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https://doi.org/10.26881/gsp.2021.1.07

Burden of Proof in Medical Malpractice Cases under Polish Law

Introduction (nature of medical malpractice cases)

The specificity of medical malpractice cases consists in the fact that these are complicated cases mostly in terms of evidence. In many cases, the difficulty lies not only in determining the person responsible for causing the damage, but also in determining how and where the damage occurred. Moreover, it should be borne in mind that not every treatment failure should be equated with a legal harm. It will therefore be problematic to distinguish between the so-called complications or side-effects from the damage that could be indemnified under civil law. For the reasons mentioned, rules on burden of proof are of enormous practical importance. Thus, rules on burden of proof come into play when there is uncertainty as to the facts of the case.

Another characteristic feature of medical malpractice cases is that in most of them compensation is sought under the tort regime (art. 415 *et seq*. of the Polish Civil Code; hereinafter CC). This does not mean, of course, that the contractual regime cannot be applied in these cases at all, but statistically speaking, tort liability is the basis for most of the claims pursued. The main reason for that is the lack of the legal provision that would allow the awarding of non-pecuniary damages to the injured person in contractual regime.

The presented paper analyzes the basic rules of the burden of proof between the parties to the proceedings and indicates the evidentiary problems encountered by injured patients. The article is also an attempt to show that the basic rule of the distribution of the burden of proof under Polish civil law must be alleviated by various legal constructions. Otherwise injured patients would not be able to obtain compensation in too many cases since only proving all the conditions for imposing liability allows the plaintiff to win the case and obtain compensation.

Burden of proof in medical malpractice cases

After these initial remarks, it is possible to discuss the most relevant issues, i.e. what role the rule on burden of proof plays in medical malpractice proceedings. For the purposes of this article, we could assume that the plaintiff is a patient, who sought medical help, and as a consequence of it being provided or not being provided, suffered deterioration of health or additional body or health injury. The claim will be based on art. 415 of the Polish Civil Code, according to which "who by his own fault caused damage to another is obliged to repair it." A brief analysis of the cited provision shows that the scope of the facts relevant to the resolution of the case (see art. 227 of the Polish Code of Civil Procedure) includes: the defendant's fault, the damage suffered by the claimant and its amount, and an adequate causal link between the defendant's actions and the plaintiff's damage. Therefore, it is worth mentioning that the scope of legally relevant facts is determined by the norm of substantive law constituting the basis for the claim, and not by the rule on burden of proof itself. The latter could never be applied independently, but always in conjunction with the relevant provisions of substantive law.

Let us take an example to illustrate the operation of the aforementioned legal provisions. In a case that was decided a few years ago by the Polish Supreme Court, the plaintiff was infected with the virus that causes hepatitis C.[1] The greatest evidentiary difficulty was determining where the infection had taken place, as the claimant had been subjected to various medical treatments in recent years. He was an honorable blood donor which means that he had donated blood at the Provincial Blood Donation Station; his teeth were treated in dental clinics and he underwent many different medical treatments in several hospitals. Nonetheless, the defendant in the case was the Provincial Blood Donation Station, from which the plaintiff demanded a pecuniary and non-pecuniary damages and the determination of the defendant's liability for damages that may appear in the future.

The claim was based on the already mentioned provision of art. 415 of the CC. According to art. 6 of the CC, the plaintiff bears the burden of proving all the premises of the claim: the defendant's fault, the damage suffered and its amount, as well as the adequate causal link between the defendant's actions and the plaintiff's damage. Article 6 of the CC states that the burden of proving the fact rests on the person who derives legal consequences from that fact. It is the plaintiff who derives favorable consequences for himself from all the facts already mentioned, since they are the basis of his claim for damages. It is also worth noting that the mere mentioning of the facts is never sufficient. Plaintiff will be asked to submit the evidence that would confirm his version of events. Plaintiff's evidentiary activity is necessary, as the adversarial nature of the civil trial presupposes that the parties are in dispute regarding the facts and that the court plays mainly the role of an independent arbitrator. Although art. 232 of the

[1] Judgment of the Supreme Court of 17 May 2007, III CSK 429/06, LEX nr 274129.

Polish Code of Civil Procedure allows the court to admit the evidence *ex officio*, it is a rather rare and exceptional situation.

The above-mentioned provision of art. 232 of the Polish Code of Civil Procedure also regulates the direction of evidentiary activity of the parties, as it states that the parties are obliged to provide evidence to establish the facts from which they derive legal effects. It will therefore be the claimant who will, in the first place, refer to evidence supporting his factual statements. The defendant, on the other hand, has at least several 'procedural tactics' at his disposal. First, he can behave completely passively. However, such behavior exposes him to the consequences of art. 230 of the Polish Code of Civil Procedure, according to which the court will accept as established all the facts which the defendant did not comment on and which he did not deny. Secondly, the defendant may simply deny the facts presented by the plaintiff, but still runs the risk that the evidence presented in the statement of claim will be so convincing that the court will uphold the claim. And third, the defendant can deny the facts set out in the claim by the plaintiff and provide evidence to support his own statements. The last-mentioned tactic is most often used in practice (as most effective one), especially if there is a professional attorney acting on the defendant's side.

However, it is important to remember that the fact that the defendant takes an active stand of evidence does not mean that he is burdened with the burden of proof or that the burden of proof has passed on to him. The burden of proof as to one fact can be imposed on one party to the proceedings only. Unfortunately, this important feature of the rule on burden of proof is sometimes forgotten by both professional attorneys and judges. Therefore, if the burden of proof of fault, damage and causation in a tort regime is borne by the injured party, then it cannot be borne by the defendant at the same time. It should also be emphasised that the burden of proof of the same factual circumstance neither passes nor shifts to the opposite party. It can be reversed but reversal needs a legal basis – there should be a provision reversing the main rule or a court's justified decision (allowed in some jurisdictions only).

If the evidence presented by the injured party is convincing enough to outweigh the statements and evidence of the defendant, the claim will be awarded and the patient will receive compensation. However, if the defendant manages to introduce so many doubts into the findings that the judge will not be convinced of the truth of the injured party's claims, the so-called state of non liquet as to the facts of the case will arise. The state of non liquet means there is an uncertainty as to the facts of the case and the court is not able to make a substantive decision. A state of non liquet as to the facts cannot, however, lead to a state of non liquet in terms of the law, as the court is obliged to render a judgment irrespective of the success or failure of the evidence proceeding. In such a situation the function of the burden of proof rule is most clearly visible. Article 6 of CC allows even the most questionable cases to be decided, as the provision requires that the negative consequences of failure to prove the facts relevant to the resolution of the dispute should be placed on the party who was burdened with the burden of proof as to those facts. In our case, it would be the plaintiff – the injured patient who would lose his case. Thus, only proving all the conditions for imposing

liability allows the plaintiff to win the case and obtain compensation. The allocation of the burden of proof is the most burdensome for the plaintiff.[2]

Need for exceptions

Returning to the example of an infection case cited above – it was mentioned that the greatest difficulty for the injured party was proving that the infection occurred at the defendant's facility and not elsewhere. This is unfortunately the so-called 'weak link' of most infection cases. Most often, it is impossible to prove exactly by what route and at what exact moment the infection got into the patient's body. Therefore, the jurisprudence uses certain legal constructions that are to lessen the burden of the plaintiff.

Sometimes the plaintiff is helped in satisfying the burden of proof by legal or factual presumptions. In other cases, prima facie evidence is applied. In some jurisdictions the reversal of the burden of proof is allowed. Last but not least, courts allow the lowering of the standard of proof.

Presumptions of fact

Presumption is in essence a mode of reasoning which leads to certain interferences being drawn i.e. to the acceptance of certain facts or legal consequences from other proven facts. A presumption thus allows the judge to base the existence of a certain factual element on the presence of another fact which has already been proven. So, in short, the object of proof (fact that needs to be proven) is changed.[3]

According to art. 231 of the Polish Code of Civil Procedure, the court may consider as established facts relevant to the resolution of the case, if such a conclusion can be derived from other established facts (presumption of fact). In practice, a factual presumption is therefore an acceptable method of inferring from known facts about unknown facts. However, the condition for their use is the creation of a logical sequence of thought supported by the principles of life experience. The correct application of the factual presumption is subject to instance control. This is all the more important as the parties find out about the fact that the court has applied the factual presumption only after the end of the trial while reading the justification of the decision.

Using the example of the above-cited infection case, the practical usage of the factual presumption can be illustrated. Since it is not possible to show a specific moment and route of the infection entering the patient's body, it becomes necessary to

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[2] V. Ulfbeck, M.L. Holle, "Tort Law and Burden of Proof – Comparative Aspects. A Special Case for Enterprise Liability?" (in:) *European Tort Law 2008*, eds H. Koziol, B. Steininger, Wien 2009, p. 29.

[3] I. Giesen, "The Burden of Proof and other Procedural Devices in Tort Law" (in:) *European Tort Law*…, p. 56.

use the so-called indirect evidence. In this case, plaintiff managed to prove that at the defendant Blood Donation Station, despite the fact that the results of blood tests showed liver damage, blood was still collected from such donors. As a result, people infected with the virus appeared at the Station, mistakenly considered free of it. This increased the risk of contact with contaminated material by both station staff and other blood donors. In addition, it was shown that the segregation of patients was not strictly obeyed, which meant that infected people could have contact with healthy people and *vice versa*. The type of infection and the incubation interval of the disease were also taken into account. These findings allowed the court to build a basis for a factual presumption, which then led to the conclusion that there was a high probability of the patient being infected in that particular place. The District Court stated that the evidence proceedings did not lead to any findings regarding other places and circumstances in which the plaintiff was as likely to be infected as at the Blood Donation Station. However, the Court of Appeal, as a result of the defendant's appeal, changed the decision and dismissed the claim, finding that the plaintiff had not proved the defendant's faulty behavior and had not proved that the infection occurred at the blood donation station.

This example is a good illustration of the difficulties faced by victims in medical malpractice cases. On the one hand, they bear the burden of proving the place where the damage was caused (i.e. the infection) and on the other hand, it is commonly known that they cannot present direct evidence of this particular fact. Therefore, the Supreme Court hearing this case rightly accepted that "in cases concerning the so-called hospital infections, it is possible and justified to accept negligence of a healthcare facility by presumption of fact, in the absence of evidence to the contrary."[4]

In so-called infection cases, judiciary has developed a kind of "list" of circumstances justifying the application of the factual presumption. These include: the fact that the patient was not infected at the time of admission to the hospital; other cases of the same kind of infection discovered at the same time and in the same hospital; negative sanitary and epidemiological assessments; failure to comply with the asepsis requirements of medical equipment and personnel; "nosocomial" type of bacteria that is the source of the disease discovered in the hospital; no information about the fact that the patient's family members previously suffered from this kind of disease (and therefore – that the infection could occur as part of family contacts); the lapse of time from the stay in the hospital to the detection of symptoms of infection, corresponding to the incubation periods of the disease. The above-mentioned circumstances, with the application of factual presumption, allow the patient to prove that the infection occurred in a specific facility. It should also be remembered that information on various types of infections is collected and stored by state authorities appointed for this purpose and could always be used as a piece of evidence.

[4] Judgment of the Supreme Court of 17 May 2007, III CSK 429/06, LEX nr 274129.

It is also worth noting that the application of a factual presumption cannot lead to any changes in the distribution of the burden of proof.[5] This means that once the court decides to apply a factual presumption, the burden of proof as to the contrary does not transfer, nor does it shift to the defendant, as has already been mentioned. Therefore, it is not the defendant's duty to prove that the plaintiff's statements are false. Defendant may show the initiative in submitting evidence. However, in relation to the defendant's statements, the rule under art. 6 of the CC cannot be applied.

The function a presumption fulfils is that it might alleviate the evidential burden one may encounter and it provides for the possibility to use probabilities when deciding a case.[6] In that sense, a presumption prevents the non liquet state from arising in certain instances.

At the end of this part of the discussion, it is worth noting that in the area of medical liability the legislature has not decided to introduce any legal presumptions into the legal system that could make it easier for injured patients to prove the facts on which they base their case. The correct interpretation of such decision leads to a conclusion that the evidentiary difficulties of the victims of medical malpractice are not significant enough to justify the introduction of facilitations in the form of legal presumptions. Legal presumptions, if introduced into the legal system, would naturally result in a different allocation of the burden of proof in relation to the main rule provided in art. 6 of the CC.

Prima facie evidence

Another legal construction that should be noted here is prima facie evidence. It has been assumed that this legal construction, developed mainly through court practice, is of particular use in cases that present factual difficulties. Due to the non-normative nature of this institution, the legal doctrine is still debating the subject of this proof, the premises for its application and the possibility of its impact on the distribution of the burden of proof.[7] In short there is disagreement as to whether, after applying the prima facie evidence, the burden of proving contrary should be shifted to the other party to the proceedings.[8] If we allow such a possibility, then we equate the operation of prima facie evidence with the operation of a legal presumption. Shifting of the burden of proof, however, will take place without a normative basis. If, on the other hand,

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[5] I. Giesen, "The Burden of Proof and other Procedural Devices…," s. 56.

[6] *Ibidem*.

[7] *Prima facie* evidence and *res ipsa loquitur* doctrine has also been questioned elsewhere due to its difficulties in determining its application. Chr. Witting, "Res Ipsa Loquitur: Some Last Words?," *Law Quarterly Review* 2001, vol. 117, p. 392.

[8] In Germany for example, the doctrine of Anscheinbeweis is applied. The construction does not lead to a reversal of the burden of proof – rebutting the presumption assumes that a proof to the contrary is not needed. J. Metz, "Der Anscheinbeweis im Strassenverkehrsrecht," *Neue Juristische Wochenschrift* 2008, nr 2806.

we take the position that the application of prima facie evidence cannot lead to such far-reaching changes in the distribution of the burden of proof, then we will obtain a construction that is confusingly similar to the factual presumption.

Regardless of the option taken, the fact is that prima facie evidence is relatively frequently applied in medical malpractice cases. In most cases, however, it is used as a tool to allow the lowering of the standard of proof, and not as a tool allowing the burden of proof distribution to be changed. Used in this way prima facie evidence allows the parties to establish facts by showing a high probability of a certain event occurring, rather than having confidence or full conviction. By way of example, one can point to the thesis of the Supreme Court's decision in which the court indicated: "Prima facie evidence is used primarily in situations where the law allows the evidence to be limited to showing the probability of a specific event occurring."[9] In another decision Supreme Court stated that "if it was proved that the sanitary condition of the hospital was exceptionally bad and could lead to infection, and the infection did occur, the probability of a causal link between bad sanitary condition of the hospital and patient's infection is so high that it can be assumed that the plaintiff has fulfilled his obligation under art. 6 of the CC. If the defendant claims that, despite the established state of affairs, the infection comes from other sources, the burden of proof shifts to the defendant".[10] The last cited thesis leads to the conclusion that Supreme Court allows such an interpretation of *prima facie* evidence that changes the allocation of the burden of proof.

The more recent decisions of the Supreme Court also contain theses that clearly indicate that the court allows for the modification of the basic rule of the burden of proof as a result of the application of prima facie evidence. In one of the judgments the court states: "Prima facie evidence serves to shift to the opposing party, who knows the circumstances surrounding the occurrence of the damage and can prove them, the burden of proving that he was not at fault. Its role is to facilitate the proof of defendant's responsibility for plaintiff's damage, and not its actual size or causal relationship between this event and the damage."[11]

To summarise the above considerations, one can say that prima facie evidence is among legal constructions that alleviate burden of proof. Its application allows the injured patients to prove the most problematic premises of defendant's liability – causation and fault. Without it many cases would be lost not because defendant is not responsible for plaintiff's damage but because plaintiff is not able to submit the evidence confirming his statements.

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[9] Judgment of Supreme Court of 23 March 2007, V CSK 477/06, LEX nr 470003.

[10] Judgment of Supreme Court of 17 July 1974, II CR 415/74, LEX nr 7605.

[11] Judgment of Supreme Court of 11 April 2014, I CSK 291/13, LEX nr 1526621.

Lower standard of proof

The expression "standard of proof" describes the degree to which the proof must be established by the party on which the legal burden of proof rests.[12] Thus, the standard of proof turns on the intensity of the proof. The precise question is how great a likelihood is required for something to be considered proved.[13] The answer to this question varies considerably among different legal systems. In some of them almost 100% proof is required.[14] In other legal systems it is sufficient to prove a fact on a so-called "balance of probabilities" meaning usually that something is more likely than not. Yet, there are also legal systems that take a middle position as a starting point.

As Rosenberg once put it: burden of proof and free consideration of evidence lie right beside each other but are separated by fix boundaries.[15] Hence the actual placing of this boundary depends on the standard of proof applied in the legal system.[16]

The standard of proof, unlike the burden of proof, does not answer the question of who and what to prove, but how convinced the judge should be to consider a fact proven. The party deriving legal consequences from a given legal fact will achieve the intended result only if the court finds it proven. Therefore, it is extremely important to establish the degree of persuasion of the judge assessing the evidence. Is a certain degree of probability sufficient? Or shall we require the judge to be 100% confident or fully convinced each time? If so, is it a real requirement to achieve certainty in every single case? Or is it rather a myth? This, in turn, may lead us to yet another question, whether the standard of proof should be the same in both civil and criminal proceedings.[17]

In the Polish doctrine of civil law, the dominant position is that the entirety of the provisions of the Code of Civil Procedure requires a conclusion that a judge must be fully convinced that certain statements are true. However, jurisprudence practice, especially in the field of medical malpractice cases, seems to contradict it.

In well-established case law, the existence of a "sufficient dose of probability" is usually considered enough.[18] Courts avoid percentage indication of the degree of probabil-

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12 L. Khoury, *Uncertain Causation in Medical Liability*, Portland 2006, p. 34.

13 V. Ulfbeck, M.L. Holle, "Tort Law and Burden of Proof – Comparative Aspects…," p. 28.

14 In France i.e. the trier of fact must obtain so-called "intime conviction" – an inner, personal, subjective conviction or belief in the truth of the facs at issue.

15 L. Rosenberg, *Die Beweislast auf der Grundlage des Bürgerlichen Gesetzbuchs und der Zivilprozessordnung*, Berlin 1965, p. 62.

16 E. Karner, The Function of the Burden of Proof in Tort Law (in:) *European Tort Law 2008*…, Wien 2009, p. 70.

17 There is a clear distinction between the standard of proof in criminal and civil proceedings in common law jurisdictions. In criminal trials the standard is very high, referred to as "beyond a reasonable doubt". In civil proceedings, however, the plaintiff generally needs to prove his case by "preponderance of the evidence" standard (calles also "balance of probabilities" standard). R.W. Wright, "Proving Facts: Belief versus Probability" (in:) *European Tort Law*…, p. 80.

18 Judgment of Supreme Court of 17 June 1969, II CR 165/69, OSPiKA 1969, z. 7–8, poz. 155; judgment of Supreme Court of 12 January 1977, II CR 671/76, LEX nr 7900.

ity, using descriptive expressions instead, e.g. "very high degree of probability,"[19] "high degree of probability,"[20] "sufficient probability,"[21] "prevailing degree of probability,"[22] or "significant degree of probability."[23] Determining a certain dose of probability takes place by referring to the principles of logic, indications of common knowledge and life experience.

A lowered standard of proof is usually applied when establishing causation as this is one of the most difficult premises to prove. There are many examples of judgments where a sufficient degree of the probability of a causal link was considered enough from the perspective of art. 6 of the CC.

In one of the most recent judgments the Supreme Court stated that, "in the so-called medical cases, in a situation where it is not possible to reliably establish a causal relationship between the detriment to the health of the injured person undergoing treatment in a medical facility and the behavior of medical staff, the court assesses whether, in the light of the facts established, there is a sufficiently high probability of the existence of such a relationship. The basis for its construction is the recognition based on life experience that there are circumstances in the light of which this kind of inference is justified (res ipsa loquitur). In order to accept liability for damages, it is necessary, however, to establish, as it is assumed in legal literature and many judicial decisions, a sufficiently high degree of probability of the existence of such a relationship."[24]

Lowering the standard of proof in civil proceedings from the degree of certainty to the degree of high or prevailing probability is a significant facilitation for the injured persons, who bear the burden of proving the premise of a causal relationship. Nevertheless, courts do not use the expression "lowering of the standard of proof". Actually, the term "standard of proof" is only just making its way to the Polish legal language. Courts that decide to lower the standard of proof in medical cases usually justify it with prima facie evidence application and hardly ever see a clear difference between these two constructions.

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[19] This expression was used i.e. in judgment of Court the Appeal in Kraków of 21 March 2000, I ACA 192/00, OSA 2002, z. 1, poz. 3.

[20] This expression was used i.e. in judgment of Supreme Court of 27 February 1998, II CKN 625/97, PiM 1999, nr 3, s. 130.

[21] This expression was used i.e. in judgment of Supreme Court of 5 April 2012, II CSK 402/11, LEX nr 1168538.

[22] This expression was used i.e. in judgment of Supreme Court of 5 July 1967, I PR 174/67, OSN 1968, z. 2, poz. 26.

[23] This expression was used i.e. in judgment of 13 June 2000, V CKN 34/00, LEX nr 52689.

[24] Judgment of Supreme Court of 3 April 2019, II CSK 96/18, LEX nr 2645151; judgment of Supreme Court of 14 December 1973, II CR 692/73, OSPiKA 1975, z. 4, poz. 94; judgment of Supreme Court of 6 November 1998, III CKN 4/98, not published; judgment of Supreme Court of 13 June 2000, V CKN 34/00, not published; judgment of Supreme Court of 24 May 2005, V CSK 654/04, not published; judgment of Supreme Court of 4 November 2005, V CK 182/05, not published; judgment of Supreme Court of 26 March 2015, V CSK 357/14, not published.

Conclusions

There is no court dispute that could be solved without the use of the rules on the distribution of the burden of proof. The question of who and what is to be proved during the trial is the essence of the trial and exists as long as the trial itself.[25] At the same time, one of the greatest advantages of the oneris probandi rule is that it allows each case to be resolved – regardless of whether the result of the evidence proceedings is satisfactory for the judge or not. Rosenberg expressed this very picturesquely: the place where the kingdom of consideration of evidence ends is the beginning of the domination of the burden of proof; if the judge has crossed over this without being able to find a judgment, then the burden of proof will supply him with what free consideration of evidence has failed to give him.[26]

As was mentioned above medical malpractice trials are ones of the most demanding cases in terms of evidence. Patients are often unable to meet the high evidential requirements resulting from applicable regulations. Evidence rules, including the rules on the distribution of the burden of proof, are designed to facilitate the conduct of the trial by the court. However, to be such a facility, they must be applied properly. Proper application of the evidence rules may also mean that the court has to apply different legal constructions to overcome the evidentiary difficulties encountered by injured patients. Such constructions include factual presumptions, prima facie evidence, lowering the standard of proof or the construction of anonymous fault.[27] Proper application of these constructions can and should provide injured patients a real chance of obtaining compensation and redress under a civil law.

Since there are no legal presumptions in Polish civil and medical law that could ease the burden of proof put on injured patients, the postulate of a wide application of factual presumptions should be expressed. Factual presumptions are not restricted to specific types of proceedings; thus they can be applied in any civil (including medical) case.

Application of prima facie evidence on the other hand is limited to accidental (i.e. car accidents, work accidents) and medical trials. As was explained in this paper, there are many different interpretations of that legal construction and there is little agreement in legal doctrine in the matter of prima facie evidence's impact on the distribution of burden of proof. Since prima facie evidence is not regulated in the statutory law, courts tend to use it in many different ways. Sometimes, its application refers to factual presumptions, another time it resembles the application of legal presumption, yet another time it is used as a construction allowing the standard of proof to be lowered. Therefore, one should express the postulate to standardise the practice of apply-

[25] H. Dolecki, *Ciężar dowodu w polskim procesie cywilnym*, Warszawa 1998, p. 9.
[26] L. Rosenberg, *Die Beweislast auf der Grundlage des Bürgerlichen Gesetzbuchs und der Zivilprozessordnung*, Berlin 1965, p. 62.
[27] The doctrine of anonymous fault is not discussed in this paper though.

ing this legal construction so that parties to the trial know what to expect and what they need to be prepared for in the matter of evidentiary obligations.

The last conclusion concerns the standard of proof and reasons allowing it to be lowered. As was explained in this paper Polish courts do not use the term "standard of proof". Legal doctrine also very rarely addresses this issue[28] even though it is widely discussed in Europe and beyond.[29] The lack of interest may be one of the reasons why courts in Poland often lower the standard of proof in medical cases without realising it or justify it with incorrect terminology. Therefore, one should strive not so much to regulate this legal issue as to clarify the essence of standard of proof. Polish courts should apply one common standard of proof in all civil proceedings as a starting point. This standard should be known to the parties to the trial. What is equally important, courts should be aware of a possibility of lowering the standard of proof in selected cases. These decisions should be justified in a proper way so that the parties to the trial do not have an impression that the decision of the court in this matter is accidental. Considering the above, one can formulate a conclusion that in the matter of standard of proof there is still a lot of work to be done and many legal issues to be clarified.

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[28] See E. Bagińska, K. Krupa-Lipińska, "Zdarzenia medyczne a problem przyczynowości" [w:] Kompensacja szkód wynikłych ze zdarzeń medycznych. Problematyka cywilnoprawna i ubezpieczeniowa, red. E. Kowalewski, Toruń 2011, p. 243; E. Bagińska, *Odpowiedzialność deliktowa w razie niepewności związku przyczynowego. Studium prawnoporównawcz*e, Toruń 2013, p. 44.; I. Adrych-Brzezińska, *Ciężar dowodu w prawie i procesie cywilnym*, Warszawa 2015, p. 101; M. Gutowski, P. Kardas [w:] Wykładnia i stosowanie prawa w procesie opartym na Konstytucji, Warszawa 2017, p. 136; P. Rylski, Stopień dowodu w postępowaniu cywilnym – zagadnienia podstawowe, Prz. Pr. Cyw. 2016, nr 3.

[29] See H.J. Ahrens, *Der Beweiss im Zivilprozess*, Köln 2015; I. Giesen, "The Burden of Proof and Other Procedural Devices…," Wien 2008; A. Keane, *The modern law of evidence*, Oxford 2010; E. Sherwin, K.M. Clermont, "A comparative view of standard of proof", *The American Journal of Comparative Law*, vol. 50, no. 2, Spring 2002.

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Streszczenie

Izabela Adrych-Brzezińska

Ciężar dowodu w polskim prawie medycznym

Artykuł przedstawia problematykę ciężaru dowodu w procesach z udziałem poszkodowanych, którzy doznali uszkodzenia ciała lub rozstroju zdrowia (tzw. procesach medycznych). Omówiona została podstawowa reguła rozkładu ciężaru dowodu oraz konstrukcje mające na celu przezwyciężanie trudności dowodowych: domniemanie prawne, domniemanie faktyczne dowód *prima facie* oraz obniżenie standardu (stopnia) dowodu.

Słowa kluczowe: ciężar dowodu; dowód; fakty; szkoda; odszkodowanie; zadośćuczynienie.

Summary

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Burden of Proof in Medical Malpractice Cases under Polish Law

The article presents the problem of the burden of proof in trials involving injured patients (so-called medical trials). The basic rule of burden of proof and structures used to overcome evidence difficulties are discussed: legal presumptions, factual presumptions, *prima facie* evidence, and standard of proof.

Keywords: burden of proof; evidence; facts; damage; damages; non-pecuniary damages.