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## ADAPTING RULES ON TORT CIVIL LIABILITY TO ARTIFICIAL INTELLIGENCE

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**Abstract:** On September 28, 2022, the European Commission introduced a Proposal for a Directive on adapting rules regarding tort civil liability to artificial intelligence, known as the Directive on Liability for Artificial Intelligence. However, considering the distinctive features of artificial intelligence (autonomy, lack of transparency, and complexity) that pose challenges to existing liability rules, coupled with the complexity of the burden of proof issue, the choice of suitable legal instruments is highly constrained. In the Directive on Liability for Artificial Intelligence, the focus narrows down to "evidence disclosure" and "rebuttable presumptions", strategically and proportionally reducing the burden of proof. This paper specifically examines the provisions of the Directive on Liability for Artificial Intelligence, with a closer look at the provisions related to evidence disclosure, provisions on the rebuttable presumption of failure to exercise due care, and provisions on the rebuttable presumption of causation in cases of negligence.

**Keywords:** artificial intelligence, civil liability, evidence disclosure, burden of proof

### INTRODUCTION

On 28.9.2022, the European Commission presented the Proposal for a Directive on adapting non-contractual civil liability rules to Artificial Intelligence (Proposal for a Directive of the European parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI liability directive), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0496>,

hereinafter: the AI Liability Directive). The aim of the AI Liability Directive is to improve the functioning of the internal market by defining uniform requirements for certain aspects of non-contractual civil liability for damage caused by the use of AI systems, and it also serves to adapt private law to the digital economy. However, given the characteristics of AI (autonomy, opacity, and complexity) that challenge existing liability rules, as well as the complexity of the burden of proof issue, the choice

of suitable legal instruments is very limited, and in the AI Liability Directive boils down to “disclosure of evidence” and “rebuttable presumptions” through which the burden of proof is very specifically and proportionately reduced.

Accordingly, as regards the subject matter of the AI Liability Directive, it contains rules on the disclosure of evidence relating to high-risk AI systems, with the aim of enabling the claimant to substantiate their non-contractual civil claim for damages based on fault, as well as rules on the burden of proof in cases of non-contractual civil claims for damages based on fault brought before national courts for damage caused by an AI system (Directive on Liability for Artificial Intelligence, Art. 1, Para. 1), as well as rules on the rebuttable presumption of a failure to comply with a duty of care and the rebuttable presumption of causation in case of fault. As for the scope of the AI Liability Directive, it applies to non-contractual civil claims for damages based on fault, if the damage caused by the AI system occurred after the deadline for implementation of the AI Liability Directive (Directive on Liability for Artificial Intelligence, Art. 1, Para. 2).

The AI Liability Directive does not affect the rules of European Union law governing liability conditions in the field of transport, nor the rights that the injured party may have under national provisions implementing the Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31985L0374>), nor the exclusions from liability and duties of care laid down in Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For

Digital Services and amending Directive 2000/31/EC (Digital Services Act), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065>) and amending Directive 2000/31/EC, and finally, national rules on which party bears the burden of proof, what standard of proof is necessary or how fault is defined (Directive on Liability for Artificial Intelligence, Art. 1, Para. 3). Member States have the option to adopt or maintain national rules that facilitate the claimant’s proof of non-contractual civil claims for damages caused by an AI system, provided that those rules are compatible with European Union law (Directive on Liability for Artificial Intelligence, Art. 1, Para. 4).

The focus of the author in this paper is precisely the provisions of the AI Liability Directive, specifically the provisions on the disclosure of evidence, the provisions on the rebuttable presumption of a failure to comply with a duty of care, as well as the provisions on the rebuttable presumption of causation in case of fault. However, first, the definitions.

## 1. OVERVIEW OF ARTIFICIAL INTELLIGENCE

Artificial Intelligence (AI) refers to the simulation of human intelligence processes by machines, especially computer systems. AI systems are designed to perform tasks that would typically require human intelligence, such as perceiving, learning, reasoning, and decision making. AI development involves training models using large datasets to enable the AI system to recognize patterns and make predictions or decisions without being explicitly programmed with rules. There are various AI techniques like machine learning, deep learning, natural language processing, computer vision, etc. The current stage of AI development is considered

Artificial Narrow Intelligence (ANI) where AI systems excel at specific, narrowly defined tasks like playing chess, facial recognition, language translation, etc. but lack the generalized intelligence of humans.

Artificial General Intelligence (AGI) refers to hypothetical AI that exhibits human-level intelligence across a wide range of cognitive tasks, having strong reasoning, problem-solving, and learning capabilities akin to the human mind. AGI does not yet exist but is a long-term goal of AI research.

Artificial Superintelligence (ASI) is a speculative concept of AI that surpasses human intelligence in virtually every domain of interest, exhibiting capabilities far beyond the human intellect. ASI is considered an existential risk by some experts if not developed with robust controls.

The legal field is significantly impacted by advancements in AI technology. AI systems are increasingly being deployed in areas like legal research, contract analysis, prediction of case outcomes, etc. However, AI also raises complex ethical, regulatory and liability challenges that the legal system must grapple with. Developing robust governance frameworks for the development and deployment of AI is crucial to mitigate risks while realizing its benefits.

## 2. DEFINITIONS OF THE AI LIABILITY DIRECTIVE

The AI Liability Directive contains definitions of the terms “artificial intelligence system”, “high-risk artificial intelligence system”, “provider”, “user”, “claim for damages”, “claimant”, “prospective claimant”, “defendant”, as well as “duty of care”. For the definitions of the terms “artificial intelligence system”, “high-risk artificial intelligence system”, “provider” and “user”, the Directive refers, for the sake of consistency, to the definitions of these terms contained in the Regulation of the European Parliament and of the Council on Harmonised Rules on Artificial Intelligence (the Artificial Intelligence Act) and amending certain European Union legislative acts (Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>).

Specifically, for the definition of “artificial intelligence system”, it refers to Article 3(1) of the Artificial Intelligence Act; for the definition of “high-risk artificial intelligence system”, it refers to Article 6 of the Artificial Intelligence Act; for the definition of “provider”, it refers to Article 3(2) of the Artificial Intelligence Act; and finally, for the definition of “user”, it refers to Article 3(4) of the Artificial Intelligence Act.

An artificial intelligence system is software that is developed with one or more of the techniques and approaches listed in Annex I to the Artificial Intelligence Act (The concept of machine learning with supervised, unsupervised, and reinforcement learning, utilizing a wide range of methods including deep learning, logic-based and knowledge-based concepts, including knowledge representation, inductive (logical) programming, knowledge bases, inference and deduction modules, symbolic reasoning systems, expert systems, statistical approaches, Bayesian estimation methods, search, and optimization. See Annex I of the Artificial Intelligence Act, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>) and that can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments with which the AI system interacts (Artificial Intelligence Act, Art. 3, Para. 1). An artificial intelligence system is considered high-risk if the AI system is used as a safety component of a product covered by the European Union harmonisation legislation listed in Annex II to the Artificial Intelligence Act (See Annex II of the Artificial Intelligence Act containing a list of European Union legislation on harmonization, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>), or if the AI system itself is such a product covered by the European Union harmonisation legislation listed in Annex II to the Artificial Intelligence Act, and if the product whose safety component is the AI system, or the AI system itself as a product, is required to undergo a third-party conformity assessment

with a view to the placing on the market or putting into service of that product under the European Union harmonisation legislation listed in Annex II to the Artificial Intelligence Act. In addition, the artificial intelligence systems listed in Annex III to the Artificial Intelligence Act (Artificial Intelligence Act, Art. 6. According to Annex III of the Artificial Intelligence Act, high-risk artificial intelligence systems are systems in any of the following areas: biometric identification and categorization of individuals, critical infrastructure management and operation, education and vocational training, employment, workforce management and access to self-employment, access and use of essential private services, as well as public services and social benefits, criminal prosecution, migration management, asylum and border control supervision, judiciary, and democratic processes. See Annex III of the Artificial Intelligence Act, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>) are also considered high-risk artificial intelligence systems. A provider is a natural or legal person, public authority, agency or other body that develops an AI system or has an AI system developed with a view to placing it on the market or putting it into service under its own name or trademark, whether for payment or free of charge (Artificial Intelligence Act, Art. 3, Para. 2). A user is a natural or legal person, public authority, agency or other body using an AI system under its authority, except where the AI system is used in the course of a personal non-professional activity (Artificial Intelligence Act, Art. 3, Para 4).

A claim for damages is a non-contractual civil claim based on fault for damages caused by the output of an AI system, or through the AI system's failure to produce an expected output. A claimant is a person who brings a claim for damages and who is either harmed by the output of an AI system or through the AI system's failure to produce an expected output (A claim for compensation can therefore be filed not only by the injured party but also by persons who have inherited the rights of

the injured party, or by persons to whom the rights of the injured party have been transferred by subrogation. Subrogation implies the assumption from a third party (e.g., an insurance company) of the right to claim payment or compensation. This means that one person has the right to enforce the rights of another person for their own benefit. Subrogation also applies to the heirs of the deceased victim), or who has acquired rights from the injured party by means of transfer or inheritance under the applicable national law, or who represents one or more injured parties by mandate or operation of law (Therefore, a claim for compensation can also be filed by a person acting on behalf of one or more injured parties. The aim of this provision is to provide individuals who have suffered damage caused by artificial intelligence systems with more opportunities to have their claims considered by the court, even in cases where individual lawsuits are deemed too costly or burdensome, or where the benefit would be greater by filing a joint lawsuit). A prospective claimant is a natural or legal person considering bringing a claim for damages but who has not yet done so. A defendant is a person against whom a claim for damages is brought. Duty of care is a standard of conduct established under European Union law or national law to be adhered to in order to avoid harm to legally protected interests recognized under national law or European Union law, such as life, physical integrity, property, and fundamental rights (Directive on Liability for Artificial Intelligence, Art. 2).

### **3. DISCLOSURE OF EVIDENCE AND REBUTTABLE PRESUMPTION OF FAILURE TO COMPLY WITH DUTY OF CARE**

Claimants seeking compensation for harm caused by a high-risk AI system should be provided with effective means to establish potentially responsible persons and to gather relevant evidence. To this end, the AI Liability Directive provides that Member States shall ensure that national courts are empowered, upon request of a prospective claimant (who has

previously unsuccessfully requested the disclosure of relevant evidence concerning a particular AI system suspected of having caused harm from the provider, a person subject to the obligations of a provider under Article 24 (If a high-risk artificial intelligence system related to products subject to the legal acts listed in Annex II of the Artificial Intelligence Act is placed on the market or put into operation together with a product manufactured in accordance with those legal acts and under the name of the manufacturer of that product, the manufacturer of the product assumes responsibility for the conformity of the artificial intelligence system with this Regulation and regarding the artificial intelligence system has the same obligations as those provided for by this Regulation for suppliers. See, Art. 24 of the Artificial Intelligence Act, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>) or 28(1) (Distributors, importers, users, or other third parties are considered suppliers for the purposes of this Regulation and are subject to the obligations of suppliers if they place a high-risk artificial intelligence system on the market or put it into operation under their own name or trademark, if they change the intended purpose of a high-risk artificial intelligence system that has already been placed on the market or put into operation, or if they make a substantial modification to a high-risk artificial intelligence system. See, Art. 28, Para. 1 of the Artificial Intelligence Act, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>) of the Artificial Intelligence Act, or the user) or of a claimant, to order the disclosure of relevant evidence available to those persons. However, to substantiate their request (relating to the disclosure of relevant evidence), the prospective claimant must demonstrate the plausibility of their claim for damages by presenting facts and evidence. Nevertheless, regarding a claim for damages, the national court shall order the disclosure of evidence only if the claimant has undertaken all reasonable steps to obtain the relevant evidence from the

defendant (Directive on Liability for Artificial Intelligence, Art. 3, Para. 1).

Member States also have an obligation to ensure that national courts are empowered, upon request of a claimant, to order specific measures for the preservation of relevant evidence (Directive on Liability for Artificial Intelligence, Art. 3, Para. 2). In order to ensure proportionality in the disclosure and preservation of evidence and to prevent indiscriminate requests, national courts shall limit the disclosure and preservation of evidence to what is necessary and proportionate to support the claim of the claimant or prospective claimant for damages (Directive on Liability for Artificial Intelligence, Art. 3, Para. 3). When assessing the proportionality of an order for the disclosure or preservation of evidence, national courts shall take into account the legitimate interests of all parties involved, including affected third parties, in particular with regard to the protection of trade secrets within the meaning of Article 2(1) of Directive (EU) 2016/943 of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition (Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use, and disclosure, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0943#>). Article 2, Para. 1 of this Directive provides that business secrets shall be considered information meeting the following conditions: 1) the information is secret in that it is not, as a body or in the precise configuration and assembly of its components, generally known or easily accessible to persons within the circles that normally deal with that kind of information; 2) it has commercial value because it is secret; 3) and the person who lawfully controls the information has taken reasonable steps under the circumstances to preserve its secrecy), use and disclosure, as well as the protection of confidential information relating to public

or national security. Member States shall ensure that, in cases where the disclosure of a trade secret or alleged trade secret classified as confidential by the court within the meaning of Article 9(1) of Directive (EU) 2016/943 is ordered, national courts are empowered (Article 9, Para. 1 of this Directive provides that Member States shall ensure that parties, their lawyers or other representatives, judicial officers, witnesses, experts, and any other persons participating in court proceedings concerning the unlawful acquisition, use, or disclosure of a trade secret, or who have access to documents that form part of such court proceedings, shall not be allowed to use or disclose any trade secret, or alleged trade secret, which the competent judicial authorities have determined, upon a justified request by the interested party, to be confidential and of which they became aware because of such participation or access. Member States may also allow competent judicial authorities to take such measures on their own initiative. This obligation shall apply even after the end of the judicial proceedings, provided that it ceases to exist if it is established by a final decision that the alleged trade secret does not meet the conditions set out in Article 2, Para. 1, or if the relevant information becomes generally known or easily accessible to persons within the circles that normally deal with such information over time), upon a duly reasoned request by one of the parties or on their own initiative, to take specific measures necessary to preserve the confidentiality of such information in proceedings before them or when referring to that information. This achieves a balance between the rights of the claimant and the legitimate interests of others in protecting trade secrets and confidential information. Member States shall also ensure that persons against whom an order for the disclosure or preservation of evidence is directed have adequate legal remedies against such an order (Directive on Liability for Artificial Intelligence, Art. 3, Para. 4).

Furthermore, a rebuttable presumption of failure to comply with a duty of care is introduced. Namely, if the defendant fails to comply

with the national court's order to disclose or preserve available evidence, the national court shall presume that the defendant failed to comply with their duty of care. However, the defendant has the right to rebut this presumption (Directive on Liability for Artificial Intelligence, Art. 3, Para. 5).

#### 4. REBUTTABLE PRESUMPTION OF CAUSATION IN CASE OF FAULT

Given that proof of a causal link between the failure to comply with a duty of care and the output or lack of output of the AI system that caused harm to the claimant may be difficult, the AI Liability Directive provides that national courts shall presume a causal link between the defendant's fault and the output produced by the AI system or the AI system's failure to produce an output, if three cumulative conditions are met. The first condition is that the claimant has proven, or the court has presumed, the fault of the defendant or a person for whose conduct the defendant is responsible for a breach of a duty of care established under European Union law or national law, the direct aim of which is to prevent the harm that has occurred. The second condition is that, based on the circumstances of the case, it can reasonably be assumed that the fault influenced the output produced by the AI system or the AI system's failure to produce an output. The third condition is that the claimant has proven that the output produced by the AI system or the AI system's failure to produce an output has caused harm (Directive on Liability for Artificial Intelligence, Art. 4, Para. 1).

However, if the claim for damages is brought against the provider of a high-risk AI system or a person subject to the obligations of a provider (See, footnotes 16 and 17), the aforementioned first of the three cumulative conditions is only fulfilled if the claimant proves that the provider or the person subject to the obligations of a provider has failed to comply with any of the following requirements: 1) if the AI system uses techniques involving the training of models with data, the AI system must have been developed on the basis of training, validation

and testing data sets that meet quality criteria; (Quality criteria are established in Art. 10, Para. 2, Para. 3, and Para. 4 of the Artificial Intelligence Act) 2) the AI system must be designed and developed to meet transparency requirements; (Requirements regarding transparency are established in Art. 13 of the Artificial Intelligence Act) 3) the AI system must be designed and developed in a manner that allows for effective human oversight during its use; 4) the AI system must be designed and developed with an appropriate level of accuracy, robustness, and cybersecurity in light of its intended purpose; 5) corrective measures must be taken without undue delay to bring the AI system into compliance with the requirements (Obligations to comply with regarding artificial intelligence systems are determined in Chapter 2, Chapter III of the Artificial Intelligence Act, or more specifically in Articles 8-15 of the Artificial Intelligence Act) or, if necessary, to withdraw or recall the AI system (Directive on Liability for Artificial Intelligence, Art. 4, Para. 2). If the claim for damages is brought against a user of an AI system, the Directive provides that the aforementioned first of the three cumulative conditions is only fulfilled if the claimant proves that the user failed to comply with their obligation to use or monitor the AI system in accordance with the accompanying instructions for use or failed to comply with their obligation to suspend or stop the use of the AI system when necessary, or if the claimant proves that the user provided inputs to the AI system that were under their control but were not suitable for the intended purpose of the AI system (Directive on Liability for Artificial Intelligence, Art. 4, Para. 3).

In the case of a claim for damages relating to a high-risk AI system, national courts shall not apply the presumption of causation in case of fault if the defendant proves that the claimant had access to evidence or expertise under acceptable conditions that would have enabled them to prove causation (Directive on Liability for Artificial Intelligence, Art. 4, Para. 4). If, however, the claim for damages relates to an AI system that is not high-risk, the presumption

of causation in case of fault shall only apply if, in the view of the national courts, it would be excessively difficult for the claimant to prove causation (Directive on Liability for Artificial Intelligence, Art. 4, Para. 5). If the claim for damages is brought against a defendant who uses the AI system in the course of a personal non-professional activity, the presumption of causation in case of fault shall only apply if the defendant significantly modified the operating conditions of the AI system or if the defendant was required or able to define the operating conditions of the AI system but failed to do so (Directive on Liability for Artificial Intelligence, Art. 4, Para. 6). The presumption of causation in case of fault is a rebuttable presumption, meaning that the defendant has the right to rebut it (Directive on Liability for Artificial Intelligence, Art. 4, Para. 7).

## 5. EVALUATION

The AI Liability Directive also provides for an evaluation and targeted review. Namely, within five years after the deadline for the implementation of the AI Liability Directive, the Commission shall review its application and submit a report to the European Parliament, the Council, and the European Economic and Social Committee, together with a legislative proposal, if necessary (Directive on Liability for Artificial Intelligence, Art. 5, Para. 1). The report shall analyse the impact of Articles 3 and 4 on the achievement of the objectives pursued by the AI Liability Directive. In particular, the report shall consider whether rules on strict liability are appropriate for claims against operators of certain AI systems, and whether liability insurance coverage is necessary, taking into account the effects on the introduction and use of AI systems, particularly by small and medium-sized enterprises (Directive on Liability for Artificial Intelligence, Art. 5, Para. 2). For the purpose of preparing the report, the Commission shall establish a monitoring program setting out how and at what intervals data and other necessary evidence will be gathered, and defining the measures that the Commission and Member States will take

in relation to the gathering and evaluation of data and other evidence. For the purposes of this program, Member States shall provide the Commission with relevant data and evidence by 31 December of the second full year following the implementation deadline and by the end of each subsequent year (Directive on Liability for Artificial Intelligence, Art. 5, Para. 3).

## CONCLUSION

The problem with the classical fault-based compensation system was the injured party, in addition to having suffered damage-which often caused serious financial hardship-was also in a difficult procedural position because they had to prove both the causal link and the fault of the wrongdoer. For this reason, legal proceedings for compensation often took a very long time, so that, over time, even the compensation itself could become meaningless. These were the reasons why modern legal systems, including ours, have departed from the traditional rule that, the burden of proof lies by the injured party. It has been recognized that if there is a causal link between the wrongdoers behavior and the damage, that is sufficient to create a rebuttable presumption of their fault, and consequently, the burden of proof shifts

from the injured party to the wrongdoer (Antić, 2008:472). This is the meaning of the provision that the wrongdoer is obliged to prove that the damage occurred without their fault. In other words, the injured party proves causation, while the wrongdoer proves the absence of fault (Art. 154 Law on Obligations. “The Official Gazette of the SFRY”, No. 29/78, 39/85, 45/89 – Decision of the CCY and 57/89, “The Official Gazzete of the FRY”, No. 31/93, “The Official Gazzete of Serbia and Montenegro “, No. 1/2003 – Constitutional Charter and “The Official Gazzete of RS”, No. 18/2020).

The Directive on liability for artificial intelligence goes even further, as we have seen. Under certain conditions, it not only introduces a presumption of fault, but also a presumption of causation, which we certainly consider justified. Although the Directive on AI liability provides for evaluation in this regard, we cannot help but feel that so-called high-risk AI systems, objective liability should have been established from the outset, based on the principle that damage arising in connection with a high-risk AI system is presumed to originate from that system, unless it is proven that the system was not the cause of the damage (See, Art. 173 Law of Obligations).

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## ПРИЛАГОЂАВАЊЕ ПРАВИЛА О ДЕЛИКТНОЈ ГРАЂАНСКОПРАВНОЈ ОДГОВОРНОСТИ НА ВЕШТАЧКУ ИНТЕЛИГЕНЦИЈУ

**Резиме:** Европска комисија је 28.9.2022. године представила Предлог директиве о прилагођавању правила о деликтној грађанскоправној одговорности на вештачку интелигенцију, тзв. Директиву о одговорности за вештачку интелигенцију. Међутим, с обзиром на особине вештачке интелигенције (аутономија, нетранспарентност и комплексност) које представљају изазов за постојећа правила о одговорности, као и сложеност проблематике сношења терета доказа, избор погодних правних инструмената је врло ограничен и у Директиви о одговорности за вештачку интелигенцију своди се на „откривање доказа“ и „обориве претпоставке“ путем којих се циљано и сразмерно смањује терет доказивања. Предмет пажње аутора у овом раду управо су одредбе Директиве о одговорности за вештачку интелигенцију, конкретније одредбе о откривању доказа, одредбе о оборивој претпоставци непоштовања обавезе пажљивог поступања, као и одредбе о оборивој претпоставци постојања узрочне везе у случају кривице.

**Кључне речи:** вештачка интелигенција, грађанскоправна одговорност, откривање доказа, терет доказивања