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STANDARDS OF PROOF: A COMPARATIVE OVERVIEW FROM THE UKRAINIAN PERSPECTIVE

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STANDARDS OF PROOF: A COMPARATIVE OVERVIEW FROM THE UKRAINIAN PERSPECTIVE

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Abstract *The article addresses the issue of standards of proof from a comparative perspective. The author sketches the conventional distinction between common law and civil law countries in this regard, as well as some approaches that query the validity of the rigid division. The main purpose of the article is to characterise the Ukrainian approach to the standards of proof against the background of comparative analysis. The author concludes that recent developments in Ukrainian law have paved the way for a distinction between criminal and civil standards of proof. However, the doctrine is not yet elaborate enough to warrant a coherent application of the two different standards.*

There is a view that in civil law countries, not much attention is paid to the standard of proof. We would rather not take the liberty of generalising about all civil law countries, but with regard to Ukrainian doctrine, the assertion seems rather justified. However, some recent developments in procedural legislation give reasons to believe that the approach is being gradually changed. The disregard of the issue, underpinned by the sacred belief in the attainability of absolute truth, fades in comparison to the acknowledgement that standards of proof may differ in civil (commercial) and criminal cases. It is this inflexion point in Ukrainian evidence law that may entail far-reaching repercussions. Therefore, open discussion of the issue is needed to elaborate a doctrinal approach that could serve as a basis for the development of a coherent jurisprudence.

Keywords: *standard of proof, intime conviction, proof beyond reasonable doubt, preponderance of the evidence, balance of probability, Bayesian decision theory*

1 INTRODUCTION

The main purpose of the article is to characterise the current Ukrainian approach to standards of proof against the background of comparative analysis. For this purpose, I will start by explaining that proof is gradable, which means that some facts may be more or less proved. It is this core idea that justifies the very existence of the concept of a 'standard of proof' in law. Following this, the common law approach to standards of proof will be addressed since, in the common law countries, the issue was elaborated with great sophistication. Afterwards, I will consider the approach of civil law countries. Within this discussion, the conventional view will be outlined, according to which, in civil law countries, there is no distinction between civil and criminal standards of proof, and the unified standard is akin to the 'beyond reasonable doubt' standard in common law. At the same time, some insightful perspectives that query the sharp line between the two systems are also outlined. In the final part of the article, the Ukrainian approach is analysed. Within this part, I will address the recent changes in procedural codes and new trends in the Supreme Court's jurisprudence.

Special attention will be paid to compensation for lost profit since this concept per se implies that courts inevitably have to deal with uncertainty. Finally, I will focus on a case in which the Supreme Court touched upon the interplay between a civil case and a criminal case concerning the same fact. The paucity of legal arguments in this case once again proves the need for revisiting the standard of proof in national doctrine.

2 PROOF AS A GRADABLE CONCEPT

In the criminal trial known as the 'trial of the century'¹ and 'the most publicized criminal trial in history',² the jury found NFL star O. J. Simpson not guilty of the murder of his ex-wife and her friend. However, after the acquittal on criminal charges, the relatives of the deceased brought a civil action against O. J. Simpson, claiming compensation for damages caused by the deaths. The claim was satisfied: O. J. Simpson was held responsible for the deaths and was ordered to pay 33.5 million USD in compensatory and punitive damages.³

The following question arises: how can it be that the same fact is considered unproven in criminal proceedings and proven in civil proceedings? It can only be explained if one acknowledges that proof has degrees of comparison, which means that some statements can be more proven or less proven. Subsequently, the degree of proof can vary along a scale from 0 to 1: something can be 100% proven (equal to 1), 90% proven (0.9), or 75% proven (0.75), etc.

In this regard, it worth noting that according to contextualism, the verb 'to know' is context-dependent.⁴ Thus, the same expression, such as 'A knows that x', can be true in one circumstance (context) and false in the other. In this sense, the verb 'to know' is similar to adjectives that have degrees of comparison. Just as, for example, the adjective 'tall' implies that someone can be more or less tall ('taller' than the other), the verb 'to know' implies that something can be more or less known.⁵ And the same level of knowledge may appear sufficient in one case (for a particular purpose) and insufficient in another (for some other purpose).

From the linguistics perspective, it is interesting that in their decisions, judges avoid stating that 'the court *knows*' or 'it is *known* to the court that' and prefer instead to say 'the court finds'. Nevertheless, the analogy between 'known' in the layperson's use and 'proven' in the procedural sense seems fair since hardly anyone can deny that from the civil procedure perspective, only that what is proven is known.⁶

Thus, once we recognise that a certain fact can be more or less proved, the way is opened to explain the opposite conclusions about the same fact made in criminal and civil proceedings. The existence of the two opposite conclusions is not logically contradictory if there are different proof thresholds in civil and criminal proceedings, ie, the minimum barrier that has to be overcome for some fact to be considered proven is set on different

- 1 J Diaz, 'Trial of the century legacy: How O.J. Simpson case changed US' (*San Francisco Chronicle*, 22 July 2017) <www.sfchronicle.com/opinion/diaz/article/Trial-of-the-century-legacy-How-O-J-11306325.php> accessed 10 January 2021.
- 2 R Price and J T Lovitt, 'Confusion for Simpson kids "far from over"' (*USA Today*, 12 February 1997) <<https://usatoday30.usatoday.com/news/index/nns224.htm>> accessed 10 January 2021.
- 3 'O.J. Simpson trial' (*Encyclopædia Britannica*, 17 January 2020) <<https://www.britannica.com/event/O-J-Simpson-trial>> accessed 10 January 2021.
- 4 KN Kotsoglou, 'How to Become an Epistemic Engineer: What Shifts When We Change the Standard of Proof' (2013) 12 Law, Prob & Risk 275.
- 5 *ibid* 295.
- 6 On the relation between knowledge and judicial proof see: VR Walker, 'Preponderance, Probability and Warranted Factfinding' (1996) 62 Brooklyn Law Review 1075, 1079-1080.

levels. If the threshold value is higher in criminal proceedings, it may well be that in proving the guilt of the defendant, the prosecution overcomes the civil threshold but does not reach the higher, criminal threshold. Such thresholds⁷ or threshold values are called the standard of proof.

While the *burden* of proof determines what facts shall be proved, the standard of proof determines the extent to which a fact must be proved in order for a court or a jury (fact-finder) to find it proven and decide a case grounding on it. In other words, the burden of proof answers the question of *what* should be proved, and the standard of proof, *how* (to what extent) it should be proved. Thus, the standard of proof is a quantitative indicator. As a result, the problem of measuring proof naturally arises.

Whether a fact is proven or not is for the court or the jury (fact-finder) to decide. For a statement to be found proven, the judge (juror) has to be convinced that it is true. Therefore, the degree of proof is determined by the degree of the fact-finder's conviction in the truth of the statement. That is why the standard of proof is also called the standard of conviction.⁸ In everyday speech, we often say, 'I am one hundred per cent sure' or 'I am ninety per cent sure' and so on. Thus, the idea that conviction has degrees of comparison that can be measured (at least approximately) should not seem strange.

3 STANDARDS OF PROOF IN COMMON LAW COUNTRIES

There are two different standards of proof in the common law system: one for civil cases and the other for criminal cases. The standard of proof for civil cases is called the 'preponderance of the evidence' in the United States or the 'balance of probability' in the United Kingdom.⁹

Under this standard, some statement (as to the fact) is deemed proven if the fact-finder finds it is more probably true than not true. In other words, having considered all the evidence, the fact-finder comes to the conclusion that the probability of the statement being true is greater than the probability of the opposite. So, even the slightest deviation from the 'fifty-fifty' equiponderance (when the truth and falsity of the statement are equally probable) is sufficient. Therefore, this standard is also known as the 50+ standard, meaning that to prove a statement, it is enough that its probability is greater than 50%.¹⁰

In English law, the standard is enunciated in a similar way. Thus, in *In Re B (Children) (Fc)*,¹¹ Baroness Hale wrote

[i]n our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place.

7 KN Kotsoglou (n 4) 275, 282.

8 S Gold, 'Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence' (1986) 96 Yale L J 376, 381; RS Bell, 'Decision Theory and Due Process: A Critique of the Supreme Court's Lawmaking for Burdens of Proof' (1987) 78 Journal of Criminal Law & Criminology 557, 576; RW Wright, 'Proving Causation: Probability Versus Belief' in R Goldberg (ed), *Perspectives on Causation* (Hart Publishing 2011), 80.

9 KN Kotsoglou (n 4) 280; RW Wright (n 8) 80; M Schweizer, 'The Civil Standard of Proof – What is it, Actually?' (2013) MPI Collective Goods Preprint 1, 1-2.

10 M Redmayne, 'Standards of Proof in Civil Litigation' (1999) 62 The Modern Law Review, 167, 168; VR Walker (n 6) 1076-1077; RW Wright (n 8) 87; S Gold (n 8) 378, 384-386.

11 [2008] UKHL 35 para 32.

However, in the United States, each state has its own model instructions for a civil jury. And although they all more or less uniformly define the civil standard of proof, one may notice some discrepancies in the formulations used.¹²

In this respect, it is worth noting the New Jersey Model Civil Jury Charges, which convey the standard as follows: 'To sustain the burden, the evidence supporting the claim must weigh heavier and be more persuasive in your minds than the contrary evidence. It makes no difference if the heavier weight is small in amount'.¹³

This formulation is somewhat different from the previous ones: while the previous formulations require that the probability of the statement being true exceeds 50%, the New Jersey variant can be read in such a way that it requires only that the plaintiff's evidence outweighs the defendant's evidence, and it does not matter that the plaintiff's evidence, despite being 'weightier', may produce a low degree of conviction, far below the threshold of 50%. It can be analogised to putting the plaintiff's evidence on one scale and the defendant's evidence on the other to see which one will prevail. In contrast, the California Instruction¹⁴ specifically underlines that all the evidence (ie, presented by both the plaintiff and the defendant) has to be considered in the aggregate and produce a conviction greater than 50% (as if both plaintiff's and defendant's evidence were put on one scale and measured against a scale weight of 50%).

The 'more likely than not' or 50+ formulation is definitely the dominant understanding of the standard.¹⁵ The task of the fact-finder is not to determine the winner of the proving contest but to establish whether the statement about the fact is credible enough to constitute a ground for a court judgement. Any statement of a (particular) fact, such as, for instance, 'the plaintiff's harm is caused by the defendant's actions' may be either true or false. And if the plaintiff has proved that the probability of this statement being true is 30%, the probability that this statement is false cannot be other than $100 - 30 = 70$ (%). In other words, in relation to a single statement of fact, it cannot be that the plaintiff has proved that it is true with a probability of 30%, and the defendant has proved that it is false with a probability of, say, 20%. That the civil standard of proof requires 50+ probability or, equivalently, the statement being more likely true than not true is substantiated by the Bayesian decision theory, which is analysed below.

In criminal cases, another standard applies, known as proof 'beyond reasonable doubt'. According to this standard, it is not enough to incline a little bit more to the truth of the statement than to its falsity. Instead, a strong conviction is required that the statement corresponds to reality; every doubt that from the standpoint of common sense and daily life experience can reasonably call into question the probability of the statement must be excluded. The degree of conviction required by the criminal standard of proof is close to a moral certainty. It is not feasible to eliminate all the possible doubts (that is, to achieve absolute certainty). Therefore, some doubts may remain, but only those ones which experience shows are extremely implausible and based on unrealistic assumptions that hardly ever hold true in everyday life. Thus, the criminal standard of proof sets the threshold much higher than the civil one.¹⁶ In number, it is estimated as 90% conviction.¹⁷ In the USA, the standard 'beyond

12 J Leubsdorf, 'The Surprising History of the Preponderance Standard of Civil Proof' (2016) 67 Fla L Rev 1569, 1571-1576.

13 Charge 1.12I.

14 California Civil Jury Instructions para 200, p 40.

15 M Redmayne (n 10) 168.

16 J Kaplan, 'Decision Theory and the Factfinding Process' (1968) 20 Stanford Law Review, 1065, 1073; RS Bell (n 8) 560.

17 DH Kaye, 'Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do' (1999) 3 International Journal of Evidence and Proof, 1, 1; RS Bell (n 8) 561.

reasonable doubt' is considered as emanating from the due process clause enshrined in the Fourteenth Amendment to the United States Constitution.¹⁸

In addition to the fact that civil and criminal standards set different threshold values of conviction, some writers also point out another distinction. In its formulation, the civil standard refers more to *objective* categories, such as 'evidence' ('preponderance of evidence') or 'probability' ('balance of probability') (in this context, 'probability' can be interpreted as a mathematical concept amenable to calculation according to probability theory). In contrast, the criminal standard refers to the *subjective* concept of 'doubt'.¹⁹ But whether it is correct that the proof threshold for civil cases is measured on an objective scale while the proof threshold for criminal cases is measured on a subjective scale is a topic of heated debate. The issue becomes especially acute in the discussion revolving around the probative value of 'naked statistics',²⁰ in particular, that of epidemiological data. However, as the earlier discussion shows, to prove a statement means to convince the fact-finder that it is true. Therefore, the criterion for measuring proof in both civil and criminal cases is always a subjective one – the degree of the fact-finder's conviction.²¹

The distinction between civil and criminal standards of proof in common law is rationalised by means of Bayesian decision theory.²² The approach prevailing in common law is based on three basic tenets.²³ First, the court and the jury have to decide under uncertainty, ie, in a situation where the absolute truth about the facts of the case is not achievable.²⁴ Second, under uncertainty, the best thing to do is to make a rational decision based on the available knowledge, ie, a decision that minimises the total amount of expected disutility. Third, in civil cases, the disutility of the error in favour of the plaintiff equals the disutility of the error in favour of the defendant,²⁵ but in criminal cases, a mistake in favour of the prosecution is much worse than a mistake in favour of the defence.²⁶

As a result, in a civil case where the error cost is symmetrical, it is reasonable to conclude the fact is true whenever the probability of it being true at least slightly exceeds the probability of the opposite. In contrast, in a criminal case, much greater confidence is needed since the cost of a false positive error significantly exceeds the cost of a false negative one. To sum up, under the Bayesian decision theory, the standard of persuasion to be applied depends on the ratio of false positive error cost to false negative error cost. Since those ratios differ in civil and criminal cases, the standards of proof differ as well.

18 KN Kotsoglou (n 4) 276.

19 M Schweizer (n 9) 3.

20 T Ward, 'Expert Evidence, "Naked Statistics" and Standards of Proof' (2016) 3 EJRR, 580.

21 M Brinkmann, 'The Synthesis of Common and Civil Law Standard of Proof Formulae in the ALI/ UNIDROIT Principles of Transnational Civil Procedure' (2004) 9 Uniform Law Review 875, 878; M Schweizer (n 9) 3.

22 On the application of Bayesian decision theory to fact-finding process in court in general, see: NC Stout and PA Valberg, 'Bayes' Law, Sequential Uncertainties, and Evidence of Causation in Toxic Tort Cases' (2005) 38 University of Michigan Journal of Law Reform 781; RS Bell (n 8); Kaplan (n 17); Kaye (n 17); DH Kaye, 'Apples and Oranges: Confidence Coefficients and the Burden of Persuasion' (1987) 73 Cornell Law Review 54.

23 A more exhaustive list of the ten basic tenets is offered by K Kotsoglou. See: Kotsoglou (n 4) 286-287.

24 C Engel, 'Preponderance of the Evidence versus Intime Conviction: A Behavioral Perspective on a Conflict between American and Continental European Law' (2009) 33 Vermont Law Review 435, 436; J Brook, 'Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation' (1982) 18 Tulsa L Rev 79; Kotsoglou (n 4) 275, 282; Redmayne (n 10) 167.

25 KM Clermont, 'Standards of Proof Revisited' (2009) 33 Vermont Law Review 469-470; Kotsoglou (n 4) 280; Bell (n 8) 559; Schweizer (n 9) 3; Redmayne (n 10) 171; Leubsdorf (n 12) 1580-1581; KM Clermont and E Sherwin, 'Comparative View of Standards of Proof' (2002) 50 The American Journal of Comparative Law 243, 252.

26 Clermont & Sherwin (n 25) 268; Bell (n 8) 560; Schweizer (n 9) 3.

In American law, in contrast to UK law, there is a third, intermediate standard of proof – the standard of ‘clear and convincing evidence.’²⁷ It sets the threshold value of conviction higher than the ‘balance of probabilities’ but lower than ‘beyond a reasonable doubt’. This higher standard applies to a limited number of civil cases where something more than just a pecuniary interest is at stake,²⁸ namely, personal liberty, reputation, or accusations of quasi-criminal offence. For instance, the standard applies to cases involving fraud, defamation, civil commitment proceedings, involuntary sterilisation of an incompetent person, termination of life-sustaining treatment of an incompetent person, and some others.²⁹

4 STANDARDS OF PROOF IN CIVIL LAW COUNTRIES

In civil law countries, there is no distinction between civil and criminal standards of proof – in both cases, the same standard applies, known as ‘intime conviction.’³⁰ It requires the judge (or jury) to find the fact proven only if, having considered all the evidence adduced, he/she has an inner conviction that the fact did take place. And though from the perspective of modern epistemology, it seems settled that absolute truth is hardly ever achievable, the standard of proof in civil law countries is often formulated as if it were achievable.³¹ The fact-finder is supposed to search for the truth and has to be firmly convinced of the facts on which the decision is based.

In ELI/UNIDROIT Model European Rules of Civil Procedure, the rigidity of the civilian standard is softened. Thus, under Rule 87, ‘[a] contested issue of fact is proven when the court is *reasonably* convinced of its truth’ (italics added). In the commentary, it is explained that ‘[t]his should be understood to mean “as close to being fully convinced as possible”, accepting that being fully convinced is an ideal that cannot generally be realised in practice.’

When the civilian standard is interpreted as insisting on the search for truth, it is severely attacked for being naive, unrealistic, unfair, and ineffective.³² In this sense, it is rightly stressed that in order to seek the actual truth, one must (a) not be limited in time, (b) be able to gather evidence on one’s own (and not be content with what is presented by someone else), and (c) be free to refrain from deciding whenever the search has not led to a satisfactory result. But none of these requirements applies to the court hearing a civil case. Under the realistic conditions (when the court is limited in time, does not collect evidence on its own, and cannot refrain from making a decision), too high a standard of proof does not lead to finding actual truth in a courtroom but rather results in the victory of the party favoured by the burden of proof allocation (ie, the party not saddled by the burden, which is usually the defendant).³³ So, the burden of proof allocation turns into a decisive advantage.

Under the dominant view, the intime conviction standard is effectively equivalent to ‘beyond reasonable doubt’³⁴ and sets the threshold value of conviction at the same level of 90%. Thus, as far as criminal cases are concerned, there is no sharp distinction between

27 *Addington v Texas* 441 US 418, 99 S. Ct. 1804 (1979).

28 *ibid.*

29 For a complete list, see: New Jersey Model Civil Jury Charges, Charge 1.19.

30 Wright (n 8) 80; Schweizer (n 9) 4; Engel (n 24) 435; Clermont & Sherwin (n 25) 245-251.

31 Wright (n 8) 80; Schweizer (n 9) 5.

32 Clermont & Sherwin (n 25) 259; Wright (n 8) 81.

33 Clermont & Sherwin (n 25) 271.

34 G Wagner, ‘Asbestos-Related Diseases in German Law’ (2013) 21 *European Review of Private Law* 319, 325; Clermont & Sherwin (n 25) 245.

common law and civil law,³⁵ but with regard to civil cases, the latter sets the standard of proof much higher.

In view of the above, the O.J. Simpson case scenario is not feasible in civil law countries. Since the standard of proof in a civil case is as high as in a criminal case, the lack of proof of the accused's guilt in criminal proceedings means that it cannot be proved in civil proceedings either. Thus, the verdict in a criminal case is decisive for a civil lawsuit based on the same fact.³⁶

In civil law countries, civil lawsuits can be filed within criminal proceedings. The fact that this tool is rather popular with the aggrieved persons, according to K. Clermont and E. Sherwin, proves once again the uniformity of the standard of proof in civil law countries.³⁷ If it were otherwise, no one would voluntarily file a civil lawsuit in criminal proceedings, thereby significantly complicating his/her own task. Everyone would file civil lawsuits in separate civil proceedings, where the proof threshold is lower and, therefore, easier to achieve.

Thus, according to the established view, there is a unified standard of proof in civil law countries, applicable to both civil and criminal cases. This standard, though not requiring absolute certainty, requires a firm inner conviction, which is the level of conviction that is, if not identical, then at least comparable to that required by the 'beyond reasonable doubt' standard. In sum, there is no sharp dividing line between the systems of common and civil law in what relates to criminal cases. But for civil cases, the difference seems to be significant.

5 IS THE DISTINCTION ACTUALLY SO CRITICAL?

As is often the case in comparative law research, the actual significance of the distinction between the law systems is queried. Many writers doubt that civilian lawyers actually apply as high a standard of proof as follows from its wording. There are different views on the issue in the academic literature. Some writers believe that with regard to the standard for civil cases, there is a genuine and sharp difference between common and civil law.³⁸ Instead, others argue that, despite the differing rhetoric, in practice, everything works more or less the same in both systems.³⁹ Some interesting empirical data are provided in favour of the latter point of view.

M. Schweizer conducted a survey of Swiss judges and judicial clerks in which he used various methods to ascertain the threshold value of confidence that respondents consider sufficient to conclude that the fact is proven before the civil court.⁴⁰ Different methods gave different results.⁴¹ At first, respondents were directly asked how much (by percentage) they have to believe in the truth of a statement in order to find it proven for the purposes of civil proceedings. The average value amounted to 91%.⁴² At the same time, a small number of respondents indicated that 100% confidence is needed.⁴³ According to Bayesian decision theory, this should mean that respondents consider a mistake in favour of the plaintiff

35 Clermont & Sherwin (n 25) 246; Kotsoglou (n 4) 275.

36 Clermont (n 25) 471.

37 Clermont & Sherwin (n 25) 264; Clermont (n 25) 471.

38 J Kokott, *The Burden of Proof in Comparative and International Human Rights Law* (Brill Nijhoff 1998) 18; Clermont & Sherwin (n 25) 254-255; Wright (n 8) 79; Engel (n 24) 435.

39 Schweizer (n 9); Brinkmann (n 21).

40 Schweizer (n 9).

41 *ibid.*

42 *ibid* 17.

43 *ibid* 22.

(false positive) ten times worse than a mistake in favour of the defendant (false negative).⁴⁴ However, when the respondents were asked to estimate the relative costs of the two types of errors in civil litigation, the vast majority (72%) acknowledged that they are equivalent.⁴⁵ The survey led M. Schweizer to conclude that in Switzerland, the actual standard of proof applied by the judges in civil cases is significantly lower than it is declared. Therefore, the difference between common and civil law in this respect may be significantly overestimated.⁴⁶

The clear-cut comparison of the systems is obscured because the civilian lawyers, in contrast to their Anglo-American counterparts, paying surprisingly little attention to the standard of proof issues.⁴⁷ As K. Clermont and E. Sherwin note, in common law, the jury was the catalyst for the development of the standards of proof doctrine.⁴⁸ The need to explain the standard of proof to jurors stimulated elaborate discourse on the subject. So, the educational principle worked here: explaining something to others is a way to understand the subject for yourself. In contrast, in continental Europe, the problem was hidden 'behind the closed doors of deliberation rooms'.⁴⁹

An unorthodox point is made by M. Taruffo: he argues that civil law does not set any standard of proof whatsoever.⁵⁰ In his view, intime conviction does not really imply any threshold value of conviction. It is, instead, a principle with only a negative meaning, which replaced the medieval rule establishing a rigid hierarchy of evidence (legal proof). Intime conviction means only that no evidence has a predetermined probative value for the court, and the court evaluates it according to its inner conviction (and not according to prescribed rules of evidence hierarchy).⁵¹ R. Wright specifies that the only thing required in civil law is that the judge must be convinced, but nothing is said about the degree of conviction necessary.⁵² That is why the concept of the standard of proof in civil law is intuitive rather than explained.⁵³

Yet, in European countries, there are also the supporters of the common law approach to the standard of proof,⁵⁴ and not only among academics. For example, the Italian Court of Cassation expressly embraced a common law approach, recognising that the standard applicable in civil cases is 'preponderance of evidence', while in criminal cases, it is 'beyond reasonable doubt'.⁵⁵

44 *ibid* 22.

45 *ibid* 18.

46 *ibid* 24.

47 Leubsdorf (n 12) 1593; Clermont & Sherwin (n 25) 253-255, 258. In civil law countries, the following issues are addressed within the evidence law: dichotomy of adversarial and inquisitorial models of civil procedure, absolute (material) or formal truth as a goal of civil procedure, principles and types of evidences, obligations of parties and the court in terms of the case-management, etc. See: J Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *The International and Comparative Law Quarterly* 281; A Uzelac, 'Goals of Civil Justice and Civil Procedure in the Contemporary World' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 3, 19-21; C Koller, 'Civil Justice in Austrian-German Tradition: The Franz Klein Heritage and Beyond' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 35, 46-48; DH Nokhrin, 'Civil Litigation in Russia: "Guided Justice" and Revival of Public Interest' in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 183,197-198; CH van Rhee and A Uzelac (eds), *Evidence in Contemporary Civil Procedure: Fundamental Issues in a Comparative Perspective* (Intersentia 2015).

48 Clermont & Sherwin (n 25) 257-258.

49 MR Damaška, *Evidence Law Adrift* (Yale University Press 1997) 54.

50 M Taruffo, 'Rethinking the Standards of Proof' (2003) 51 *AJCL* 659, 666.

51 *ibid*.

52 Wright (n 8) 84.

53 *ibid* 95.

54 Schweizer (n 9) 5.

55 Cass, sez un, 11 gennaio 2008, n 581 (Pres Carbone, Rel Segreto).

6 STANDARDS OF PROOF IN UKRAINIAN LAW

6.1 Recent Developments in Legislation and Jurisprudence

In conformity with civil law tradition, the procedural legislation of Ukraine sets forth that the judge shall evaluate evidence according to his/her inner conviction.⁵⁶ The formula is further accompanied by the clarification that no evidence has a preestablished probative force.⁵⁷ Until very recently, the standard of proof concept was relatively unknown in Ukrainian law. As Supreme Court Justice K. Pilkov notes, the courts started to recognise the concept no earlier than 2018-2019.⁵⁸ Since the issue has not been addressed in the academic literature⁵⁹ and there is no empirical data revealing the actual threshold of conviction applied by the judges, it is difficult to assess whether the standard of proof was actually differentiated depending on the type of proceedings or not. Most probably, in the absence of any statutory provisions to the contrary, the common belief was that both in civil and criminal cases, the judge had to be equally convinced of the truth of the parties' statements. Interestingly, the Civil Procedure Code (CPC) replicates the provision from the Criminal Procedure Code (CrPC), under which proof cannot be based on conjectures.⁶⁰

It is safe to say that an O.J. Simpson case scenario could not have taken place in Ukrainian law: a person acquitted in a criminal case (due to lack of evidence proving her guilt) could not have been successfully sued in civil court for damages on the same facts. As in other European countries, in Ukraine, the legislation provides for a possibility to file a civil lawsuit in a criminal proceeding. Moreover, an aggrieved person retains a right to bring a civil action (in a separate civil proceeding) even after the tortfeasor has been acquitted in a criminal case.⁶¹ However, from this rule, it cannot be inferred, as R. Wright proffers,⁶² that the standard of proof actually applied in civil cases is lower than in criminal cases (unless the civil standard is actually lower than the criminal, it does not make any sense to allow civil action against a person acquitted in a criminal case since, from the outset, it would be doomed to failure).

In Ukrainian law, the availability of a civil lawsuit in a case of the tortfeasor's acquittal on criminal charges is not incompatible with the uniformity of the standard of proof. Even under the assumption that the standard is the same in criminal and civil cases, the rule makes sense for the cases in which tort liability does not depend on fault (strict liability) because in this case, the burden of proof differs from criminal to civil case.

Imagine a motorist driving his own car knocked down a pedestrian. He was accused of committing a criminal offence under Art. 286 CrC of Ukraine 'Violation of safety rules

56 See: para 1 Art 94 Criminal Procedure Code (hereinafter – CrPC), para 2 Art 80, para 1 Art. 89 Civil Procedure Code of Ukraine (hereinafter – CPC), para 2 Art 79 Code of Commercial Procedure of Ukraine (hereinafter – ComPC), para 2 Art 76, para 1 Art 90 Code of Administrative Procedure of Ukraine (hereinafter – APC).

57 See: para 2 Art 94 CrPC, para 2 Art 89 CPC, para 2 Art 90 APC.

58 K Pilkov, 'Standard of Proof as an Element of Warranting the Right to a Fair Trial' (4 November 2019) <<https://supreme.court.gov.ua/supreme/pres-centr/zmi/816559/>> accessed 10 January 2021.

59 Among the rare exceptions, see: KN Pilkov, *Evidence and Proof in International Commercial Arbitration: Scientific and Practical Guide* (Osvita Ukrainy 2016), 91-105; GR Kret, *International Standards of Proof in Criminal Procedure of Ukraine: Theoretical and Practical Foundations* (Petrash 2020); AA Pavlyshyn, XR Slyusarchuk, *Standards of Proof in Criminal Proceedings* (Kolir PRO 2018).

60 Cf para 6 Art 81 CPC and para 3 Art 373 CrPC.

61 See: para 7 Art 128, para 3 Art 129 CrPC. See, for instance: Judgment of the Civil Cassation Court (Second Chamber) 23 May 2018 case no 183/7497/15 <<https://reyestr.court.gov.ua/Review/74439914>> accessed 10 March 2021; Decision of the Civil Cassation Court (Second Chamber) 20 June 2018 case no 219/7195/16-ц <<https://reyestr.court.gov.ua/Review/74926920>> accessed 10 March 2021.

62 Richard Wright (n 8) 86.

of road traffic or transport exploitation by the persons driving vehicles'. However, within the criminal trial, it turns out that the accident occurred due to an unexpected failure of the brake system. The driver could not have reasonably foreseen it since it was caused by a hidden defect of the newly purchased car. In this case, the driver is not guilty of the accident, and therefore, in criminal proceedings, he is acquitted due to the absence of the *corpus delicti*. If a civil lawsuit has been filed in this criminal proceeding, the court leaves it without consideration.⁶³ However, the victim in such a case is entitled to bring the same claim in separate civil proceedings.⁶⁴ Such an entitlement makes sense for the victim because, under the Civil Code of Ukraine, damage caused by the use of a car is compensated regardless of fault (strict tort liability).⁶⁵

Thus, the fault of the driver (due to the absence of which he was acquitted by the criminal court) will not even be considered in the civil case. Consequently, the fact that he was found not guilty in the criminal case will fall beyond the court's vision in the civil trial. Therefore, due to the distinction between the burdens of proof (fault is needed in a criminal case but not in a civil case), the verdict in the criminal case does not predetermine the outcome of the civil case.

Moreover, even if the fault were relevant for the civil case, the outcome would still not be predetermined because of the rules on the issue preclusion contained in para. 6 Art. 82 CPC. According to these rules, a verdict in a criminal case is binding for a court considering a civil case only with regard to two issues: whether the alleged actions or omission were committed and whether they were committed by the particular person. The issue of fault is not encompassed. This result seems perfectly natural if it is remembered that the concept of fault in civil law is distinct from fault in criminal law. While in criminal law, the fault is a state of mind, in civil law, it is an objective category denoting that a defendant has not done his best to avoid the infliction of harm.⁶⁶

So, one way or another, the possibility to pursue a civil claim after the acquittal does not mean that standards of proof in civil and criminal cases are actually different.

However, the approach to the standard of proof in Ukrainian law is being shifted, timidly and unsystematically, but still towards distinguishing between civil and criminal cases according to the image of common law countries. There are several reasons for this shift: (a) the impact of ECtHR case-law (which recognises, first, that the standard applicable in criminal cases is 'beyond a reasonable doubt'⁶⁷ and, second, that the standard for civil cases shall be lower than that⁶⁸); (b) the judicial reform of 2016, as a result of which the Supreme Court was replenished with new justices from attorneys at law and academics that have fresh views on many issues; and (c) adoption of the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Stimulation of Investment Activity in Ukraine', which amended, in particular, Art. 79 ComPC.

63 See: para 3 Art 129 CrPC.

64 See: para 7 Art 128 CrPC. See, for instance: Judgment of the Kyiv Appellate Court 10 December 2018 case no 326/299/18 <<https://reyestr.court.gov.ua/Review/78482494>> accessed 10 March 2021; Judgment of the Desnianskyi District Court of Kyiv 12 October 2018 case no 754/4142/18 <<https://reyestr.court.gov.ua/Review/77716893>> accessed 10 March 2021; Judgment of the Kyiv Appellate Court 30 January 2019 case no 754/4142/18-ii <<https://reyestr.court.gov.ua/Review/79573382>> accessed 10 March 2021; Judgment of the Kyiv Appellate Court 24 January 2019 case no 759/13971/18 <<https://reyestr.court.gov.ua/Review/79427887>> accessed 10 March 2021; Judgment of the Desnianskyi District Court of Kyiv 12 March 2019 case no 754/17928/18 <<https://reyestr.court.gov.ua/Review/80423354>> accessed 10 March 2021.

65 See: Art 1187 Civil Code of Ukraine.

66 See: B Karnaukh, *Fault as a Precondition of Civil Liability* (Pravo 2014); B Karnaukh, 'Fault in Tort Law: Moral Justification and Mathematical Explication' (2018) 141 Problems of Legality 54.

67 Yearbook of the European Convention on Human Rights, 1969: The Greek Case. (The Hague: Martinus Nijhoff 1972) 196.

68 *Ringvold v Norway* App No 34964/97 (ECtHR, 11 February 2003) para 38.

Currently, Art. 17 CrPC expressly sets forth that an accused person's guilt must be proved beyond a reasonable doubt,⁶⁹ and the courts recognise it as the standard of proof to apply. Explaining this standard, the Supreme Court notes:

The prosecution must prove before the court with relevant, admissible and credible evidence that there is only one version by which a reasonable and impartial person can explain the facts established in court, and this version involves person's guilt in the criminal offence in respect of which he/she was charged.⁷⁰

In one of the recent judgements, the Supreme Court even proffers the following definition:

reasonable doubt is an insurmountable doubt that remains with the investigator, prosecutor, investigating judge or the court as to the guilt of the accused after a thorough, exhaustive and impartial investigation of the circumstances of the case. The presence of a reasonable doubt as to the validity of the accusation prevents any impartial person who deliberates reasonably and honestly to find the accused guilty.⁷¹

Therefore, in criminal procedure, it is now settled that the proper standard of proof is 'beyond reasonable doubt', and it is now for the lawyers to develop a coherent doctrine that would explain how to interpret and apply the standard in practice.

Until 2017, CPC and ComPC mentioned only two criteria for the assessment of evidence – relevancy and admissibility⁷² – though, in the doctrine, two more criteria were proffered, namely sufficiency and credibility.⁷³ In 2017, new editions of CPC and ComPC were adopted.⁷⁴ In the new editions, sufficiency and credibility were introduced into the Codes.⁷⁵ Thus, what is known as the standard of proof in Ukrainian civil procedure is addressed through those two criteria for evidence assessment.

Under Art. 79 CPC, '[e]vidence is credible if it is capable of establishing actual circumstances of the case.' Under Art. 80, '[e]vidence are sufficient if in their totality they allow to conclude on the existence or absence of circumstances comprising the subject matter of the case.' In para. 2 Art. 80 CPC, it is added that on the issue of sufficiency of evidence, the court decides according to its inner conviction. In 2019 in the commercial procedure, the standard of proof was changed by the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Stimulation of Investment Activity in Ukraine.' The law amended Art. 79 ComPC. Under the title 'Probability of Evidence', the provision now blends a loose adaptation of the 'preponderance of evidence' standard with the declaration that the court evaluates evidence according to its inner conviction:

The existence of a circumstance to which a party refers as the basis of its claims or objections shall be considered as proven if the evidence provided in support of such circumstance is more probable than the evidence provided to refute it.

On the probability of evidence for the purpose of establishing relevant circumstances the court decides according to its inner conviction.

The wording of this article essentially implies that the plaintiff's evidence should be compared with the defendant's evidence, and if the former proves to be more probable,

69 See: para 2 Art 17 CrPC.

70 Judgement of the Criminal Cassation Court (Third Chamber) 18 December 2020 case no 187/1565/18 <<https://reyestr.court.gov.ua/Review/93667121>> accessed 10 January 2021.

71 Judgement of the Criminal Cassation Court (Second Chamber) 27 October 2020 case no 185/6833/17 <<https://reyestr.court.gov.ua/Review/92747249>> accessed 10 January 2021.

72 See: Arts 58 and 59 CPC (in edition of the Law No 1618-IV from 18 March 2004); Art 34 ComPC (in edition of the Supreme Council's Ruling no 1799-XII of 6 November 1991).

73 V Komarov (ed), *The Course of Civil Procedure* (Pravo 2011), 488–95.

74 By the Law No 2147-VIII from 3 October 2017.

75 See: Arts 77-80 CPC.

the facts substantiating the claim should be considered proven. By that logic, even if both (the plaintiff's and the defendant's) versions of the events (or 'stories', in Christoph Engel's terminology)⁷⁶ are very improbable, but the plaintiff's is at least slightly more probable than the defendant's, the claim should be upheld. Imagine that the probability of the plaintiff's version (story) is 25%, and the defendant's version (story) is 20%. According to the literal interpretation of Art. 79, the claim must be satisfied. But if we assume that the court considered four such cases, then in three of them, the decisions are wrong. So, it is clearly not the conventional meaning that 'preponderance of evidence' has in the countries of its origin. Under the conventional understanding, the fact is proven only if the consideration of all the evidence makes the fact-finder believe that the fact is more likely than not, i.e. the probability of the fact is greater than 50%.

As has been noted above, the requirement is to overcome the absolute threshold value and not that the evidence of the party saddled with the burden be stronger than the evidence of the opponent.⁷⁷ Only under the former interpretation will the number of correct judgements prevail over the number of erroneous ones. So far, Ukrainian courts do not recognise the difference between the two interpretations, so the same judgement may contain contradictory points. On the one hand, the court may stress that it is sufficient to present evidence stronger than the evidence of the opposite party, while on the other, it may insist that the party's statement must be more probably true than false. The confusion of two conflicting interpretations has so far gone unnoticed.

For instance, in one of the Supreme Court's judgments, there is the following passage explaining the applied standard of proof in commercial cases:

The "probability of evidence" standard, in contrast to the "sufficiency of evidence standard" emphasizes the need for the court to compare the evidence provided by the plaintiff and the defendant. That is, with the introduction of the new standard of proof, it is necessary not to provide sufficient evidence to prove a particular fact, but to provide the amount of evidence that can outweigh the arguments of the opposing party. [...]

Within the provisions of this article, the court is obliged to estimate the evidence... looking for the probability, that would allow to conclude that the facts under consideration more likely happened, than not. [...]

The circumstance must be proved in such a way as to satisfy the standard of preponderance of more weighty evidence, i.e. when the conclusion that the alleged circumstance exists in the light of the evidence presented seems more probable than the opposite.⁷⁸

From the point of view of 'epistemic engineering', as K.N. Kotsoglou calls it,⁷⁹ it is important to note that the introduction of a new standard of proof in commercial proceedings has indeed led commercial courts to take a different approach to deciding on the issue of fact. And there are already cases where lower courts rejected claims with reference to the lack of proof, and afterwards, the Supreme Court overturned the judgment, emphasising that according to the newly established standard, the relevant fact shall be considered proven.⁸⁰ Note that the legislative change of the standard of proof relates to commercial proceedings

76 Christoph Engel (n 24).

77 However, see: EK Cheng, 'Reconceptualizing the Burden of Proof' (2013) 122 *The Yale Law Journal* 1254, 1259.

78 Judgement of the Commercial Cassation Court 1 December 2020 case no 904/1103/20 <<https://reyestr.court.gov.ua/Review/93296180>> accessed 10 January 2021.

79 Kyriakos N. Kotsoglou (n 4).

80 See, for instance: Judgement of the Commercial Cassation Court 25 June 2020 case no 924/233/18 <<https://reyestr.court.gov.ua/Review/90205664>> accessed 10 January 2021.

only and does not affect the (regular) civil proceedings. In the latter, the inner conviction requirement and the rule that proof cannot be based on conjectures remain the only two guidelines on the applicable standard of proof.

However, in one of the civil cases, the Grand Chamber of the Supreme Court briefly remarked:

The circumstance must be proved in such a way as to implement the standard of greater persuasiveness, according to which the conclusion that the alleged circumstance exists, taking into account the evidence presented, seems more probable than the opposite.⁸¹

6.2 Lost Profit in Ukrainian Law

Indicative of the standard of proof applied by the courts are the cases involving claims for compensation of lost profit. Ukrainian courts have developed a rigid approach that requires a plaintiff to prove his/her lost profit with a probability close to absolute certainty. These requirements are expressed by courts with the following passage:

Only the income that could have been actually gained shall be reimbursed as a damage under the head of lost profit.

Claiming the uncollected income (lost profit) imposes an obligation on the creditor to prove that this income (profit) is not abstract, but would really have been gained by him.

The plaintiff must also prove that he could and should have gained the said income, and the wrongful acts of the defendant became the only sufficient reason that deprived him of the opportunity to make the profit.⁸²

The passage is obviously aimed at preventing the reimbursement of utterly far-fetched losses. For example, if someone whose wallet with a hundred dollars was stolen then claims compensation for a million, alleging that he could have bought a lottery ticket and won a jackpot. Such speculative claims are effectively cut off by the passage.

In one remarkable case, the plaintiff was injured when the airbag in his old car unexpectedly popped out. He claimed compensation for 75 million EUR in lost profits,⁸³ alleging that as a result of the injuries, he was unable to perform a contract with a foreign motion picture company, under which he was supposed to construct aircraft replicas for the film. According to his estimates, the box office receipts of the film in which his works were supposed to appear should have been at least ten billion EUR. However, no written contract or other credible evidence of the plaintiff's relationship with the motion picture company was provided. Judging by the Supreme Court findings, the plaintiff must have provided only the correspondence (probably electronic), from which it is impossible to identify the addressee. The courts of all three instances found the lost profit unproven.⁸⁴

However, it seems that Ukrainian courts, when applying excessively strict requirements for the proof of lost profit, often throw out the baby with the bathwater. For example, in a

81 Judgement of the Grand Chamber of the Supreme Court 18 March 2020 case no 129/1033/13-ii <<https://reyestr.court.gov.ua/Review/88952196>> accessed 10 January 2021.

82 See: Judgement of the Grand Chamber of the Supreme Court 30 May 2018 case no 750/8676/15-ii <<https://reyestr.court.gov.ua/Review/74537186>> accessed 10 January 2021; Judgement of the Commercial Cassation Court 12 December 2019 case no 910/5073/19 <<https://reyestr.court.gov.ua/Review/86336737>> accessed 10 January 2021; Judgement of the Civil Cassation Court (Second Chamber) 12 March 2020 case no 127/22717/18 <<https://reyestr.court.gov.ua/Review/88294511>> accessed 10 January 2021.

83 In addition to 14 million EUR in moral damage.

84 Judgement of the Civil Cassation Court (First Chamber) 4 September 2020 case no 226/569/19 <<https://reyestr.court.gov.ua/Review/91337997>> accessed 10 January 2021.

case where the plaintiff was wrongfully prevented from using his land, the Supreme Court refused to award the lost profit calculated as the income from rental payments the plaintiff could have received (had he rented out the land), arguing that the plaintiff did not adduce a signed lease contract (although the plaintiff did provide a draft of such an agreement and evidence of negotiating with a potential lessee).⁸⁵ Although, in this case, as in the previous one, there was no evidence of the previously concluded contract that was supposed to bring about the desired profit, nevertheless, there is a fundamental difference between the two cases. Leasing land is a routine business, and usually, there is no doubt that the owner is able to find someone willing to rent his/her land at a fair market price. In contrast, gaining a multi-million profit by a physical person dealing with a foreign filmmaker is an utterly extraordinary thing; therefore, utterly credible and firm evidence is needed to prove it. Therefore, although the two cases are similar in that both lack the proof of a signed contract (that would give the plaintiff the alleged profit), they should be treated differently.

It often seems that Ukrainian courts insist that it has to be proved that the plaintiff would *inevitably* have made a profit had it not been for the defendant's actions (which is next to impossible). Indicative are cases where the plaintiff claims the amount of money in a UAH equivalent to the sum in foreign currency. In such cases, the courts apply the exchange rate applicable on the day of the judgment.⁸⁶ However, it may happen that the judgment remains unexecuted for a long time, and the national currency depreciates in value in the meantime. Eventually, on the day of the actual execution of the court judgment, the person receives an amount of funds that is no longer equivalent to the corresponding sum in foreign currency. In some cases, during the period from the judgment delivery to its actual execution, the foreign currency doubled in value. The plaintiffs in such cases brought new actions claiming compensation for the exchange rate adjustment. They considered it as a lost profit.

However, the Supreme Court repeatedly states that such claims shall be rejected, arguing that 'the "exchange rate adjustment" can in no way constitute a lost profit since the creditor may have not received such income.'⁸⁷ Thus, the Court seems to suggest that even if the money had been paid on time, there is no guarantee that the plaintiff would have exchanged them for a strong currency the same day and thus secured him/herself against the future depreciation of the national currency.

But what could hypothetically provide such a guarantee? Should it be the previously signed contract for the exchange of currency (which the plaintiff did not have at that moment)? It is a tricky question.

Here, the Supreme Court effectively requires the plaintiff to prove with absolute certainty something that, in principle, cannot be known with absolute certainty. The lost profit is all about future events, with regard to which no one can assure in advance that they will inevitably happen. A lost profit is speculation by definition, and to demand absolute certainty about it is to ignore the obvious logical inconsistency. That is why in European countries and

85 Judgement of the Civil Cassation Court (First Chamber) 11 November 2019 case no 370/3281/15-ц <<https://reyestr.court.gov.ua/Review/85903338>> accessed 10 January 2021.

86 See: Ruling of the Plenary Supreme Court of Ukraine 18 December 2009 no 14 'On the judicial decision in civil case', para. 14 <<https://zakon.rada.gov.ua/laws/show/v0014700-09#Text>> accessed 10 January 2021; Judgement of the Civil Cassation Court (First Chamber) 18 September 2019 case no 756/4694/15-ц <<https://reyestr.court.gov.ua/Review/84481515>> accessed 10 January 2021.

87 See: Judgement of the Grand Chamber of the Supreme Court 30 May 2018 case no 750/8676/15-ц <<https://reyestr.court.gov.ua/Review/74537186>> accessed 10 January 2021; Judgement of the Civil Cassation Court (Second Chamber) 11 September 2019 case no 608/532/17 <<https://reyestr.court.gov.ua/Review/84304722>> accessed 10 January 2021; Judgement of the Civil Cassation Court (Third Chamber) 21 August 2019 case no 496/1300/17 <<https://reyestr.court.gov.ua/Review/83775340>> accessed 10 January 2021; Judgement of the Civil Cassation Court (First Chamber) 10 June 2020 case no 766/7004/17 <<https://reyestr.court.gov.ua/Review/89793320>> accessed 10 January 2021.

international commercial law, it is provided that when it comes to determining the amount of damages, it is not always necessary to prove the exact figure with absolute certainty. Even if there is no firm certainty about the exact amount of damages, the courts, instead of denying compensation altogether, shall determine the amount of damages at their discretion, as far as it is reasonable to do, with due regard to all the evidence presented by the parties.⁸⁸

Under Art. 7.4.3(1) and (3) UNIDROIT Principles 2016:

Compensation is due only for harm, including future harm, that is established with a reasonable degree of certainty.

Where the amount of damages cannot be established with a sufficient degree of certainty, the assessment is at the discretion of the court.

With regard to the 'exchange rate adjustment', it is noteworthy that according to the DCFR, in a case of a debtor's failure to pay in due time, the creditor may choose the applicable rate of exchange out of two – the one prevailing at the time when payment was due or the one prevailing at the time of actual payment.⁸⁹ Furthermore, it is added that even in the absence of such a special rule, the creditor would nevertheless be entitled to recover the difference under the heading of damages.⁹⁰ However, a potential disadvantage of such an approach would be the need to bring a new action.⁹¹ To avoid complicating the matter for the plaintiff, the above rule was introduced. The rule rests on the assumption (which is taken for granted) that the plaintiff could have avoided currency fluctuation risks had he/she been paid on time.

In view of the above, the standard of proof applied by the Ukrainian courts with regard to the lost profit issue seems too rigid and hardly compatible with the very concept of lost profit. We hope the open debate on the standards of proof in Ukrainian law will eventually lead to the reconsideration of the courts' attitude towards the issue of fact and, in particular, change the approach to the proof of lost profit.

6.3 An O.J. Simpson Case Scenario in Ukraine?

As has been noted above, an O.J. Simpson case scenario could not have taken place under Ukrainian law (it certainly could not have taken place until 2019, and even now, in 2021, it seems unlikely). Yet in the Supreme Court's jurisprudence, there was at least one category of cases where the Court applied a somewhat similar approach, though without conceivable exposition.

These are cases related to compensation for damage caused by the destruction of real estate in the Anti-Terrorist Operation zone (ATO) in eastern Ukraine.⁹² Art. 19 of the Law 'On Combating Terrorism' provides for the right of citizens to be compensated at the

88 For instance, according to Section 287(1) of the German Code of Civil Procedure: 'Should the issue of whether or not damages have occurred, and the amount of the damage or of the equivalent in money to be reimbursed, be in dispute among the parties, the court shall rule on this issue at its discretion and conviction, based on its evaluation of all circumstances.'

89 Art III-2:109(3) DCFR.

90 C von Bar, E Clive and H Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Interim outline ed 1), 344.

91 *ibid.*

92 See, for instance: Judgement of the Civil Cassation Court (Second Chamber) 1 August 2018 case no 242/1618/17 <<https://reyestr.court.gov.ua/Review/75781622>> accessed 10 January 2021; Judgement of the Civil Cassation Court (Second Chamber) 11 December 2019 case no 242/519/17 <<https://reyestr.court.gov.ua/Review/87581077>> accessed 10 March 2021; Judgement of the Civil Cassation Court (First Chamber) 25 March 2020 case no 646/4339/17 <<https://reyestr.court.gov.ua/Review/88667035>> accessed 10 March 2021; Judgement of the Civil Cassation Court (First Chamber) 01 July 2020 case no 185/9816/16-ц <<https://reyestr.court.gov.ua/Review/90349589>> accessed 10 March 2021.

expense of the State for the damage caused by a terrorist act. Invoking the article, many plaintiffs whose property in the ATO zone was demolished brought civil actions claiming compensation.⁹³

One of the defendant party's arguments was that an act of terrorism is a criminal offence; hence, it cannot be claimed that the plaintiff suffered damage as a result of such an offence until the relevant fact is established in criminal proceedings. However, hostilities continue in the area, and in such circumstances, one can hardly expect effective criminal investigation and sentencing of the responsible individuals. Therefore, requiring plaintiffs to substantiate their claims with a verdict in a criminal case would mean imposing an excessive and unmanageable burden on them. Apparently, the Supreme Court recognised this and rejected the defendant's argument, stating the following:

Based on a systematic analysis of Articles 1, 11 and 19 of the Law of Ukraine 'On Combating Terrorism', the identification of perpetrators of terrorist acts, and their conviction by a criminal court, is not necessary for the reimbursement of damage by the State under Article 19 of the said Law.

The necessary condition for the satisfaction of claims... is the location of the damaged property within the territory of Anti-Terrorist Operation.⁹⁴

Although the Court's conclusion is praiseworthy, its reasoning can hardly be considered satisfactory or coherent in the context of the current approach to the standard of proof. The reasoning could have been much more sophisticated had the standard of proof been addressed openly and had it been recognised that the courts have to act under uncertainty. Given the different values at stake in criminal and civil proceedings, it is rational to be content with a greater or lesser probability of the facts underpinning the judgment.

7 CONCLUSION

From the conventional point of view, with regard to the standard of proof, there is a sharp distinction between common law and civil law. Common law distinguishes between criminal and civil cases and thus sets two different standards of proof: 'beyond reasonable doubt' and 'balance of probabilities', respectively. On the contrary, in civil law countries, the same standard of 'intime conviction' applies to both criminal and civil cases, and it is thought that this standard is effectively equal to 'beyond reasonable doubt'.

Yet, things may not be so straightforward. In civil law countries, the standard of proof has not been paid much attention, and, therefore, the very concept remains rather vague. Moreover, it is often formulated as if absolute certainty is attainable, which hardly corresponds to the current view of what knowledge is. As a result, it is not clear what exact percentage of the fact-finder's conviction is necessary to decide that the statement is true. It makes the standard applied in civil law countries intuitive rather than elaborate. The discourse on the standard of proof is premised on the acknowledgement that absolute truth is unattainable. Once this paramount tenet of the postmodernist epistemology is accepted by lawyers, the door is open for the search for rational decision-making under uncertainty. It inevitably leads to the dependence between the value of the interest at stake and the degree of persuasion sufficient to decide on the issue pertaining to the interest.

93 Judgement of the Grand Chamber of the Supreme Court 22 September 2020 case no 910/378/19 <<https://reyestr.court.gov.ua/Review/92270718>> accessed 10 January 2021.

94 Judgement of the Civil Cassation Court (Second Chamber) 1 August 2018 case no 242/1618/17 <<https://reyestr.court.gov.ua/Review/75781622>> accessed 10 January 2021.

For a long time in Ukrainian law, the standard of proof remained unaddressed, and it was believed that the court had to seek the truth. But recent developments have paved the way to the distinction between criminal and civil standards of proof. The current Criminal Procedure Code expressly provides that the standard is 'beyond reasonable doubt', while the Commercial Procedure Code provides for a hybrid standard titled 'probability of evidence' that blends some variation of the 'preponderance of evidence' with 'intime conviction'. However, courts still often hesitate to admit openly that a judgment can be based on probabilities. It entails too cautious an approach in cases where claimants seek compensation of lost profit. Therefore, there is an acute need for a candid discussion of the role of probability in the judicial factfinding process, and there is a long journey ahead before rationality is implemented in Ukrainian evidence law.

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