



Centre for Comparative Law of Charles University

warmly invite you to



International Conference – Humboldt Kolleg

STANDARD OF PROOF

Prague, October 26 – 27, 2017

Faculty of Law, Charles University, Prague 1, nám. Curieových 7, room No. 38

The object of the conference is to inquire into the key question of assessment of proof, namely standard of proof. In general, evaluation of evidence requires an intellectual process, in which the evaluator reconstructs the past based on available information. Since the past cannot be repeated, the evaluator may only attempt to get as close as possible to the reality. Generally, as to the standard of proof we may identify two extreme approaches. First, which we can describe as hypothetical or speculative, stems from the persuasion of the judge. It employs such terms as “truth”, “certainty” or “beyond reasonable doubts”, etc. The result of it is “everything or nothing”. The second approach is, on the first sight, more scientific, since it measures the extent of credibility of the reconstruction by a degree of probability. If, for example, the degree of probability exceeds 51 %, such information is considered as proven.

The main purpose of the conference is therefore to learn about different approaches in relevant European jurisdictions. The second purpose of the conference is to assess these different approaches and find an adequate standard. Finally, the conference shall increase the understanding of the matter by the interested public and the participants.

With kind support of Alexander von Humboldt Foundation, Czech Judicial Academy, Czech Bar Association and dr. Martin Vychopeň, Rakovský & Partners law firm,
and Faculty of Law of Charles University

PROGRAM

First day, October 26 – Fundamentals (14.00 – 18.30)

14.00 – 14.15 *Opening*

14.15 – 15.00 **Prof. Pavel Holländer** (Brno, Košice): Proof, theory of truthfulness and the purposes of procedure

15.00 – 15.45 **Prof. Mark Schweizer** (Zürich): The standard of proof as a decision threshold

15.45 – 16.00 *Coffee break*

16.00 – 16.45 **Prof. Christoph Kern** (Heidelberg): Probability as an element of the standard of proof

16.45 – 17.30 **Prof. Magne Strandberg** (Bergen): The more probable than not standard – a critical approach

17.30 – 18.15 **Prof. Christoph Althammer. Dr. Madeleine Tolani** (Regensburg): Proof of causation in German tort law

18.15 – 18.30 *Final discussion, end of first day*

Second day, October 27 – National reports (09.00 – 17.30)

09.00 – 09.45 **Prof. Hans Jürgen Ahrens** (Osnabrück): The standard of proof – the German approach

09.45 – 10.30 **Prof. Walter Rechberger** (Vienna): The Austrian approach and the inherent connection between the standard of proof and the burden of proof

10.30 – 10.45 *Coffee break*

10.45 – 11.30 **Prof. Michael Stürner** (Konstanz): Evaluation of evidence and the standard of proof in the ELI/UNIDROIT European Rules of Civil Procedure

11.30 – 12.15 **Mgr. Jan Balarin, Ph.D.** (Prague): The Czech approach

12.15 – 12.30 *Final discussion*

14.00 – 14.45 **Prof. Emmanuel Jeuland** (Paris): The standard of proof and the French approach

14.45 – 15.30 **Prof. Roberto Poli** (Cassino): The Italian concept of the standard of proof

15.30 – 15.45 *Coffee break*

15.45 – 16.30 **Prof. John Sorabji** (London): The English approach to the standard of proof

16.30 – 17.15 **Prof. Luboš Tichý** (Prague): Main problems from the perspective of a comparative analysis

17.15 – 17.30 *Final discussion, end of conference*

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SESSION I: FUNDAMENTALS

Prof. Pavel Holländer, Brno, Košice

Proof, theory of truthfulness and the purposes of procedure

Pavel Holländer is a university teacher and currently a researcher at the Institute of Theory of Law of the Faculty of Law in Košice, from 1993 to 2013 judge of the Constitutional Court of Czech Republic, from 2003 to 2013 his Vice-Chairman, in the professional work he deals with the issues of philosophy and theory of law, legal logic and constitutional law. He is the author of many scientific or professional publications, including - among others - the books: Rechtsnorm, Logik und Wahrheitswerte. Versuch einer kritischen Lösung des Jörgensenschen Dilemmas, Baden-Baden 1993; Constitutional arguments - a look back after ten years of the Constitutional Court, Prague 2003; Abriß einer Rechtsphilosophie. Strukturelle Überlegungen, Berlin 2003; Verfassungsrechtliche Argumentation - Optimism and Skepsis, Berlin 2007; Philippines against reductionism (texts from philosophy of law), Bratislava 2009; Fundamentals of General State Science, 3. vyd., Plzeň 2012; Philosophy of Law, 2. vyd., Plzeň 2012; Rechtspositivism versus Naturrechtslehre als Folge des Legitimitätskonzepts, Berlin 2013; Concepts - in Sisyf's crown (chips from the philosophy of law), Bratislava 2015, Stories of legal concepts, Prague 2017.

Abstract

Legal science is currently focusing on new, modern, modern evidence-based technology, the issues of the lawfulness of evidence, or the growing role of experts as indirect judges. In contrast to the excited controversies in legal science in the 19th century and the first half of the 20th century, less attention is paid to the extent or scope of evidence, the relationship of proof and truth. However, a number of indications suggest that this neglect ignores significant changes in the perception of the category of truth. Evidence and evaluation of proof is not only influenced by the accepted concept of truth, but above all by understanding the relationship between the individual and society and the perception of the individual's freedom: Modern brings the theory of correspondence as an expression of a free and rational individual, the Middle Ages perceived the relationship of the individual and the whole differently as the relationship in which he played the decisive role of the community, ie the authority, therefore, the probative force of the means of proof was not determined by the individual, but by authority (apostolic authority or law). Postmodern brings criticism of modernity, criticism of rationalism, and at the same time extensions of negative freedom, brings noetic skepticism but at the same time freedom in the sense of personal autonomy, not a return to authority: the result is skeptic evidence, increasing demands for proof, uncertainty of proof, witnessed an increase in skepticism towards the results of court evidence resulting in an increase in the complexity of the lawsuit, an increase in review bodies dealing with fact finding, and we are

witnessing an increase in the requirements of evidence in cases where statutory procedural rules do not provide a condition for establishing the facts without reasonable but only as a condition of reasonable suspicion or of reasonable concern. Thus, there are two tendencies: the institutional development of procedural law and the leveling of evidence-based requirements.

Prof. Mark Schweizer, Zürich

The standard of proof as a decision threshold

Mark Schweizer is the President elect of the Swiss Federal Patent Court, taking office on 1 January 2018, and currently works as a Senior Associate with Meyerlustenberger Lachenal, Zurich, recognized as a leading practitioner in patent law by Who's Who Legal and for information technology law by Best Lawyer's Switzerland. He is Privatdozent for legal sociology, legal theory and civil procedure at the University of St. Gallen and lectures in intellectual property law at the Federal Institute of Technology (ETH) Zurich. He studied law at the University of Zurich and the University of Michigan Law School, Ann Arbor, USA. Mark previously held positions as delegate of the International Committee of the Red Cross in Kabul, Afghanistan, and Kampala, Uganda, and as Senior Research Fellow with the Max Planck Institute for Collective Goods in Bonn, Germany. Mark's PhD thesis (Dr. iur., University of Zurich, 2005) investigated the cognitive psychology of judicial decision making. His post-doctoral thesis (Habilitationsschrift, University of St. Gallen, 2014) applied probability theory (Bayesian networks) and psychological models of intuition (parallel constraint satisfaction) to forensic evidence evaluation and standards of proof. He is co-editor, together with Prof. Herbert Zech (University of Basel), of the forthcoming one volume commentary on the Swiss Patent Act. Key publications: The civil standard of proof – what is it, actually?, *International Journal of Evidence & Proof*, 2016, 217–234; Beweiswürdigung und Beweismaß: Rationalität und Intuition, Tübingen 2015; 2005 Kognitive Täuschungen vor Gericht: eine empirische Studie, Dissertation Universität Zürich, 2005.

Abstract

From positing that the goal of judicial fact finding is the correspondence of the reconstruction of the relevant state of the world in the judgment with the external state of the world follows that the judge will not know with certainty in almost all cases whether the factual basis of the judgment is correct. Fact finding is decision making under uncertainty. This leads to the conclusion that the standard of proof is best understood as a decision threshold, a degree of belief required before the judge may accept a factual statement as true. Establishing the decision threshold requires consideration of the costs of wrongly accepting a factual statement as true (relative costs or errors). The rest of this contribution considers the implications of analysing standards of proof with this (decision theoretic) framework.

Prof. Christoph A. Kern, Heidelberg

Probability as an element of the standard of proof

Christoph A. Kern has been Professor for Private Law and Civil Procedure and one of three directors of Heidelberg University's Institute for Comparative Law, Conflict of Laws and International Business Law since August 2014. Before moving to Heidelberg, he was Professor for German Law at the University of Lausanne and he still teaches there as professeur remplaçant. He holds a law degree and a doctorate from the University of Freiburg (Germany). In 2005, he qualified as a German barrister ("Rechtsanwalt"). In 2006, he earned an LL.M. (2006) from Harvard Law School. In fall term 2015, he was Visiting Professor for Comparative Civil Procedure at Georgetown University, Law Center, Washington DC (U.S.A.), and in fall term 2017, he was Visiting Professor per Diritto processuale civile comparato at the Università degli Studi di Brescia, Brescia (Italy). He is co-reporter of the working group "judgments" in the cooperative project of UNIDROIT and the European Law Institute entitled "From Transnational Principles to European Rules of Civil Procedure".

Abstract

The relationship between probability and proof can be analysed under various aspects: Probability can be the object of proof, can be the standard of proof or can be an element of proof. In all these cases, it makes sense to distinguish "objective" and "subjective" probability. The most challenging case is the last one: probability, and in particular, "subjective" probability, as an element of proof. In this case, proof cannot be equated with a certain probability. Nevertheless, not only "objective", but also "subjective" probability should play a role. Of course, the judge should not be obliged to assign a probability to every individual issue and combine the numerous probabilities in order to find out whether a certain percentage of probability is achieved. However, the judge should, where appropriate, consider the probabilities and render an account of this in the grounds of the judgment. Probability, therefore, should indeed be considered an element of the standard of proof, and the judge should take into account the factual and legal environment when asking herself on what level of probability she bases her personal conviction.

Prof. Magne Strandberg, Bergen

The more probable than not standard – a critical approach

Magne Strandberg (born 1978) is professor at the faculty of law, University of Bergen. He is one of two leaders of the research group for civil procedure at the faculty and is one of two leaders of the course in procedure law. Strandberg wrote his doctor thesis on the standard of evidence, which was published as a book in 2012 (*Beviskrav i sivile saker*, Fagbokforlaget).

Currently, Strandberg is a member of one working group in the ELI-UNIDROIT project on European civil procedure rules.

Abstract

The standard of evidence is one of the most debated topics in civil procedure law. The more probable than not standard, or the preponderance of the evidence standard, is one of the most well-known alternatives in that debate. Such a standard implies that even the slightest overweight of probability will suffice. This standard of evidence is under debate, though. While Anglo-American law has the more probable than not standard as the main rule for civil cases, most Continental jurisdictions have higher standards of evidence. And while most Anglo-American scholars defend that standard, the prevailing view on the continent seems to be that a higher or more flexible standard is preferable. Underlying these attitudes towards the more probable than not standard is a set of arguments that is typically put forward in favor of that standard. The topic for my speech at the conference, and my contribution for the book, is whether these arguments are persuasive. I will analysis whether a consistent application of the more probable than not standard can abolish the need for traditional burden of proof rules. I will analysis whether a consistent application of the more probable than not standard will lead to the highest number of correct judgments. And I will analysis whether the negative value of an incorrect judgment in disfavor of one party in a civil case typically are as negative as an incorrect judgment in the opposite direction.

Prof. Christoph Althammer and Dr. Madeleine Tolani, Regensburg

Proof of causation in German tort law

Christoph Althammer studied law at the University of Regensburg and passed his First and Second State Examination in Law in Bavaria; 2002 to 2009: Research assistant at the Chair of Civil Law and German, European and International Civil Procedural Law at the University of Regensburg (Professor Dr. Herbert Roth); 2004: Doctorate in Law at the University of Regensburg; March 2006: Degree in Mediation (CVM) – main focus on business mediation – at the Ludwig Maximilians University of Munich (LMU); 2007: Award for excellent teaching in 2006 of the State of Bavaria (Preis für gute Lehre an den Staatlichen Universitäten in Bayern); January 2009: Habilitation at the University of Regensburg (Supervisor: Professor Dr. Herbert Roth); Venia legendi for Civil Law, German, European and International Civil Procedural Law as well as for Comparative Law and Private International Law; Summer semester 2009: Stand-in professorship at the University of Konstanz; January 2010 to March 2012: W3-professorship at the University of Konstanz for Civil Law, Civil Procedure Law, Private International Law; April to September 2012: W3-professorship at the University of Passau (Chair of Civil Law and Civil Procedural Law); October 2012 to September 2014: Director of the Institute for German and International Civil Procedural Law, Dept. I, at the

Albert-Ludwigs-University of Freiburg (succession of Professor Dr. Dr. h.c. Rolf Stürner); 2014: Call for a W3-professorship at the University of Bayreuth (denied) and call for a W3-professorship at the University of Regensburg (accepted); since October 2014: Professor (W3) of Civil Law, German, European and International Civil Procedural Law at the University of Regensburg (succession of Professor Dr. Herbert Roth); 2015 - 2017 Research Dean at the University of Regensburg, Faculty of Law; Prof. Althammer is member of the German Association of Civil Law Teachers (Zivilrechtslehrervereinigung), the German Association of Civil Procedural Law Teachers (Zivilprozessrechtslehrervereinigung), the German Association of International Procedural Law, the German Scientific Association for Family Law and the International Association of Procedural Law (IAPL) and co-editor of the journal "Zeitschrift für Zivilprozess" (ZZP).

Madeleine Tolani studied law at the Ernst-Moritz-Arndt-University of Greifswald, Germany (1999-2003); 2003 First State Exam with honorary distinction; 2003-2005 Two year legal clerkship (Rechtsreferendariat); internship with an international law firm in Miami, U.S.A.; 2005 Second State Exam with highest distinction (best of the state); 2009 Doctorate in Law (Dissertation) with highest distinction (summa cum laude) at the Ernst-Moritz-Arndt University of Greifswald (Supervisor: Prof. Dr. Hans-Georg Knothe); 2008-2009 Lecturer (Lehrbeauftragte) at the Ernst-Moritz-Arndt University of Greifswald; 2009-2010 LL.M.-Studied (US Legal Studies) at Golden Gate University, San Francisco, U.S.A.; graduation with honors; 2011 Notary (Notarassessorin) in the State of Mecklenburg-Vorpommern; 2011-2012 Lecturer at the Ernst-Moritz-Arndt-University of Greifswald and at the University of Passau; 2012 Research assistant at the University of Passau (Prof. Dr. Christoph Althammer); 2012-2014 Research assistant at the Albert-Ludwigs University of Freiburg (Prof. Dr. Christoph Althammer); 2013-2015 Lecturer at the Administration and Business Academy (Verwaltungs- und Wirtschaftsakademie) for the district of Freiburg; 2017 Habilitation at the University of Regensburg Supervisor: Prof. Dr. Christoph Althammer); *venia legendi* for Civil Law, German, European and International Civil Procedural Law, Private International Law as well as for Comparative Law. Awards received 2006-2008 Scholarship from the State of Mecklenburg-Vorpommern based on academic excellence; 2009 Award for the best Dissertation of the Faculty of Law, Ernst-Moritz-Arndt-University of Greifswald; 2009-2010 LL.M.-Merit Tuition Scholarship, Golden Gate University, San Francisco, U.S.A.; Since 2015 Scholarship from the Faculty of Law of the University of Regensburg, based on academic excellence.

Abstract

The presentation addresses proof of causation in German tort law. Generally, a party must demonstrate and prove the facts favouring that party's claim or defence. For instance, if a plaintiff seeks recovery for damage he suffered from wrongful conduct, he must demonstrate

and prove all elements of the claim, including the element of causation. The element of causation is a fundamental principle which is generally understood as the judgment that one condition results from another. A link between the defendant and the harm suffered by the plaintiff must be established in all Western legal traditions. However, the proof of causation will often be difficult in practise and therefore needs to be facilitated. This can be achieved either by shifting the burden of proof or by mitigating the standard of proof.

With regard to the proof of causation under German tort law it is extremely important to note that German law does not operate with only one nexus between the defendant's activity and the plaintiff's loss. Unlike other legal systems, such as U.S. tort law, German civil law dogmatically distinguishes between two categories of causation: first, the causation between the particular defendant's wrongful conduct or a source and the infringement of the victim's right, which is called 'liability establishing causation' ('haftungsbegründende Kausalität') and second, the causation between the infringed right and the damage, the 'liability implementing causation' ('haftungsausfüllende Kausalität').

This distinction between two different types of causation under German law is the basis of the analysis because it has significant procedural consequences in terms of the standard of proof as the key question of assessment of proof. The causation between the conduct and the injury must be proven to the general standard of full conviction of the court according to § 286 ZPO (German Civil Procedure Code), but can be facilitated by the doctrine of prima facie proof which allows the judge to rely upon a generalisation and may affect the standard of proof. However, in principle the judge must be convinced of the truth of the claim on rational grounds. The standard for the causation between the injury and the damage (liability implementing causation) is relaxed according to the special provision of § 287 ZPO and through the use of prima facie proof. The effect of § 287 ZPO is the introduction of less stringent requirements of proof and a lower standard which brings German law closer to the common law.

Problems arise when independent tortfeasors have acted and it remains uncertain which of the tortfeasors caused the damage. This situation of multiple tortfeasors is governed by the special rule § 830 BGB (German Civil Code), but its legal character is disputed.

The presentation will familiarize the audience with the distinction between 'liability establishing causation' and 'liability implementing causation' ('haftungsausfüllende Kausalität') and will explain different options of mitigating the general full conviction standard in order to facilitate the proof of causation.

SESSION II: NATIONAL REPORTS

Prof. Hans Jürgen Ahrens, Osnabrück

The standard of proof – the German approach

Legal education in Göttingen and Tübingen 1965-1969. Dr. jur. 1974 in Göttingen. Research assistant 1974-1981, University of Göttingen. Admitted to the Bar 1982-1984. Full Professor at University of Osnabrück since 1983, retired 2014. Offered Chairs at the Universities of Marburg and Saarbrücken. Board member of the German Association for the Protection of Intellectual Property since 1994. Part-time Judge at the Court of Appeal in Celle/Lower Saxony from 1995 to the end of 2010. Dean for Affairs of Study and Teaching from 2004 to 2011. Vice-president of the Lower Saxony State Examination Office for Legal Qualification from 2007 to 2013. Visiting Professor at the University of Nanjing/China (2004). Numerous lectures in European and Asian universities. Award of the German Association for Legal Drafting for the developing of a Model Code on Intellectual Property (2014). Member of several Scientific Associations. Numerous publications in all fields of his research interests: Law of Intellectual Property, Competition Law, Tort Law, Law of Civil Procedure (national and international), Private International Law.

Abstract

The German statutory Law of Civil Procedure establishes the principle of free assessment of evidence, laid down in section 286 ZPO. Nevertheless, the court is not free to credit or discredit factual proof arbitrarily. Section 286 ZPO is to be understood as full evidence; to be convinced of a proven fact demands a high degree of certainty. This standard is relaxed by section 287 ZPO for the assessment of damages and the causation of damages which is important both after suffering bodily harm or pure economic loss. A special way to relax the fact finding under section 286 ZPO is the fact conclusion based on prima facie evidence in the absence of contrary explanation. Factual assertions are not required to be proven if they are subject matter of (mostly refutable) presumptions.

Prof. Walter Rechberger, Vienna

The Austrian approach and the inherent connection between the standard of proof and the burden of proof

Walter H. Rechberger is Professor emeritus at the Vienna University Faculty of Law and Head of the Research Institute of Legal Development. He held the position of Dean, of the Head of the Department of Civil Procedure Law (*Institut für Zivilverfahrensrecht*) and member of the Council of the International Association of Procedural Law (IAPL) for many

years. He received his J.D. from Vienna University and holds degrees of an honorary doctor of the University of Pécs, Hungary and of the University of Athens, Greece. In 1989, he was a visiting professor at the Kansas University School of Law, Lawrence, US. From 1992 to 2007, Prof. Rechberger was a member of the Faculty of European Studies, Department of European Integration, at Danube University Krems. He is also a member of several boards, such as the Vienna International Arbitral Center (VIAC) and the Institute for Danube Region and Central Europe (IDM). Publications of Prof Rechberger comprise of more than 300 legal works, seven books of which represent standard literature on Austrian Civil Procedural Law. He gave almost 100 lectures abroad (in Europe and worldwide, e.g., China, Cuba, Iran, Israel, Japan, Mongolia, Singapore, South Africa, and the US).

Abstract

The uncontested principle of the free evaluation of evidence is closely connected with the dispute about the “standard of proof“. There can neither be a purely subjective nor a purely objective theory of the standard of proof. Nevertheless in Austria – like in Germany – the „conviction-of-truth-theory“ was predominant for a long time. But because of the human limits of possible perception and of the subjective cognitive faculties the total conviction of truth as demanded by this theory could never mean absolute certainty. It is sufficient if „no other reasonable man with a clear view of the conditions of life would be convinced“. Therefore, an objective theory, which sees the judge’s task only in consideration of probabilities, is becoming increasingly dominating in Austria. Otherwise, the preponderance principle as realised in common law systems and in the Swedish „Överviktsprincip“ is considered as to be not in accordance with the – in particular – substantive law in Austria. Apart from that there will never be a generally acknowledged scale of probability appropriate to all procedural circumstances from which the exact percentage of probability of a fact to be confirmed can be deduced.

The judge’s subjective conviction is objectified by his obligation to substantiate his evaluation of evidence by declaration on what experimental grounds he has arrived at the opinion that the stated facts are to be held to be true. Finally, it has to be a matter for the judicial conscience to decide if it is justifiable to assume that the degree of probability demanded by law is present.

Today Austrian judicature considers high probability as the regular standard of proof. The two deviations from this standard are the increased standard (probability verging on certainty) and the reduced standard (preponderant probability). The system of establishing degrees of probative standard depends on evaluations and therefore primarily on the legislator’s notions of justice, partly also on case law.

Prof. Michael Stürner, Konstanz

Evaluation of evidence and the standard of proof in the ELI/UNIDROIT European Rules of Civil Procedure

Michael Stürner (Dr. iur, Munich; M.Juris, Oxford) is Professor of Civil Law, Private International Law and Comparative Law at the University of Konstanz, Germany, since 2012. He also serves as a judge at the Higher Regional Court of Appeals (Oberlandesgericht) in Karlsruhe, Germany. From 2009 to 2012 he held a chair of Civil Law, Private International Law and Comparative Law at Europa-Universität Viadrina Frankfurt (Oder), Germany. He has been appointed as a member of the Council of the International Association of Procedural Law (IAPL) and as a Fellow of the European Law Institute (ELI). In 2013 he has been a Visiting Scholar at the University of California at Berkeley, Boalt Hall School of Law. Since 2014 he is a member of the Working Group on Access to Information and Evidence in the framework of the ELI/UNIDROIT-Project „From Transnational Principles to European Rules of Civil Procedure”. In 2016-17 he is a Fellow at the Institute for Advanced Study Konstanz. His main research interests lie in the fields of cross-border dispute resolution, comparative law, conflict of laws, and European private law.

Abstract

In 2004, after years of intensive drafting, the American Law Institute (ALI) and UNIDROIT adopted Principles of Transnational Civil Procedure. Those principles were designed to reduce uncertainty for parties litigating in unfamiliar surroundings and promote fairness in judicial proceedings through the development of a model universal civil procedural code. Together with the Rules of Transnational Civil Procedure, which were not formally adopted by either UNIDROIT or the ALI, these Principles may be considered as a ‘model for reform in domestic legislation’. Building upon this work, the cooperative venture of the European Law Institute (ELI) and UNIDROIT entitled ‘From Transnational Principles to European Rules of Civil Procedure’ aims at a regional development of the ALI/UNIDROIT Principles. The project started in late 2013. The first three Working Groups (Service and Due Notice of Proceedings; Provisional and Protective Measures; and Access to Information and Evidence) were constituted in 2014. Close-to-final drafts were already discussed in the official bodies of both ELI and UNIDROIT. The aim of the paper is to show an outline of the Rules drafted by the Working Group on Access to Information and Evidence, especially with regard to the evaluation of evidence and standard of proof, from the viewpoint of a member of that Working Group.

Mgr. Jan Balarin, Ph.D., Prague

The Czech approach

Jan Balarin, Ph.D., is an attorney and research fellow at the Center for Comparative Law of the Charles University in Prague. Jan Balarin received his Ph.D. in civil procedure at the Charles University in 2011. Aside from civil litigation, Jan's research focus is contractual law. Recently, he concentrates on the topic of collective enforcement of rights and is a member of the legislative committee on a group litigation law in the Czech Republic. Jan Balarin was engaged in preparatory works for the new Czech Civil Code, signed into law in 2012, and published on various subjects in that context (such as good faith and fiduciary contracts). Jan made his research (i.a.) at the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg and assisted also in several international projects (such as the Study Group on a European Civil Code).

Abstract

The Czech Concept of the standard of proof is basically a subjective one, as it shows strong (historical and scholarly) links to German and especially Austrian civil-procedure theory. However, the connection with the traditional legal doctrine had been interrupted in the real-life judiciary during the communist era. After restoration of the democratic conditions, a still-ongoing struggle for reinvention of the standard-of-proof basics was started. The Supreme Court case law took a conservative standpoint as it insisted – although referring back to the subjective approach – on strong persuasion of the trier of fact, leaving, in consequence, little room for the trier's subjective valuation of evidence. Although secondary burden of proof was acknowledged in case law, there exists little or no authority if and in which extent *prima facie* evidence can be admitted. This stagnant situation was recently churned up by the Constitutional Court which, in several decisions, preferred evaluation of evidence based on (high) probability, i.e. not certainty. This triggered a conflict between both the Tribunals, as the Supreme Court strictly refuses probability-based decision making (on the merits).

In the Paper, it is argued that the probability-concept is not necessarily at odds with the subjective approach and that the efforts to delete every mention of probability from judicial decisions are artificial. The fact finder's judgment (persuasion) is usually created in condition of uncertainty employing complex mental processes which must be – as far as possible – made transparent and not pushed out of the range of procedural law and theory. If subjective probability is a factor in creating judge's conviction of truth, it should be acknowledged and, additionally, supplemented by correctives such as the *prima facie* evidence.

Prof. Emmanuel Jeuland, Paris

The standard of proof and the French approach

Emmanuel Jeuland completed his Master of Law at the University of Paris 1 and holds an LL.M from King's College (London). His PhD on the law of obligations focused on the procedural law relating to the substitution of persons in contractual matters. Sept. 2005 to 2016: Professor at the University Paris I Panthéon-Sorbonne, in civil procedural law, international litigation and legal theory. Director of the master of Procedural Law and Justice. Dean of the undergraduate department (2008 to 2012). From November 2012, Director of the department of research on Justice and Litigation. Private Consultant in procedural law. Sept. 2014 to February 2015: Visiting professor at the University the Viadrina (Francfort/Oder) in European civil procedure. He is currently the Director of the Sorbonne Institute of legal Research of the Master's Program on Justice and Litigation at the University of Paris 1 – Panthéon-Sorbonne. He has published textbooks and essays on procedural law and legal relations. Major publications include *Lexicographical Research in Civil Procedure*, with S. Lalani (dir.) IRJS publisher, France, 2017; *Introduction to French Business Litigation*, publisher Lextenso, France, 2016; *La qualité dans la performance judiciaire (Quality in judicial performance, contract with the Ministry of Justice)*, dir. avec C. Boillot, pub. IRJS, 2015; *Droit processuel general (procedural law)*, Montchrestien, 3rd ed. 2014, 2nd éd. 2012, coll manuel, LGDJ, 2007; coll systèmes, LGDJ, 2003; *Le nouveau management de la justice et l'indépendance des juges (New Management of Justice and the Independance of the Judiciary)*, dir. avec B. Frydman, Dalloz, coll. Commentaires, 2011; *Droit judiciaire privé (private procedural law)*, with L Cadiet, LexisNexis, 9th éd., 2016.

Abstract

The difficulty to translate the expression « standard of proof » in French shows that this concept is still not well known in France. We use different expressions meaning the « norm of proof », « the degree of proof », the « reasonable conviction » (ALI/Unidroit) or then more and more « standard de preuve » which is the literal translation of standard of proof (Vergès). It has been said that the civil law countries have a subjective approach of the standard of proof. What counts is the conviction of the judge. The situation of France is specific since it is still a system of legal proof even though the principle of free proof applies to the infringements of the law (tort law) and the legal document where a small amount of money is at stake. However, a written proof is necessary for contract in which the amount at stake is over 1500 Euros. In this situation, the French judge does not have a margin of appreciation. In the other way around the expression « standard of proof » (standard de preuve) is more and more influential through European and international law (competition law, arbitration, patent law). One of the reasons why it is difficult for the supreme Court to set up a principle of standard of proof in France is the prohibition of the dubious reasons in the judgment. But it is mainly a matter of form of the judgment, not a matter which concerns the evidence law. So, if

there was to be a reform of the law of evidence in France there would certainly be a provision on the standard of proof.

Prof. Roberto Poli, Cassino

The Italian concept of the standard of proof

Born in Rome in 1964, he received law degree with honors from the University of Rome La Sapienza. First PhD, then researcher in Civil Procedural Law, and from November 2002 Associate Professor of Civil Law at the University of Cassino and Southern Lazio. In 2011, he won the competition for full professorship held at the University of Eastern Piemonte. In 2013, he was entrusted by the University of Cassino and Southern Lazio as Full Professor for Civil Procedural Law, where he has taken office in September 2016 and where he teaches Civil Procedural Law and General Procedural Law. He has organized and participated as a speaker at numerous conferences concerning procedural law. He has taught also in initiatives promoted by professional associations, judges and other bodies of the public administration, as well as the School of Specialization in Legal Professions at the University of Sapienza in Rome. He is a member of the Italian Association among scholars of the civil proceedings, ISSA, the Scientific Committee of the Permanent Observatory on conflict and reconciliation, and the Editorial Board of the Journal of procedural law. He is the author of two large monographs; *I limiti oggettivi delle impugnazioni ordinarie*, Padova, 2002 (XII-614); *Invalidita ed equipollenza degli atti processualo*, Torino 2012 (XV-689); and 70 other publications, including items of legal encyclopedias, commentaries, reviews, as well as notes to judgment and articles.

Abstract

In Italy, neither legal commentators nor case law have ever taken a great interest in the criteria to assess evidence and, consequently, in the standards required as evidence. It is only over the last twenty years or so that a more extensive debate has been developing on the standards of proof, especially with reference to the ascertainment of the causal link. At this time, according to the stances of the Italian Court of Cassation (the Italian Highest Court), criminal cases require the “beyond any reasonable doubt” standard to establish evidence, whereas in civil cases, the “balance of probabilities” criterion or the “preponderance of evidence”, or the “more probable than not” criterion apply. However, what is meant by these three expressions is not unequivocal at all. The decisions issued by Criminal Courts state that the rule behind the “beyond any reasonable doubt” expression, implemented in positive law in 2006 (sec. 533 of the Italian Code of Criminal Procedure), regards all the aspects of the trial and requires that the accused should be declared liable only when the evidence gathered suggests only remote chances of different versions, which can nonetheless be claimed and even apply in theory as they are *in rerum natura*. E.i.e., in the nature of things), but whose actual realisation in the

relevant case is not supported by any of the evidence provided in the trial, as they are outside the natural order of things and against normal, human rationality. However, the analysis of court decisions shows that such criteria are too summary and vague to describe the judge's reasoning in ascertaining the causal link and, more generally, in establishing the existence or inexistence of the facts, which must at all times be done according to a standard of "high rational credibility", both in criminal and in civil cases. The difference in the standards of proof between criminal proceedings and civil proceedings, represented by the fact that the "beyond any reasonable doubt" criterion does not apply in civil proceedings, is justified by the diversity in the values at stake in the two cases. The most problematic aspect is to identify the functional and structural characters of this rule (*bard* - beyond any reasonable doubt) and the differences compared to the criterion adopted in civil proceedings. It is understood that the answers to such questions must be grounded as much as possible on rational bases and on positive law.

Prof. John Sorabji, London

The English approach to the standard of proof

John Sorabji is the Senior Judicial Institute Fellow at UCL's Judicial Institute as well as being the Principal Legal Adviser to the Lord Chief Justice of England and Wales and the Master of the Rolls. At UCL he teaches its LLM course on Principles of Civil Justice and its LLM and LLB courses on Alternative Dispute Resolution. He is also a Visiting Professor at the University of Paris-II, where he teaches introduction to English Civil Justice and selected issues in English civil procedure on their international Masters course. He is an assistant editor of the International Journal of Procedural Law; a past assistant editor and now Case Note editor of the Civil Justice Quarterly. He is a member of White Book's editorial board and is responsible for its commentary to CPR Pts 1, 2 and 52 and Sections 11 and 12. He is also the author and editor of Civil Procedure News. He is also a governor of the Expert Witness Institute. He has published widely on civil justice, and is the author of *English Civil Justice after Woolf and Jackson* (2014), a contributing author of both *Foskett on Compromise* (2015) and *Civil Litigation in a Comparative Perspective* (2nd edn., 2017). He has also acted as an expert for the Council of Europe and is a member of the European Law Institute's Executive Committee.

Abstract

The paper provides an outline of the approach in English civil proceedings, which is to say all proceedings other than criminal proceedings, to the standard of proof. It first considers upon whom the burden of proof, i.e., the legal obligation to prove a fact in issue, lies. Having done so it goes on to consider the general approach to the standard of proof in civil proceedings (proof on the balance of probabilities), contrasting it with the standard in criminal proceedings

(proof beyond reasonable doubt). It then addresses the issue of whether there is an intermediate standard of proof in civil proceedings, which lies between the general civil and the criminal standards or whether there is a flexible standard, one that requires greater cogency of evidence before a finding can be made on the general civil standard. Finally, it considers recent developments in disciplinary proceedings before specialist tribunals where there has been a shift away from the criminal towards the civil standard, before reflecting critically on the approach taken to the standard of proof in respect of specific types of civil proceeding, such as proceedings for contempt of court or for fraud.

Prof. Luboš Tichý, Prague

Main problems from the perspective of a comparative analysis

He studied law, economics and political science at the Law Faculty of Charles University Prague and at Heidelberg University in Germany. He also completed a residency at the Max Planck Institute for Foreign and International Private Law in Hamburg, Swiss Institute for Comparative Law, at the Comparative Law Institute in Lausanne, and the Academy of International Law at The Hague, and as a research scholar at the University of Michigan in Ann Arbor (1992). Before he became the director of the Centre for Comparative law (2009), he chaired the Department of Community law at the Law Faculty of Charles University in Prague (1993-2009). Professor Tichý is a member of the European Group on Tort and Insurance Law that published the Principles of European Tort Law; a member of the Study Group on European Civil Code. He is also a member of the advisory board of the European Revue of Private Law, the Zeitschrift für Europäisches Privatrecht and the European Review of Tort Law. Professor Tichý was formerly employed by the Federal Legislative Council of Czechoslovakia and his previous employment history includes serving as a legal adviser to the Federal Minister of Foreign Affairs and an adviser to the president of the Czech National Counsel. He is the former president of the Czech Bar Association.

Abstract

First, it is necessary to delimitate the topic of our inquiry and briefly deal with some of the preliminary questions. We use several key concepts, in particular probability and comparison, without being aware that they are intellectual processes applied in everyday life. The question of reality of the past events and its reconstruction is part of our life, as well as comparing options and choosing the adequate one. The standard of proof as the key element in the process of evaluation of evidence is only seemingly confined to liability for damages since the concept refers to a general process of understanding, evaluation, and interpretation used in all areas of law. For instance, the term “probability” features in eleven provisions of the new Czech Civil Code and is the basic element in the key provision of Art. 74 CISG. We have to deal all the time with a conflict between reality and its reconstruction, between probability

and certainty. We shall ask, whether it is the conviction and belief, as some authors claim, or the standard of proof, as others argue, what matters. Are they not, probability and its standard, the same thing at the end? What about conviction and belief? It has been argued that judges do not decide arbitrarily and do not use discretion. Yet, even the deliberation of a judge is not free of intuition and other psychological processes.

When we employ the comparative method, we need to determine the *tertium comparationis* and other instruments. These instruments include the fundamental legal categories such as legal certainty and justice and an array of extralegal concepts that represent standards of evaluation for compared classifications. This intellectual process leads me to an analysis of, at the first glance, irreconcilable views of Scandinavian and Anglo-Saxon approach on the one hand and Continental (Germanic) approach on the other hand, considering also such categories as reversal of burden of proof and effect of standard of proof on substantive law. These approaches, in fact, do not represent counterpoints, which is indicated for instance by the double approach in German procedural law (§§ 286 and 287 ZPO), as well as the differentiation of standards of proof in civil and criminal procedures. The solution can be found in a relatively flexible concept delimited by archetypical situations, objectivized standard and general legal principles.