's practice on that issue. And while it is not yet entirely clear what exactly is meant by the court's use of the terms "conviction" or "sufficiency of the evidence", there is no doubt that these are steps in the right direction.

As regards the standard of proof in Lithuanian civil proceedings, the Supreme Court's approach to this problem in non-dispositive cases is also problematic. One of the Supreme Court's rulings states that a higher standard of proof is applicable when claiming for the demolition of a building as a remedy for the consequences of an unauthorised construction or a construction carried out under an unlawfully issued construction permit. This means that the factual circumstances on which the illegality (arbitrariness) of the construction of a building or the illegality of a building permit and the claim for the demolition of the building are based must be substantiated by concrete, precise, clear, complete, uncontradictory and reliable factual data (evidence) of an objective nature, prepared (collected) by persons with specialised knowledge and acting within their competence. The court deciding on claims for the removal of the consequences of unauthorised construction or construction under an unlawful building permit by means of the demolition of the buildings must not be in any doubt as to the existence of the factual circumstances on which the claim is based, but must be satisfied beyond reasonable

[48] Decision of the Supreme Court of Lithuania of 14.02.2019 in civil case No. e3K-3-42-684/2019.

doubt[49]. This quotation may give the impression that the requirement of establishing the substantive truth and the consequent standard of proof is only applied in non-dispositive cases, where, due to the public interest, the role of the court is more active than in a standard civil case. Such an approach would be wrong in principle. If substantive truth is determined only in non-dispositive cases, it would follow that the formal truth is determined in all other civil cases. Such a scheme would be contrary to the social model of civil procedure enshrined in the Lithuanian l.c.p.c., and therefore to its essence. We should therefore take a different approach, namely that the substantive truth must be established in all civil proceedings if the parties cannot be reconciled. The only difference is that in non-dispositive cases, the court has more means to achieve this goal (e.g., the right of the court to take evidence *ex officio*).

Recent Supreme Court case law has taken another serious step towards the establishment of a standard of proof inherent to social civil procedure in Lithuania. In one of its rulings, the Court stated that a court could only establish the factual circumstances between the parties after it reached a certain degree of certainty. The particular degree of certainty which enables the facts proved by the parties to be established is determined by the standard of proof applicable in civil proceedings. Article 176(1) of the l.c.p.c. provides that the purpose of fact-finding is to satisfy the court, on the basis of an examination and evaluation of the evidence in the case, that certain facts relevant to the subject-matter of the dispute exist or do not exist. The standard of reasonable belief applies in Lithuanian civil proceedings, which requires the judge to be reasonably and personally convinced of the facts of the case. Reasonable belief is the judge's internal certainty as to the facts of the case. This standard does not require the removal of all doubts as to the facts of the case but requires the judge to have a degree of certainty which only removes substantial doubts without eliminating the doubts altogether[50]. Although the cited ruling does not give full clarity as to the degree of reasonable certainty to be achieved, we can already say that its formulation of the standard of proof is broadly in line with the objectives of social civil procedure.

Of course, it is far from possible to always implement this standard, but the l.c.p.c. does not require it. The standard of proof is an ideal that is achieved when all the conditions for a fair and proper trial are met. If the parties fail to fulfil the duty of cooperation (Article 8 of the l.c.p.c.) or the duty to promote the process (Article 7 of the l.c.p.c.) or abuse the process (Article 95 of the l.c.p.c.), the court will be required to adopt a lower standard of certainty and the court will apply the aforementioned balance of probabilities rule. Such situations should be characterised as exceptional and do not alter the general objectives of modern civil procedure law.

[49] Decision of the Supreme Court of Lithuania of 23.05.2018 in civil case No. e3K-3-201-695/2018.

[50] Decision of the Supreme Court of Lithuania of 8 February 2024 in civil case No. e3K-3-9-1075/2024.